

IDAHO ATTORNEY GENERAL'S REPORT

FOR FISCAL YEAR 1983

BEGINNING JULY 1, 1982

AND ENDING JUNE 30, 1983

AND

OPINIONS

FOR THE YEAR

1983

Jim Jones

Attorney General

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ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1903-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T.A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A.H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W.D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J.W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLAN G. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-1982
JIM JONES	1983-



Jim Jones
Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

April 4, 1984

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

This Book Is Dedicated To Larry K. Harvey — 1939-1984

Larry K. Harvey served as Chief Deputy Attorney General for the State of Idaho from 1979 to 1984. He suffered an untimely death on April 4, 1984, as a result of a brain hemorrhage. Larry was a first-class legal scholar who provided sound direction and wise counsel to three Idaho Attorneys General. More importantly, he was a man of principle and a warm, considerate human being.

Larry Harvey was born on March 4, 1939, in Hastings, Nebraska. He grew up in Filer, Idaho, and graduated cum laude from the College of Idaho in Caldwell in 1961. He received his law degree in 1964 from the University of Chicago, gaining membership to the Order of the Coif--a recognition of his excellent scholastic achievements.

Following graduation from law school, Larry practiced for four years with Robert Stephan in Twin Falls. In 1968 he began nine years of service as a professor of law at the Willamette University College of Law in Salem, Oregon. He was appointed dean of the law school in 1971 and served in that capacity for six years. At the time of his appointment he was the youngest law dean in the United States.

In September, 1977, he was appointed by Attorney General Wayne Kidwell as special assistant on appellate matters. On January 1, 1979, he was appointed chief deputy attorney general by Attorney General David H. Leroy. On January 8, 1983, he was re-appointed as chief deputy attorney general and he held that position until his untimely death on April 4, 1984.

Larry Harvey was dedicated to excellence and that dedication has left a strong imprint on the office of the Attorney General. He was also dedicated to the highest standards of conduct, both in his professional and personal life. He will be missed but his contribution to the Attorney General's office and to the legal profession in Idaho will be long remembered.

A handwritten signature in dark ink, appearing to read "J. Jones".

JIM JONES
ATTORNEY GENERAL

**OFFICE OF THE
ATTORNEY GENERAL**

As of December 31, 1983

Administrative

Jim Jones — Attorney General
Larry K. Harvey — Chief Deputy
Lois Hurless — Administrative Assistant
Eric J. Fieldstad — Business Manager

Division Chiefs

D. Marc Haws — Criminal Justice
David G. High - Business Affairs/State Finance
Michael Johnson — Health & Welfare
Patrick J. Kole — Natural Resources
Kenneth R. McClure — Legislative/Administrative Affairs
Robie G. Russell — Local Government
Lynn E. Thomas — Appellate
P. Mark Thompson — Administrative Law & Litigation

Deputy Attorneys General

James Baird	Fred C. Goodenough	Marilyn Roorda
Dave Barber	Brad Hall	Dick Russell
Robert Becker	Jack Hockberger	Marsha Smith
Steve Berenter	Jerry Jensen	Ted Spangler
Carol Brassey	Joseph Jones	Myrna Stahman
Kurt Burkholder	Dean Kaplan	Steve Stoddard
C.A. Daw	Wayne Klein	Clive Strong
Mike DeAngelo	W.B. Latta, Jr.	Thomas Swinehart
Bill Dillon	Andre L'Heureux	Evelyn Thomas
Curt Fransen	Steve Lord	Patricia Tompkins
Warren Felton	Roger Martindale	William VonTagen
Bob Gates	John McMahon	Larry Weeks
Mike Gilmore	Steve Parry	Jim Wickham
Leslie Goddard	Jim Raeon	Scott Wolfley
Steve Goddard	Phillip J. Rassier	Dave Wynkoop

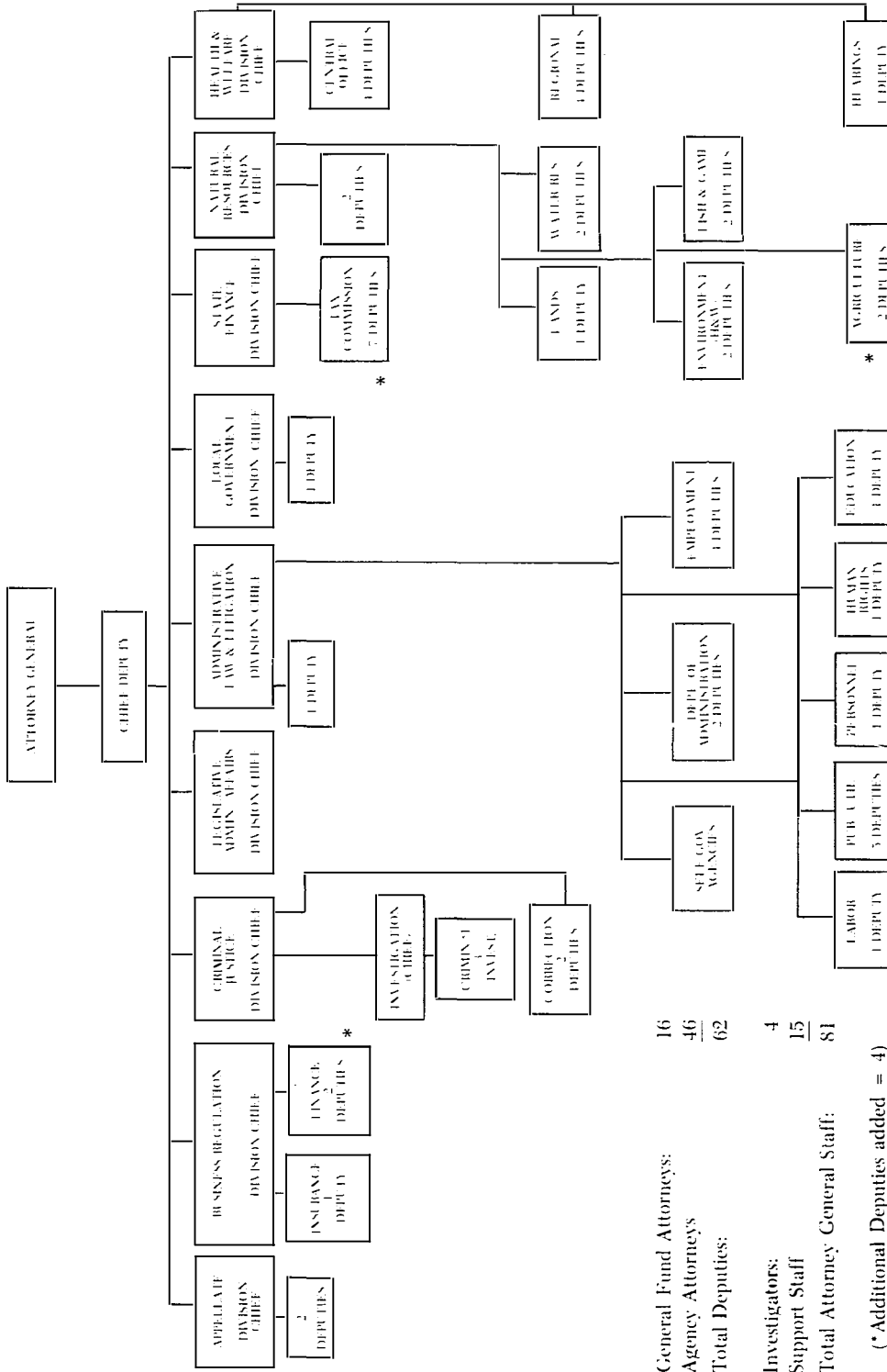
Investigative Services

Russell T. Reneau, Chief Investigator
Allen C. Ceriale
Neal B. Custer
Richard T. LeGall

Non-Legal Personnel

Jeanne Baldner	Paula Jenkins	Sandra Rich
Kriss Bivens	Teresa Lemmon	Deborah Sutherland
Lora T. Boone	Trish Luginbill	Neysa Tuttle
Tresha Griffiths	Sigrid Obenchain	Stephanie Wible

ANNUAL REPORT OF THE ATTORNEY GENERAL



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**NEW CASES OPENED
FOR COURT LITIGATION**

The Office of the Attorney General has opened the following cases for Fiscal Year 1983:

CASE NAME	TYPE OF ACTION	STATUS
State vs. Hansen, Joseph	AP/Other (Misc)	Pending
State vs. Hansen, Voyne E.	AP/Other (Misc)	Closed
State vs. Tail, Curtis	HW/Welfare	Closed
State vs. Thompson, John	HW/Mental Health	Pending
State vs. Wilson, Fran	AL/Labor/Wage Claim	Pending
State vs. Wageman, Virgil	HW/Welfare	Closed
Hatch, Wayne vs. Gardner, Darrol	CJ/Corrections	Closed
In the matter of True, Helen	HW/Mental Health	Closed
State vs. Owsley, Ricky	HW/Welfare	Closed
State vs. Hartman, Kurt	HW/Welfare	Closed
In the matter of Hardman, Loy	HW/Mental Health	Closed
Tendoy Area Council vs. State	AL/Employment	Closed
State vs. McDonald, Robert	AL/Employment	Pending
In the matter of Mike Curry	HW/Mental Health	Closed
State vs. Dennis, Pamela	AL/Employment	Pending
Teal, Jimmy W. vs. State	AP/Other (Misc)	Pending
Hatch, Wayne vs. State	CJ/Corrections	Closed
Persyn, Glenn vs. State	CJ/Corrections	Closed
State vs. Small, Dovey	AP/Other (Misc)	Closed
Wright, Glen W. vs. State	AP/Other (Misc)	Closed
In the interest of Jodoin, Dawn	HW/Welfare	Closed
Makin, Thomas W. vs. State	AL/Personnel	Closed
State vs. Lopez, Charles	AP/Other (Misc)	Pending
State vs. Weller, O.E.	AL/Employment	Pending
State vs. Petite Fashions, Inc. et al	AL/Labor/Wage Claim	Closed
State vs. Pearson, Kriss	AL/Labor/Wage Claim	Pending
Vasquez, Juan vs. State	AP/Other (Misc)	Pending
Ames, Merle & Doris vs.		
Critchell, K. & Roxie/Sol	NR/Lands	Closed
State vs. Blevins, Larry	AP/Other (Misc.)	Pending
In the mental illness of		
Halstead, Debbie	HW/Mental Health	Closed
State vs. Schimmel, James	HW/Welfare	Closed
State vs. Morgan, James	HW/Mental Health	Closed
State vs. Seamans, George	HW/Welfare	Closed
State vs. Lewis, Leroy	HW/Welfare	Closed
State vs. Schantz, Richard	AL/Labor/Wage Claim	Closed
State vs. McKaughen, Michael	AP/Other (Misc)	Pending
Soil/Wilburn, April vs.		
Adams, Gregory	HW/Welfare	Closed
State vs. Winterfeld, Robert	HW/Other (Misc.)	Closed

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In the interest of Ward, Amber	HW/Child Protective Act	Pending
State vs. Holbert, Juanita	AL/Labor/Wage Claim	Closed
State vs. Brownlee, Gail	AL/Labor/Wage Claim	Closed
State vs. Mingo, Floyd	AL/Labor/Wage Claim	Closed
State vs. Victor Guzman	AP/Other (Misc.)	Pending
State vs. Tipton, Gene	AL/Employment	Closed
Hudson, James vs. Driscoll, Jack et al	CJ/Corrections	Pending
In the interest of Wagner Children	HW/Child Protective Act	Pending
Potts, Claude vs. State	CJ/Corrections	Pending
In the interest of Dickerson children	HW/Child Protective Act	Pending
Scott, Lyle et ux vs.		
Carlson, Ron et al	NR/Water Resources	Pending
Houck, Leo Robert vs.		
Soi/Shoshone, city of	AL/Civil Rights	Pending
State vs. Small, Dovey	AP/Other (Misc)	Pending
State vs. Mattison, Mitch	HW/Welfare	Closed
State vs. Coffey, W.G.	NR/Lands	Closed
State vs. Stewart Lee	NR/Lands	Pending
State vs. German, Kenneth	HW/Welfare	Closed
In the interest of Smith, Baby Girl	HW/Terminations	Closed
State vs Bartlett, Ray	HW/Welfare	Closed
State vs. Byington, Odel	HW/Welfare	Closed
State vs Schaffer, Robert	AP/Other (Misc)	Pending
State vs. Schaffer, Robert	AP/Other (Misc)	Closed
State vs. Schaffer, Sara	AP/Other (Misc)	Closed
State vs. Schaffer, Sara	AP/Other (Misc)	Closed
Garzee, Gary vs. State	CJ/Corrections	Closed
Amos, Clarence vs.		
Crowl, C.W. et al	CJ/Corrections	Closed
State vs. Blackeagle, Norton	AP/Other (Misc)	Closed
State vs. Moulds, Michael	AP/Other (Misc)	Closed
In the interest of Dexter, James	HW/Child Protective Act	Pending
* Month Totals * 68 Listed, 68 Filed, 46 Closed . . . for July - 1982		
Ramirez, Beatrice et al vs.		
Schweiker, Richard et al	LA/Other (Misc)	Closed
State vs. Runser, Lori &		
Cooper, Brian	HW/Welfare	Closed
State of Idaho vs. Holm, Carl	HW/Welfare	Closed
Soi/State Hospital South vs.		
Cortez, Manuel Jr.	HW/Mental Health	Closed
State vs. Denning, Lewis	HW/Mental Health	Closed
State vs. Engberson, Mike	AL/Labor/Wage Claim	Pending
State vs. Marsh, Dennis	AL/Labor/Wage Claim	Pending
State vs. Flodin, Kermit	AL/Labor/Wage Claim	Closed
In the interest of		
Buerkle, Baby girl	HW/Terminations	Closed
State vs. Smith, Craig	HW/Welfare	Pending
In the matter of		
Eakle, Dean R.	HW/Mental Health	Closed

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State vs. Bean, Scott	AP/Other (Misc)	Pending
State vs. Richard, Thomas	HW/Welfare	Closed
State vs. Heller, Darrell	HW/Welfare	Closed
State vs. Henderson, Martha	AP/Other (Misc)	Closed
State vs. McQueen, Mark	HW/Welfare	Closed
State vs. Davis, Steven	HW/Welfare	Closed
State vs. Fuller, Donald	HW/Welfare	Closed
State vs. Schiggel, Burkhart	HW/Welfare	Closed
State vs. Clemons, Sharron	HW/Welfare	Closed
State vs. Trujillo, Dorothy	HW/Welfare	Closed
Manners, Charles vs.		
Soi/Bd. of Veterinary Med.	AL/Self-governing	Closed
Arellano, Eddie vs. State	CJ/Corrections	Closed
Soi Wheat Comm. vs.		
Idaho Grain & Produce et al	NR/Agriculture	Closed
State vs. Whitley, Harold	AP/Other (Misc)	Closed
State vs. Lindley, John	AL/Labor/Wage Claim	Closed
Stephens, Wilford vs. State	CJ/Corrections	Closed
In the matter of Richard Moulton	HW/Mental Health	Closed
State vs. Foss, Larry	AL/Labor/Wage Claim	Pending
Soi/State Hospital South vs.		
Hardman, Joseph	HW/Mental Health	Closed
Crawford, Delorse et al		
Purce, Les & H&W	HW/Welfare	Closed
State vs. Scheffer, Dawn	AL/Labor/Wage Claim	Closed
State vs. Ferney, Mike	AL/Labor/Wage Claim	Closed
State vs. Zimmer, Dennis	HW/Welfare	Closed
State vs. Howard, Rudy	HW/Welfare	Pending
State vs. Turnage, Richard	HW/Welfare	Closed
State vs.		
Barker, S. & Ferrell, K.	AL/Labor/Wage Claim	Pending
State vs.		
R & S Marketing Affiliates	AL/Labor/Wage Claim	Pending
State vs. Carter, Ron	AL/Labor/Wage Claim	Pending
State vs. Deshazo, Robert	AL/Labor/Wage Claim	Closed
State vs. Caudill, William	AP/Other (Misc)	Pending
State vs. Manson, Dennis	HW/Welfare	Closed
Shokal, Edward vs.		
Dunn, Kenneth et al	NR/Water Resources	Closed
Schrader, Debbie vs. SOI/H&W	HW/Welfare	Pending
State vs. Yarbrough, James	AP/Other (Misc)	Pending
State vs. Robison, Ford	HW/Mental Health	Closed
Burlington Northern vs. State	SF/Taxation	Closed
State vs. Sprute, Gerald	AL/Labor/Wage Claim	Pending
State vs. Whiskey River Corp.	AL/Labor/Wage Claim	Pending
Burlington Norther vs. State	SF/Taxation	Pending
State vs. Langley, Douglas	HW/Welfare	Closed
State vs. Womack, Doris	HW/Welfare	Closed
State vs. Cahoon, Barbara	AL/Employment	Pending

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Grant, Martin vs. State	CJ/Corrections	Closed
Goodrick, Dan vs. State	CJ/Corrections	Closed
In the matter of Timmers, Larry	HW/Mental Health	Closed
In the matter of Moon, Allen W.	HW/Mental Health	Closed
Graham, Scott vs. State	AL/Employment	Closed
State vs. Slusher, Douglas	HW/Welfare	Closed
State vs. Lockaff, Paul	HW/Welfare	Closed
State vs. Swain, James W.	AP/Other (Misc)	Pending
State vs. Johnson, Katherine	HW/Welfare	Closed
Norris, Jerry vs. Purce, Les & H&W	HW/Welfare	Closed
Spear, Cheryl vs. Purce, Thomas L. et al	HW/Personnel	Pending
Mara, Henry vs. Gardner, Darrol et al	CJ/Corrections	Closed
State vs. Jakubicz, Gilbert	HW/Mental Health	Closed
State vs. Bowen, Lowell	HW/Mental Health	Closed
In matter of Idaho Falls Garzee, Gary vs.	NR/Water Resources	Pending
Gardner, Darrol et al In the interest of Smith Children, Edward et al	CJ/Corrections	Closed
State vs. Couch, Lynn	HW/Terminations	Closed
Soi/State Hospital South vs. Lipshay, Charles	HW/Welfare	Closed
Haltom Estate vs. State	HW/Mental Health	Pending
State vs. Paul, Gary	SF/Taxation	Closed
State vs. Hopkins, Ken	AL/Employment	Closed
State vs. Morris, Esther	AL/Employment	Pending
State vs. Floyd, David	AL/Employment	Closed
Investments Unlmted., Inc. vs. Valley Builders	AL/Employment	Pending
Keith, Sonya vs. State	SF/Taxations	Pending
Olson, Vergil et ux vs. Dunn, A. Kenneth	HW/Welfare	Pending
In the interest of Brandson, Deanna vs.	NR/Water Resources	Pending
Morrow, Jeff vs. State	HW/Child Protective Act	Closed
Reinke, Leonard vs. Gardner, Darrol et al	CJ/Corrections	Closed
P & A Trucking vs. State	CJ/Corrections	Pending
State vs. Gale, John A.	SF/Taxation	Closed
State vs. Nottingham, Orville	AL/Labor/Wage Claim	Pending
Mara, Henry vs. State	AL/Labor/Wage Claim	Closed
State vs. Darnell, Samuel	CJ/Corrections	Closed
State vs. Castillo, Jose	HW/Mental Health	Closed
State vs. Wolfe, William	AL/Employment	Pending
Still, Guy vs. Crowl, C.W. et al	AP/Other (Misc)	Pending
	CJ/Corrections	Closed

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Balla, Walter vs. State	CJ/Corrections	Closed
Jeffery, James vs. State	CJ/Corrections	Closed
Jeffery, James vs. State	CJ/Corrections	Closed
Ward, Phyllis vs. Ward, Sonne	HW/Child Protective Act	Closed
Peret, Dwain vs. Purce, Thomas	HW/Medicaid	Closed
Henson, Howard vs.		
Law Enforcement, Soi Dep. of	CJ/Other (Misc)	Pending
* Month Totals * 97 Listed, 97 Filed, 66 Closed for Aug. — 1982		
State vs. Yehle, Mike	HW/Welfare	Closed
State vs. James, Henry Jr.	HW/Welfare	Closed
State vs. St. Amand, Kevin L.	HW/Welfare	Closed
State vs. Johnson, John	AP/Other (Misc)	Pending
State vs. Staker, Bill et al	SF/Taxation	Closed
State vs. Amesbury, Chris & Juanita	HW/Welfare	Closed
State vs. Preuss, Sandra & Dale	HW/Mental Health	Closed
State vs. Downing, Timothy	HW/Mental Health	Closed
State vs. Lamkey, Richard	HW/Welfare	Closed
Ward, Marti Tera vs.		
Application for Name Change	HW/Child Protective Act	Closed
Campbell, Steven K., M.D. vs.		
Soi/Bd. of Medicine	AL/Other (Misc)	Closed
State vs. Meredith, Buck	HW/Welfare	Closed
State vs. Luzinski, Fredrick	HW/Welfare	Closed
State vs. Harris, Bob	AL/Labor/Wage Claim	Closed
State vs. Freeman, Robert	AP/Other (Misc)	Pending
Taggart, Lyle vs. State	HW/Other (Misc)	
State vs. Bruner, Ted	AP/Other (Misc)	Pending
State vs. Uranga, Fred	AP/Other (Misc)	Pending
In the interest of		
Freeman, David	HW/Child Protective Act	Closed
State vs. Elrod, John	HW/Welfare	Closed
State vs. Quinn, Dale W.	HW/Welfare	Closed
State vs. Latah, Inc.	AL/Labor/Wage Claim	Pending
State vs. Wilson, Fran	AL/Labor/Wage Claim	Pending
State vs. Marsh, Dennis	AL/Labor/Wage Claim	Pending
Witke, Lois et al vs.		
Crowl, C.W. et al	CJ/Corrections	Pending
Campbell Soup Co. vs. State	SF/Taxation	Pending
Blaine County vs. State	SF/Taxation	Closed
Canyon County vs. State	SF/Taxation	Closed
Canyon County vs. State	SF/Taxation	Closed
State vs. Sims, Roger	HW/Welfare	Closed
Lindquist, Phillip vs. Gardner, Darrol	AP/Other (Misc)	Closed
State vs. Volker, Kenneth	AP/Other (Misc)	Pending
State vs. Culbertson, Wm.	AP/Other (Misc)	Closed
Cootz, Anthony vs. State	CJ/Corrections	Pending
In the matter of Welch, Ada	HW/Mental Health	Closed
In the matter of Watts, Pauline	HW/Mental Health	Closed

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In the matter of Poulson, Fred	HW/Mental Health	Closed
In the matter of Sellers, Glenn	HW/Mental Health	Closed
State vs.		
Knight Manufacturing & Lsng., Inc.	AL/Labor/Wage Claim	Pending
State vs. Ward, Dave	AL/Labor/Wage Claim	Pending
In the interest of Borger, Erica	HW/Terminations	Closed
Garzee, Gary vs. Gardner, Darrol & Brewer, Willard	CJ/Corrections	Pending
State vs. Nish, Doug	HW/Mental Health	Closed
State vs. Jackson, Chris	AP/Other (Misc)	Closed
State vs. Munoz, Daniel	HW/Welfare	Closed
In the matter of Climer, Leonard	HW/Mental Health	Closed
Caribou County et al vs. State	SF/Taxation	Pending
State vs. Taylor, Joyce	HW/Mental Health	Pending
State vs. Mitchell, Ricky	SF/Taxation	Closed
State vs. Parker, Duane & Mary	HW/Welfare	Closed
State vs.		
World Wide Achievement Corp.	AL/Labor/Wage Claim	Pending
State vs. Beveridge, Maurice	AL/Labor/Wage Claim	Pending
State vs. Michelle's, Inc.	AL/Labor/Wage Claim	Closed
State vs. Nield, David	AP/Other (Misc)	Pending
State vs. Rogers, Warner	HW/Mental Health	Closed
State vs. Zlatnik, Clay & Annette	HW/Mental Health	Closed
State vs. Matthews, William	HW/Welfare	Closed
Ross, Carroll & Marlene vs. State	SF/Taxation	Closed
In the matter of Smith, Dorothy	HW/Mental Health	Closed
Sensenig, W. & Hayden, P. vs. State	CJ/Corrections	Closed
Mathews Plumbing & Heating vs.		
New Concepts Realty, Inc	SF/Taxation	Closed
In the appeal of Bucyrus-Erie Co.	SF/Taxation	Pending
State vs. Dilworth, Brian	HW/Other (Misc)	Pending
State vs. Edwards, Robert	AP/Other (Misc)	Pending
State vs. Lopez, Julian	AP/Other (Misc)	Closed
State vs. Yarbrough, James	AP/Other (Misc)	Closed
State vs. West, Rodney	AP/Other (Misc)	Closed
State vs. Pena, Louis	HW/Welfare	Closed
State vs. Williams, Dennis	AL/Labor/Wage Claim	Pending
State vs. Boulton, Chuck	AL/Labor/Wage Claim	Pending
State vs. McCartan, Jessie	AL/Labor/Wage Claim	Pending
State vs. Family Business, Inc.	AL/Labor/Wage Claim	Pending
State vs. Anderson, Donald	AP/Other (Misc)	Closed
Allen, Gary vs. Miller, George et al	CJ/Corrections	Closed
Beco, Inc. vs. Industrial Comm.	AL/Other (Misc)	Closed
State vs. Oseen, Carl	AL/Labor/Wage Claim	Closed
State vs. Nunan, Patrick	HW/Other (Misc)	Closed
Gooding County et al vs. State	SF/Taxation	Closed
State vs. Morgan, Gale	HW/Welfare	Closed
State vs. Root, Kenneth	HW/Welfare	Closed
State vs. Nejezhleda, Karl	HW/Welfare	Closed

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State vs. Fisher, Floyd	HW/Other (Misc)	Pending
State vs. Schach, Dana J. (Long, Tammy)	HW/Welfare	Closed
State vs. Merkley, Blaine & Arlene	HW/Mental Health	Closed
* Month Totals * 85 Listed, 85 Filed, 58 Closed for Sept. — 1982		
State vs. Bugher, Georgie & Loise	HW/Welfare	Closed
State vs. Satterwhite, Jerry	HW/Welfare	Closed
State vs. Fullmer, Lisle	HW/Welfare	Closed
State vs. Fullmer, Deborah	HW/Welfare	Closed
State vs. Erickson, James	AL/Employment	Closed
State vs. Swenson, Ben	AL/Employment	Closed
State vs. Hodges, Edward	AL/Employment	Pending
State vs. Langdon, Richard	AL/Employment	Pending
State vs. Howard, Nora	AL/Employment	Closed
State vs. Zamora, Angela	AL/Employment	Pending
State vs. Clukey, Pamela	AL/Employment	Pending
State vs. Bevercombe, Craig	HW/Welfare	Closed
Husted, Beverly vs. State	HW/Fair Hearing	Closed
Lloyd, John vs. Bowlin, Paul	CJ/Corrections	Closed
State vs. Stafford, Frank	HW/Welfare	Closed
State vs. Killinger, D. & Green, C.	AL/Labor/Wage Claim	Pending
Gaines, Larry vs. State	CJ/Corrections	Closed
Cootz, Anthony vs. State	CJ/Corrections	Pending
Hindman et ux vs. State	SF/Taxation	Pending
State vs. Wolfe, Stanley	AL/Employment	Closed
State vs. Kerr, Angela	HW/Mental Health	Closed
State vs. Sturman, Paul	HW/Welfare	Closed
State vs. Cootz, Gerald	AP/Other (Misc)	Pending
Arellano, Eddie vs. State	CJ/Corrections	Closed
Goodine, Larry vs. State	CJ/Corrections	Closed
State vs. Maughan, W.G.	AL/Employment	Closed
Smith, Larry L. vs. State	AL/Employment	Pending
State vs. Samuelson, Harvey	HW/Welfare	Closed
State vs. Buttermore, Samuel	HW/Welfare	Closed
State vs. Ward, Paul Q.	HW/Welfare	Closed
State vs. Morrison, John	HW/Mental Health	Pending
State vs. Mountain States Car Rental, Inc.	AL/Labor/Wage Claim	Closed
State vs. Vera, Emmanuel	AP/Other (Misc)	Closed
State vs. Boone, Ruby	HW/Mental Health	Pending
State vs. Koehn, Marilu	AL/Labor/Wage Claim	Pending
State vs. Neep, Danny	AP/Other (Misc)	Closed
Human Rights Comm. vs. Garden City	AL/Human Rights	Pending
Hansen, Maurine et al vs. State	SF/Taxation	Pending
State vs. Alpha & Omega Realty, Inc. et al	BR/Finance	Closed
State vs. Covert, Marlin	AL/Labor/Wage Claim	Pending
State vs. Ward, Dave	AL/Labor/Wage Claim	Pending

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Roll, Richard Sr. vs.		
City of Middleton & Soi	AL/Employment	Closed
State vs. Price, Bobby & Marjorie	SF/Taxation	Closed
State vs. Simonsen, Clinton & Leila	HW/Welfare	Closed
State vs. Records, James	HW/Welfare	Closed
State vs. Early, Karen	AL/Labor/Wage Claim	Pending
Bainbridge, Randall vs. State	CJ/Corrections	Closed
Stephens, Welford vs. State	CJ/Corrections	Closed
Dejournett, T.		
& Leach, J. vs. State	CJ/Corrections	Closed
State vs. Carberry, John	CJ/P/A..Homicide	Pending
Archibald, Don C. & Vera vs.		
State	SF/Taxation	Closed
State vs. Sutter, Terry Dee	HW/Welfare	Closed
Grierson, E.D. vs. State	CJ/Corrections	Closed
Gallegos, Sherland vs. State	HW/Child Protective Act	Closed
State vs. Voss, Donnie	HW/Welfare	Closed
In the interest of		
Noel, Minette Pilar	HW/Terminations	Closed
State vs. Jones, Ken	AL/Labor/Wage Claim	Closed
In the commitment of		
Adams, Ada	HW/Mental Health	Pending
State vs. McGill, James W.	HW/Welfare	Closed
Balla, Walter vs. State	CJ/Corrections	Closed
Hecla Mining Co. vs. State	SF/Taxation	Pending
State vs. Mason, David Lee	AP/Other (Misc)	Pending
State vs. Statz, James	HW/Welfare	Closed
Jones, Todd & Schwartzmiller, Dean		
vs. Rodriguez, V. & Hammond, R.	CJ/Corrections	Pending
State vs. Baxter, Brent D.	HW/Mental Health	Closed
In the interest of Cheatwood, Justin	HW/Termination	Closed
State vs. Giles, Vern	AL/Labor/Wage Claim	Closed
State vs. Bennett, William & Carolyn	AL/Labor/Wage Claim	Closed
* Month Totals * 68 Listed, 68 Filed, 46 Closed . . . for Oct. — 1982		
Passow, Don G. vs.		
Keller, Leroy & Cenarrusa	BR/Other (Misc)	Closed
State vs. Brown, Bruce	AL/Labor/Wage Claim	Closed
State vs. Barney, Randall	AL/Labor/Wage Claim	Closed
State vs. Wood, Del	AL/Labor/Wage Claim	Pending
State vs. Mosman, Richard	SF/Taxation	Closed
State vs. Carson Vineyard	AL/Labor/Wage Claim	Pending
State vs. Whiskey River Corp.	AL/Labor/Wage Claim	Pending
State vs. Malotte, Robert	AL/Labor/Wage Claim	Pending
State vs. Schell, Louie	AL/Labor/Wage Claim	Pending
Nelson, Gerald vs. State	CJ/Corrections	Closed
State vs. Joblin, Michael K.	AP/Other (Misc)	Pending
State vs. Anderson, Judy	HW/Mental Health	Closed
State vs. Summit Truck Lines, Inc.	AL/Labor/Wage Claim	Pending
Steelman Estate vs. State	SF/Taxation	Pending

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State vs. Ziegler, Chip	AP/Other (Misc)	Pending
Union Pacific Railroad vs. State	SF/Taxation	Pending
State vs. Bro, David	AP/Other (Misc)	Closed
State vs. Old West Ranches, Inc.	AL/Labor/Wage Claim	Pending
Almada, Caesar vs. State	CJ/Corrections	Closed
Garzee, Gary et al vs. State	CJ/Corrections	Closed
State vs. Lycan, Norman	HW/Mental Health	Pending
State vs. Niehay, Edwin	HW/Welfare	Closed
State vs. Covert, Marlin	AL/Labor/Wage Claim	Pending
State vs. Reed, Earl	AP/Other (Misc)	Pending
State vs. O'Toole, Michael	HW/Welfare	Closed
State vs. Day, Mary	AL/Labor/Wage Claim	Pending
State vs. Aragon, Mark	AP/Other (Misc)	Pending
State vs. Sprenger, Troy (Mepelt, Gretchen)	HW/Welfare	Closed
State vs. Taylor, Paul Jr.	HW/Mental Health	Closed
State vs. Best, Richard	HW/Welfare	Closed
State vs. Gilley, Janice	HW/Welfare	Closed
State vs. Capps, Donald	HW/Mental Health	Closed
State vs. Weech, Regina	HW/Mental Health	Pending
State vs. Jones, Benjamin	HW/Welfare	Closed
State vs. Lopez, Andy Jr.	AP/Other (Misc)	Closed
State vs. Marcum, William	AL/Labor/Wage Claim	Pending
In the matter of Shemwell, Dorinda	HW/Other (Misc)	Closed
State vs. Jenkins, James	AP/Other (Misc)	Closed
Bowe, Dale vs. Bowe, Rafaela	HW/Welfare	Closed
Soi & Kelley Children vs. Kelley, Steve	HW/Welfare	Closed
Soi & Kelley Children		
Kelley, Jarayna	HW/Welfare	Closed
State vs. Sypher, Ray	HW/Welfare	Closed
State vs. Smith, Francis	HW/Welfare	Closed
State vs. Lepker, Daniel (Wanamaker, Helen)	HW/Welfare	Closed
State vs. Cammack, Ray	AL/Labor/Wage Claim	Pending
State vs. Sportown, Inc., et al	AL/Labor/Wage Claim	Closed
State vs. Miller, Aleta	AL/Labor/Wage Claim	Pending
State vs. Martinez, Jose G.	AP/Other (Misc)	Closed
In the interest of Schwanz, Brenda & Curtis	HW/Terminations	Closed
State vs. Jones, Gary (Richardson, Gail)	HW/Welfare	Closed
State vs. Covert, Marlin	AL/Labor/Wage Claim	Pending
State vs. Hill	AL/Labor/Wage Claim	Closed
Pierce, Ronnie vs. State	CJ/Corrections	Closed
Thompson, Charlie vs. State	CJ/Corrections	Closed
State vs. Martinez, Jose A.	AP/Other (Misc)	Pending

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State vs. Smith, Darryll	HW/Welfare	Closed
State vs. Kenny, William	HW/Other (Misc)	Closed
Harrelson, Belinda vs.		
Pine Crest Psych. Ctr. & Soi	AL/Employment	Pending
State vs. Williams, Bruce & Barbara	HW/Welfare	Closed
State vs. Covert, Marlin	AL/Labor/Wage Claim	Pending
Schmalenberger, Jessie		
vs. Board of Corrections	CJ/Corrections	Pending
Debt of		
Contractor's Lighting Supply, Inc.	SF/Taxation	Closed
Soi, ex rel Robertson, Troy vs.		
Satterfield, Jane	HW/Welfare	Closed
State vs. Keenan, David	AL/Labor/Wage Claim	Closed
State vs. Wright	SF/Taxation	Closed
Jardine Petroleum Co. vs.		
Clawson Oil Co.	SF/Taxation	Pending
State vs. Morgan, Deanna	HW/Welfare	Closed
Olsen, James Dee vs. State	CJ/Corrections	Closed
Haltom, Theodore, Estate of vs. State	SF/Taxation	Closed
Brightwell vs.		
Payette Lakes Water District	SF/Taxation	Pending
State vs. Covert, Marlin	AL/Labor/Wage Claim	Pending
* Month Totals * 71 Listed, 71 Filed, 43 Closed . . for Nov. — 1982		
State vs. Hirshbrunner, John	AP/Other (Misc)	Closed
Soi, ex rel Lisby, Tammy vs.		
Lisby, Michael	HW/Welfare	Closed
State vs. Scott, Steve	HW/Welfare	Closed
State vs. Woods, Allan	HW/Welfare	Closed
State vs. Hollandsworth, Billy	HW/Welfare	Pending
Vinar vs. Batruel	NR/Water Resources	Pending
State vs. Potts, Claude	AP/Other (Misc)	Closed
State vs. Labrie, Al & Barbara	HW/Welfare	Pending
State vs. St. Germain, Charles	AP/Other (Misc)	Pending
State vs. Saxton, Thomas	AL/Employment	Closed
State vs. Custom Wood Products	AL/Labor/Wage Claim	Pending
State vs. Hilbert, James	AL/Labor/Wage Claim	Pending
State vs. Merrifield, John	AP/Other (Misc)	Pending
State vs. Custom Wood Products, Inc.	AL/Labor/Wage Claim	Pending
Ray, Donald P. vs. State	CJ/Corrections	Closed
Kerst, Donald F. vs. State	CJ/Corrections	Pending
Carter, David vs. State	CJ/Corrections	Closed
Flores, Oscar vs. State	CJ/Corrections	Closed
Ickes vs. Farlow, Don	SF/Taxation	Pending
State vs. Kasio, Akios K.	AP/Other (Misc)	Pending
State vs. Williams, Kevin E.	HW/Welfare	Pending
In the matter of		
Matson, John C.	HW/Mental Health	Closed
State vs. Wallace, Gerald D.	HW/Welfare	Closed
State vs. Pena, Rudy	HW/Other (Misc)	Pending

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State vs. Harms, Larry A.	HW/Welfare	Closed
State vs. Stoor, Gerald	NR/Parks & Rec.	Pending
State vs. Hoffman, Michael	AP/Other (Misc)	Pending
State vs. Harmon, Jerry	AP/Other (Misc)	Pending
State vs. Delagarza, Marilyn	AL/Employment	Closed
Price, James et al vs. Carlson, Ronald	NR/Water Resources	Pending
State vs. Miramontes, Felipe	HW/Welfare	Closed
State vs. Lute, Dan	AP/Other (Misc)	Pending
State vs. Coates, Harry & Kym	AL/Labor/Wage Claim	Closed
Woodruff, Donald vs. State	CJ/Corrections	Closed
State vs. Wiebelhaus, Elvera	SF/Taxation	Closed
State vs. Lowe, Jared	SF/Taxation	Closed
State vs. Payton, James	SF/Taxation	Pending
State vs. Wurtz, Dairld G.	HW/Welfare	Closed
State vs. Hite, Kent R.	HW/Welfare	Closed
State vs. Wright, Ed	HW/Welfare	Closed
State vs. Family Fitness et al	AL/Labor/Wage Claim	Closed
State vs. Koehn, Marilu	AL/Labor/Wage Claim	Pending
Couch, Michael vs. Crowl, C.W.	CJ/Corrections	Closed
Shipley, Glenn et al vs. Soi/Issh et al	HW/Mental Health	Closed
State vs. Loftis, Gina	AL/Labor/Wage Claim	Pending
State vs. Petri, Michael	AL/Labor/Wage Claim	Pending
Bartness, Mike, in matter of vs. Horse Racing License	CJ/Law Enforcement	Pending
Vanheukelm, Marlene vs.		
Pine Crest Psych. Ctr. & Soi	AL/Employment	Pending
State vs. Adams, Paul	AP/Other (Misc)	Pending
Soi/Ramberg, Timothy vs. Davis, Sharon	HW/Welfare	Closed
State vs. Records, Robert M.	HW/Welfare	Closed
State vs. Rice, Ralph K.	HW/Welfare	Closed
State vs. Early, Karen	AL/Labor/Wage Claim	Pending
State vs. Storey, Gregory	AP/Other (Misc)	Pending
State vs. Rainey, Don	AL/Labor/Wage Claim	Closed
Vascot, Connie vs. Vascot, Dennis	HW/Welfare	Closed
Tarbox (M&K Sales) vs. State	SF/Taxation	Pending
Makin, Thomas vs. State	AL/Tort Claims	Pending
Whittle vs. Whittle	SF/Taxation	Pending
State vs. Ward, Gary	AP/Other (Misc)	Pending
Herrett, Rodney vs. Herrett, Alicia	AP/Other (Misc)	Pending
State vs. Richards, John	AP/Other (Misc)	Closed
Twin River National Bank vs. English	SF/Taxation	Closed
Tendoy Area Boy Scouts vs. State	AL/Employment	Closed
State vs. Lewis, John D.	AP/Other (Misc)	Pending
State vs. Fitness Center	SF/Taxation	Pending
State vs. Garza, Ausencio	AP/Other (Misc)	Pending
State vs. Kohl, Leroy J.	HW/Welfare	Closed
State vs. Kent, Scott	AL/Labor/Wage Claim	Pending
U.S. vs. Colianni, et al	LG/Other (Misc)	Pending

* Month Totals * 70 Listed, 70 Filed, 33 Closed . . . for Dec. — 1982

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Atkinson, John vs. State Debt of	CJ/Corrections	Closed
Hunt Bros. Construction	SF/Taxation	Closed
State vs. Rod, Michael	HW/Welfare	Closed
State vs. Stuart, Gene F.	AP/Other (Misc)	Pending
State vs. Bailey, Claudene	HW/Welfare	Closed
State vs. Thornock, Benny	AP/Other (Misc)	Closed
Manufacturer's Hanover Mortgage vs. Plantation Developers	SF/Taxation	Pending
State vs. Thomsen, Davy	HW/Welfare	Closed
State vs. Thomas, Beverly	HW/Welfare	Closed
State vs. Garcia, Nicholios & Kimberly	HW/Welfare	Closed
State vs. McIntee, Robert	HW/Welfare	Closed
State vs. Roberge, David	HW/Welfare	Closed
State vs. McNeeley, Bergen & Jarvis, Richard	CJ/Corrections	Closed
State vs. Hamp, James	HW/Welfare	Closed
State vs. Garren, Jimmy	HW/Welfare	Closed
State vs. Valdez-Abrejo, Jose I.	AP/Other (Misc)	Pending
Stradley, Mark vs. State	CJ/Corrections	Closed
Olsen, Ronald vs. State	CJ/Corrections	Pending
McGee, Frank vs. Gardner, Darrol & Burley, Ron	CJ/Corrections	Closed
State vs. Harris, Terry	HW/Welfare	Closed
State vs. Morrison, Ray & Polfer, Chardlee	AL/Labor/Wage Claim	Pending
State vs. Jensen, Lynn	AL/Labor/Wage Claim	Pending
In the interest of Dawson, Wanda	HW/Child Protective Act	Closed
Johnson, Derrall vs. State	CJ/Corrections	Closed
Bonnors Ferry, City of vs. State	AL/Employment	Pending
State vs. Gibson, David	AP/Other (Misc)	Pending
State vs. Four Star Logging, Inc.	AL/Labor/Wage Claim	Closed
State vs. Four Star Logging, Inc.	AL/Labor/Wage Claim	Closed
State vs. Lalone, Sandra	AL/Labor/Wage Claim	Closed
State vs. Sprute, Gerald	AL/Labor/Wage Claim	Closed
State vs. Ross, Jerry	AL/Labor/Wage Claim	Pending
Reinke, Leonard vs. State	CJ/Corrections	Closed
State vs. Morales, Reynolds	HW/Other (Misc)	Pending
State vs. H.P. Enterprises, Inc.	AL/Labor/Wage Claim	Pending
State vs. Wallace, Joseph	AP/Other (Misc)	Pending
State vs. McGarry, John	HW/Welfare	Closed
State vs. Toth, John	HW/Welfare	Closed
State vs. Davis, Arthur	AP/Other (Misc)	Pending
Couie, David vs. State	CJ/Corrections	Closed
Camp, Gene & Victor vs. State	CJ/Corrections	Closed
State vs. Bacon, Mark	HW/Welfare	Closed
State vs. Robison, Ford	HW/Other (Misc)	Pending
State vs. Craig, Larry	HW/Welfare	Closed

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Crossman, Francis & Jeanne vs. Soi/Tax Comm.	SF/Taxation	Closed
State vs. Tomberlin, Paula	HW/Welfare	Closed
State vs. Marcum, William	AL/Labor/Wage Claim	Pending
State vs. Roberts, Charles	AP/Other (Misc)	Pending
State vs. Dallas, Claude	AP/Other (Misc)	Pending
State vs. Taylor, Dave	HW/Welfare	Closed
In the interest of McMinn, William T.	HW/Welfare	Closed
In the interest of McManus, Daniel	HW/Welfare	Closed
State vs. Ramsey, James III	AP/Other (Misc)	Pending
State vs. Croxen, Tom	AL/Employment	Pending
State vs. The Good Earth, Inc.	AL/Labor/Wage Claim	Closed
Wolf, Steven vs. State	CJ/Corrections	Closed
State vs. Lee, James	AL/Employment	Closed
Garzee, Gary vs. State	CJ/Corrections	Closed
Pierce, Ronnie vs. State	CJ/Corrections	Pending
State vs. Davis, David	CJ/Corrections	Pending
State vs. Goodman, Michael & Marjorie	HW/Mental Health	Pending
Debt of Jason's, Inc.	SF/Taxation	Pending
Mental Illness of Glazebrook, Iva	HW/Mental Health	Closed
In the matter of Murphy, James	HW/Mental Health	Pending
State vs. Struhs, Katherine	AL/Employment	Pending
State vs. Hallstrom, Solveig	AP/Other (Misc)	Closed
State vs. Pruett, Dan	HW/Mental Health	Pending
* Month Totals * 66 Listed, 66 Filed, 40 Closed . . . for Jan. — 1983		
Gomez, Baldemar vs. State	CJ/Corrections	Closed
Neep, Danny vs. State	CJ/Corrections	Pending
State vs. Hastings, George	AL/Employment	Pending
State vs. Draper, Peggy	AL/Employment	Closed
Union Pacific Railroad vs. State	SF/Taxation	Closed
Union Pacific Railroad vs. State	SF/Taxation	Closed
State vs. Evarts, Neal	HW/Welfare	Closed
State vs. Bale, C. Duane	AL/Employment	Closed
State vs. Thorne, Steven	HW/Welfare	Closed
State vs. Stace, Keith	HW/Welfare	Closed
State vs. Chase, Mark D.	HW/Welfare	Closed
State vs. Adams, Jeffrey	HW/Welfare	Closed
State vs. Jenkins, Randy	HW/Welfare	Closed
State vs. Delucia, Dane	HW/Welfare	Closed
State vs. Jackson, Ren	HW/Welfare	Closed
Bradbury, Eugenio vs. Schuler, Barry	AL/Judiciary	Closed
Soi/Insurance vs. Pacific Insurance Administrators	BR/Insurance	Pending
Ramsey, John vs. State	CJ/Corrections	Closed

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State vs. Mata, Cirillo	AP/Other (Misc)	Pending
State vs. Gray, Walter	AL/Labor/Wage Claim	Closed
State vs. Panida Theatre	AL/Labor/Wage Claim	Pending
State vs. Tyler, Dennis	AL/Labor/Wage Claim	Pending
State vs. Davis, Solveig	AL/Labor/Wage Claim	Pending
State vs. Arrotta, Dan	AL/Labor/Wage Claim	Pending
State vs.		
Commodity Buyers Assoc., Inc.	AL/Labor/Wage Claim	Closed
State vs. Ginter Brothers, Inc.	AL/Labor/Wage Claim	Closed
State vs. Master Distributors, Inc.	BR/Consumer Protection	Pending
State vs. Hansen, James	AL/Employment	Pending
State vs. Hazen, Don L.	AL/Employment	Pending
State vs. Pechanec, Ted	HW/Welfare	Closed
State vs. Pennell, Kenneth	HW/Welfare	Closed
State vs. Boehm, William	AL/Labor/Wage Claim	Closed
State vs. Cubbage, Chip	AL/Labor/Wage Claim	Pending
State vs. Stroud, Robert	AL/Employment	Closed
State vs. Gonzales, Maria	AL/Employment	Pending
State vs. Rainey, Ed	AL/Labor/Wage Claim	Pending
Giese, David vs. State	CJ/Corrections	Closed
Goodrick, Dan vs. State	CJ/Corrections	Closed
Kyle, Michael vs. Beco Corp. & Soi	AL/Employment	Pending
State vs. Ervin, L.	AL/Employment	Pending
State vs. Caverhill, Steven	AL/Labor/Wage Claim	Pending
State vs. Carey, Everett	AL/Employment	Pending
State vs. Ayres, Randy	HW/Welfare	Closed
State vs. Bliss, Gene	HW/Welfare	Closed
State vs. Spang, Michael	HW/Welfare	Closed
State vs. Pisca, Randy	HW/Welfare	Closed
State vs. Bell, Robert	HW/Welfare	Closed
State vs. Hecht, Charles	HW/Welfare	Closed
State vs. Ponderosa Motors III, Inc.	AL/Labor/Wage Claim	Closed
State vs. Harrell, Sandra	AL/Labor/Wage Claim	Closed
Soi/Sec. of State vs. Miller, James A.	SF/Elections	Pending
Canada, British Columbia Ministry		
vs. Harbison, Maureen	HW/Welfare	Closed
State vs. Papse, Rodney	AP/Other (Misc)	Closed
State vs. Meyer, Kevin	HW/Welfare	Closed
State vs. Prout, Roberta	HW/Welfare	Closed
Yellen, Frederick Jr. vs.		
Ada County et al	AL/Judiciary	Closed
Craig, James vs. Wright, Larry	CJ/Corrections	Closed
State vs. Holderness, Loren	AL/Employment	Closed
In the interest of		
Hollon, Lonnie & Larry	HW/Welfare	Closed
State vs. Stone, Luther	HW/Welfare	Closed
State vs. Major, Melvin	CJ/Corrections	Pending
Olsen, Ronald vs. State	CJ/Corrections	Closed
Goodrick, Dan vs. State	CJ/Corrections	Closed

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Olsen, Ronald vs. State	CJ/Corrections	Closed
House, Rupert et al vs. State	SF/Taxation	Closed
State vs. Davis, Nickie J.	HW/Welfare	Closed
Beitelspacher et al vs. Risch et al	LA/Other (Misc)	Closed
State vs. Pierce, Ronnie	AP/Other (Misc)	Pending
Camp, Gene & Victor vs. State	CJ/Corrections	Closed
Reinke, Leonard vs. State	CJ/Corrections	Closed
State vs. Campos, Ramone	AL/Employment	Closed
State vs. Boven, Deanna	HW/Welfare	Closed
California, State of vs.		
Walden, Gayreth	HW/Welfare	Closed
Luther, et al vs. Swain, et al	SF/Taxation	Pending
State vs. Jones, Kenneth	AL/Labor/Wage Claim	Pending
State vs. Major Projects Funding, Inc.	AL/Labor/Wage Claim	Closed
Soi/Human Rights Comm. vs.		
Littletree Inns	AL/Human Rights	Pending
Pyzer, Teddy vs. State	CJ/Corrections	Pending
* Month Totals * 78 Listed, 78 Filed, 51 Closed . . . for Feb. — 1983		
State vs. Cassell, Steven	HW/Welfare	Closed
Brown, Ken vs.		
Iowa Beef Processors & Soi	AL/Employment	Pending
State vs. Quick, David	HW/Welfare	Closed
State vs. Horn, Kenneth	HW/Welfare	Closed
State vs. Brown, Loyal	HW/Welfare	Closed
State vs. Ponte, Jerry	HW/Welfare	Closed
In the interest of		
Pritchard, Brenda	HW/Welfare	Closed
State vs. Blaine, James II	AL/Labor/Wage Claim	Pending
Curtis, Edith vs. State	AL/Employment	Pending
State vs. Chouinard, Chris	HW/Welfare	Closed
State vs. Traudt, Richard	HW/Welfare	Closed
State vs. Griffin, Michael	HW/Welfare	Closed
State vs. McMilian, Bettie	AL/Employment	Pending
State vs. Pierce, Chester	AL/Employment	Pending
State vs. Brown, Terry	AL/Employment	Pending
State vs. Gibson, Richard	AL/Employment	Pending
State vs. Smith, H. Jim	AL/Employment	Pending
State vs. Marti, Twila	AL/Employment	Closed
State vs. Meyer, Milton & Ann	HW/Licensure	Pending
In the interest of		
Sweatman, Kimberly	HW/Welfare	Closed
State vs. B & D Electrical Contractors	AL/Labor/Wage Claim	Pending
State vs. Cornilia, Benji	AL/Labor/Wage Claim	Closed
State vs. Hall, Delicia	AL/Employment	Closed
State vs. Brown, Paul C.	AL/Employment	Pending
State vs. Ball, Ben	AL/Employment	Closed
State vs. Harr, Stephen	AL/Employment	Pending
State vs. Engie, Richard	AP/Other (Misc)	Closed
State vs. Scott, Michael	HW/Welfare	Closed

McCormick, Dewayne vs. State	CJ/Corrections	Closed
McCormick, Dewayne vs. State	CJ/Corrections	Closed
State vs. Skelton, David	AP/Other (Misc)	Pending
State vs. Merrill, Lydia	AP/Other (Misc)	Closed
State vs. Merrill, Orson	AP/Other (Misc)	Closed
State vs. Newman, Charles & Hong Olson, Vergil & Verdell vs.	AP/Other (Misc)	Pending
Funn, A.K. et al	NR/Water Resources	Pending
State vs. Seely, Donald	AL/Employment	Pending
State vs. Marinelarena, Manuel	HW/Welfare	Closed
State vs. Smallwood, Aile	AL/Employment	Pending
State vs. Delgadillo, Reuben	AL/Employment	Pending
Sensenig, Wayne & Hayden, Phillip vs. State	CJ/Corrections	Pending
State vs. Keckley, Randolph	HW/Welfare	Closed
State vs. Poulton, Dwayne	HW/Welfare	Closed
State vs. Humphreys, Jon & Denise	HW/Other (Misc)	Closed
Armfield, Calvin vs. State	CJ/Corrections	Closed
State vs. Estes, Kenneth	AP/Other (Misc)	Pending
State vs. Kelling, Tammy	AP/Other (Misc)	Pending
Soi/Dinger, Sonja vs. Johnson, Alan	HW/Welfare	Closed
State vs. Charlow, Floyd	AL/Employment	Pending
State vs. Percifield, William	HW/Welfare	Pending
State vs. Garrean, Charles	HW/Welfare	Closed
State vs. Mingo, James	HW/Welfare	Closed
Small, Patricia vs.		
Jacklin Seed Co. & Soi	AL/Employment	Pending
Schmalenberger, Jesse et al vs.		
Arave, Arvon et al	CJ/Corrections	Pending
State vs. Hacker, William	HW/Welfare	Closed
In the matter of		
Reynolds, William	HW/Mental Health	Pending
State vs. Jensen, Patricia	HW/Welfare	Closed
State vs. Thurman, Leroy	HW/Welfare	Closed
Bosted, Marta vs. State	HW/Welfare	Pending
State vs. Triangle Corral, Inc.	AP/Labor/Wage Claim	Pending
State vs. Rainn Corp.	AL/Labor/Wage Claim	Pending
State vs. Creech, Thomas	AP/Other (Misc)	Closed
State vs. Currington, Edward	AP/Other (Misc)	Pending
State vs. Jones, Larry	AP/Other (Misc)	Pending
Schrapps, Kiely vs. State	CJ/Corrections	Closed
Turner, Mark vs. State	CJ/Corrections	Pending
State vs. Waugh, Frank	HW/Mental Health	Closed
State vs. Rainn Corp.	AL/Labor/Wage Claim	Pending
In the interest of		
Bates, Baby Girl	HW/Terminations	Closed
State vs. Pullin, Wesley	HW/Welfare	Closed
State vs. Eason, Donald	HW/Welfare	Closed
State vs. Lake, Acel	AL/Labor/Wage Claim	Pending

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State vs. Smith, Delbert	HW/Welfare	Closed
State vs. Koch, Jimmy	HW/Welfare	Closed
State vs. LJB Enterprises, Inc.	AL/Labor/Wage Claim	Pending
State vs. Fire, Steven	HW/Welfare	Closed
Idaho Power Co. vs. Soi/Water Res.	NR/Water Resources	Pending
State vs.		
Ro-don-dee Energy Products, Inc.	AL/Labor/Wage Claim	Pending
State vs. Browning Freightlines, Inc.	AL/Labor/Wage Claim	Closed
State vs. Richardson, Tod	AP/Other (Misc)	Pending
In the matter of		
Halstead, Debra	HW/Mental Health	Pending
* Month Totals * 80 Listed, 80 Filed, 41 Closed . . . for Mar — 1983		
Dunn, A. Kenneth vs. Rhead, Robert	NR/Water Resources	Pending
State vs. Union Pacific Railroad	SF/Taxation	Closed
State vs.		
Camas Estates Water Users Assn.	HW/Health	Pending
In the matter of		
Robinson, Tennessee	HW/Mental Health	Closed
Perkins, Alfred vs.		
Town & Country Vkswgn. & Soi	AL/Employment	Closed
McMillan, Leroy vs.		
Boise Urban Stages & Soi	AL/Employment	Closed
State vs. Acuff, Paul	AP/Other (Misc)	Pending
Scrapps, Kiely vs. State	CJ/Corrections	Closed
Hansen, Mike vs. State	CJ/Corrections	Closed
Morrow, Jeffrey vs. State	CJ/Corrections	Pending
State vs. Adams, Elmer	AP/Other (Misc)	Pending
State vs. Sivak, Lacey	AP/Other (Misc)	Closed
State vs. Garbrecht, Louis	HW/Welfare	Closed
Gordon, George vs. State	AP/Other (Misc)	Pending
State vs. Allen, Stanley	BR/Finance	Closed
Garzee, Gary & Vannatter, Charles		
vs. State	CJ/Corrections	Closed
Zufelt, Ronald vs. State	CJ/Corrections	Closed
State vs. Sankey, Thomas	AP/Other (Misc)	Closed
State vs. Bruce, Michael	HW/Welfare	Closed
State vs. Wright, Robert L.	HW/Welfare	Closed
State vs. Stanfield, Robert	HW/Welfare	Closed
State vs. Camphouse, Kermit	HW/Welfare	Closed
State vs. Allen, Kay	HW/Other (Misc)	Closed
State vs. Treadaway, Pat	HW/Welfare	Closed
State vs. Mock, Jill	HW/Other (Misc)	Closed
State vs. Ibrahim, Fauzi	HW/Other (Misc)	Pending
State vs. Mullenix, John	AL/Labor/Wage Claim	Closed
Jones, William vs. State	CJ/Corrections	Closed
Skelton, David vs. State	CJ/Corrections	Closed
State vs. Tisdale, Charles	AP/Other (Misc)	Pending
State vs. Perez, Daniel	HW/Welfare	Closed
State vs. Wright, Louis	HW/Welfare	Pending

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State vs. Wolff, Carl	HW/Welfare	Closed
State vs. Higgins, Alan	HW/Welfare	Closed
State vs. Rivera, Salvador	HW/Welfare	Closed
State vs. Blackeagle, Norton	HW/Welfare	Pending
State vs. Birch, Molly	AL/Labor/Wage Claim	Pending
Stephens, Wilford vs. State	CJ/Corrections	Closed
Stice, Susan vs. Stice, Larry	HW/Welfare	Closed
State vs. Torgerson, Paul	HW/Welfare	Pending
Gordon, George vs. State	AL/Judiciary	Pending
State vs. Rankin, Ralph R.	HW/Mental Health	Closed
Gordon, George vs. State	CJ/P/A . . . Other (Misc)	Pending
State vs. Spalding, Phillip D.	HW/Welfare	Closed
State vs. Hogmire, David	HW/Welfare	Closed
State vs. Mote, Robert	HW/Welfare	Closed
State vs. Pettit, Wanda	HW/Welfare	Closed
State vs. Stanford, Beverly	AL/Labor/Wage Claim	Pending
State vs. Sumner, Steve	AL/Labor/Wage Claim	Closed
State vs. Idaho County Commissioners	HW/Mental Health	Pending
State vs. Whitfield, Charles	AP/Other (Misc)	Pending
Tuckett, Dean vs. Soi/Tax Comm.	SF/Taxation	Pending
Twin River National Bank vs.		
McCullough, et al	SF/Taxation	Pending
State vs. Farmer, Wayne	AL/Labor/Wage Claim	Pending
State vs. Castillo, Carlos Jr.	AP/Other (Misc)	Pending
Lindsay, Gary vs. State	CJ/Corrections	Closed
State vs. Miller, Linda	HW/Welfare	Closed
State vs. Urwin, Michael	HW/Welfare	Closed
State vs. Dechambeau, David	HW/Welfare	Closed
State vs. LJB Enterprises, Inc.	AL/Labor/Wage Claim	Pending
State vs. Star Cedar Sales, Inc.	AL/Labor/Wage Claim	Pending
State vs. Tucker, Timothy	AL/Employment	Pending
State vs. Maxfield, Cyrus	AP/Other (Misc)	Pending
State vs. Browning Freight Lines, Inc.	AL/Labor/Wage Claim	Closed
State vs. Johnson, John	HW/Welfare	Closed
Spieler, Michael vs.		
Habeas Corpus Application	HW/Mental Health	Closed
State vs. White, Darrell	AP/Other (Misc)	Pending
State vs. Rainn Corp.	AL/Labor/Wage Claim	Pending
State vs. Martinez, Levi	AP/Other (Misc)	Pending
Heaton, Mark vs. State	CJ/Corrections	Closed
State vs. Zuniga, Jose	HW/Welfare	Closed
State vs. Brown, John	HW/Welfare	Closed
State vs. Odle, Cody	HW/Welfare	Closed
State vs. Bassett, Stanley	HW/Welfare	Closed
State vs. Martin, Bruce	HW/Welfare	Closed
Maxfield, Cyrus vs. Gardner, Darrol	AP/Other (Misc)	Pending
State vs. Walker, David	AP/Other (Misc)	Pending
State vs. Brewster, Clyde	AP/Other (Misc)	Pending
State vs. Debban, Kenneth	HW/Welfare	Closed

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State vs. Kasimatis, Andrew	HW/Welfare	Closed
Lopez, Arturo vs. State	HW/Welfare	Closed
State vs. Turner, David L.	HW/Mental Health	Closed
State vs. Fischer, Melvin	AL/Employment	Pending
Carter, Annette vs. State	HW/Welfare	Pending
Young, Retta vs. State	HW/Fair Hearing	Pending
State vs. West, Ralph	HW/Welfare	Closed
State vs. Willingham, Dean	HW/Welfare	Pending
State vs. Wilson, Pelton	HW/Welfare	Closed
Regester, Gary et al vs. State	CJ/Corrections	Closed
Lopez, Rick vs. State	CJ/Corrections	Closed
State vs. McCord, Jim	AL/Employment	Pending
Potlatch Corp. vs. State	SF/Taxation	Pending
State vs. Courtright, Mike	HW/Welfare	Pending
State vs. Watson, Wayne	HW/Welfare	Closed
State vs. Likes, David	AL/Labor/Wage Claim	Closed
State vs. Lake, Acel	AL/Labor/Wage Claim	Pending
State vs. Clark, Loran	AL/Employment	Closed
State vs. Ralls, Justin	AL/Employment	Pending
State vs. Vaughn, Doreen	AL/Employment	Pending
State vs. Sumner, Steve	AL/Labor/Wage Claim	Pending
Roberts, Kathleen vs. State	HW/Welfare	Pending
Soi/Kathryn Stafford vs. Ricky Stafford	HW/Welfare	Closed
In the matter of Leiter, Alice vs.	HW/Mental Health	Pending
State vs. Taylor, John	AL/Employment	Pending
State vs. Salas, Rocky	HW/Welfare	Closed
State vs. World Wide Achievements Corp.	AL/Labor/Wage Claim	Pending
State vs. Stafford, Ricky	HW/Welfare	Closed
State vs. Spence, Melvin	AL/Employment	Closed
State vs. Vermillion, Jerry	HW/Welfare	Closed
State vs. Olson, Steven	HW/Welfare	Pending
State vs. Gonzales, Raymond	HW/Welfare	Closed
State vs. Fabian, Ronald	HW/Welfare	Pending
State vs. Brinkman, Kevin	HW/Welfare	Closed
State vs. Anschuetz, Kim	HW/Welfare	Closed
State vs. Bingham, Randy	AP/Other (Misc)	Pending
State vs. Holec, Joseph	AL/Employment	Closed
State vs. Burtenshaw, Ben	AL/Employment	Pending
State vs. Palmer, Darwin	AL/Employment	Pending
State vs. Hennig, Scott	AL/Employment	Pending
State vs. Ware, Judith	HW/Other (Misc)	Closed
State vs. Price, Randy	HW/Welfare	Closed
State vs. Lentfer, Donald	HW/Welfare	Closed
State vs. Grant, Peter	AL/Labor/Wage Claim	Closed
State vs. Lelapins Meat Processors, Inc.	AL/Labor/Wage Claim	Pending

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State vs. Horner, Craig & Donna	AL/Labor/Wage Claim	Pending
State vs. Anderson, Jill	AL/Employment	Pending
State vs. Utley, Donna	AL/Employment	Pending
Campbell, William vs. State	CJ/Corrections	Closed
State vs. Ferguson, Kathy	HW/Welfare	Closed
State vs. Boian, Ronald	HW/Other (Misc)	Closed
State vs. Holloway, Reva	HW/Other (Misc)	Pending
State vs. Matthews, Michael	AP/Other (Misc)	Pending
C.K. Cattle, Inc. vs.		
Dunn, A. Kenneth	NR/Water Resources	Closed
C.K. Cattle, Inc. vs.		
Dunn, A. Kenneth	NR/Water Resources	Closed
State vs. Waltman, Dean	AL/Employment	Pending
State vs. Reinke, Leonard	AP/Other (Misc)	Pending
State vs. Muck, Kenneth	HW/Welfare	Closed
State vs. Medeiros, Wayne	HW/Other (Misc)	Pending
State vs. Pena, Louis	HW/Other (Misc)	Pending
State vs. Lycan, Albert & Barbara	HW/Other (Misc)	Pending
State vs. Choate, Chery	HW/Other (Misc)	Closed
State vs. Donat, Tom	AL/Labor/Wage Claim	Closed
State vs. Browning, Lawny	AP/Other (Misc)	Pending
State vs. Decker, Walter	AP/Other (Misc)	Pending
State vs. Wise, Harold & Myrna	HW/Welfare	Closed
State vs. Jordan, Leroy	HW/Welfare	Closed
In the interest of		
Lopez, Miriam	HW/Terminations	Closed
In the interest of		
Peterson, Danny	HW/Welfare	Pending
Atwood, Suan & James vs. State	HW/Welfare	Pending
Wooten, James vs. State	CJ/Corrections	Closed
State vs. Bailey, George	HW/Mental Health	Closed
Bean, William vs.		
Appl. for writ of H.C.	HW/Mental Health	Closed
State vs. McKeown, Randall	AP/Other (Misc)	Pending
State vs. Meyer, John	HW/Welfare	Closed
State vs. Mullins, Monty	CJ/Corrections	Closed
State vs. Tradecom Limited, et al	BR/Finance	Closed
State vs. Beagles, Sandra	HW/Welfare	Closed
State vs. Cramer, Gene	HW/Welfare	Closed
State vs. Bruner, Mary Ann	AP/Other (Misc)	Pending
State vs. Pinkston, Delmer	HW/Welfare	Closed
Morris, Jack vs. State	CJ/Corrections	Closed
Newman, David vs. State	CJ/Corrections	Closed
Castillo, Oralia vs. State	HW/Fair Hearing	Pending
State vs. Sneed, Ronald & Eleanor	BR/Finance	Pending
State vs. Kirkwood, Miles	AP/Other (Misc)	Pending
In the interest of Dudek, William	HW/Child Protective Act	Closed
State vs. Johnson, Dennis	CJ/P/A . . Other (Misc)	Closed
State vs. Hillman, Steve	AL/Labor/Wage Claim	Closed

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State vs. Smith, Frank	AP/Other (Misc)	Closed
State vs. Gabrielson, Vernon	AP/Other (Misc)	Pending
State vs. Haener Bros., Inc.	SF/Taxation	Pending
Young, Dennis vs.		
Education, Id. Bd. of	AL/Education	Pending
State vs. Eisler, John	AL/Employment	Pending
* Month Totals * 98 Listed, 98 Filed, 50 Closed for May — 1983		
State vs. Coe, Harold & Gillian	HW/Welfare	Closed
State vs. Douglas, Michael	HW/Welfare	Closed
State vs. Reed, Donald	AL/Employment	Closed
In the interest of		
Coby, Gina Beth	HW/Terminations	Closed
State vs. Nava, Librado & Delfena	HW/Welfare	Closed
State vs. Miller, Frank	AL/Labor/Wage Claim	Pending
In the interest of		
Gage, Baby Boy vs.	HW/Terminations	Closed
Bogner, Rosmarie vs. State	SF/Taxation	Pending
State vs. Higgins, Robin	HW/Welfare	Closed
Wright, Jim vs. Schilling, Ron	AP/Other (Misc)	Closed
State vs. Hawkins, Ronald	CJ/P/A . . Other (Misc)	Closed
State vs. Loveland, J.R.	AL/Labor/Wage Claim	Closed
State vs. Lake, Acel	AL/Labor/Wage Claim	Closed
State vs. Talbot, Kelly	AL/Labor/Wage Claim	Closed
State vs. Currington, Edward	AP/Other (Misc)	Pending
Peterson, Paul vs. State	CJ/Corrections	Closed
State vs. Olander, Brian	AL/Labor/Wage Claim	Pending
State vs. Sumner, Steve	AL/Labor/Wage Claim	Pending
Houck, Leo vs. Soi Parole Bd.	CJ/Corrections	Pending
State vs. Hayes Broadcasting Co.	AL/Labor/Wage Claim	Closed
Water Permit # 21-7282 vs.		
Henry's Fork/In the matter of	NR/Parks & Rec	Pending
State vs. Collins, Joseph	AL/Employment	Pending
State vs. Cannon, James	AL/Employment	Pending
State vs. Flores, Gilbert	CJ/Corrections	Pending
State vs. Miller, Jerry	AP/Other (Misc)	Pending
Bowman, Wm.F. & Ana vs. State	SF/Taxation	Closed
State vs. Matthews, Sean	AP/Other (Misc)	Pending
Klein, Edward & Joan vs. State	SF/Taxation	Closed
State vs. Anderson, Andy	AP/Other (Misc)	Pending
State vs. Graves, Lee	HW/Other (Misc)	Pending
State vs. Cuellar, Joe	HW/Welfare	Closed
State vs. Slatter, Deborah	HW/Other (Misc)	Closed
Chadband, et al vs.		
Executive Productions, et al	SF/Taxation	Pending
State vs. Meloche, Carol	AP/Other (Misc)	Closed
State vs. Zollinger, John	AL/Labor/Wage Claim	Pending
State vs. Matthews, Wallace	AL/Employment	Pending
State vs. Bowman, John	AP/Other (Misc)	Pending
State vs. Robinson, William	AP/Other (Misc)	Pending

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State vs. Watson, Alfred	AP/Other (Misc)	Pending
State vs. Whitehead, James	AP/Other (Misc)	Closed
State vs. Sutton, William	AP/Other (Misc)	Closed
State vs. Hillman, Terry	HW/Welfare	Closed
State vs. Kenny, Arnold II	HW/Welfare	Closed
State vs. Hoffman, Robert	AP/Other (Misc)	Pending
State vs. Mahoney, Ronald	AP/Other (Misc)	Pending
State vs. Creech, Thomas	AP/Other (Misc)	Pending
State vs. Rainwater, Lynn	HW/Other (Misc)	Pending
State vs. Geier, Robert	BR/Finance	Closed
In the interest of Ratliff, Ricky	HW/Welfare	Closed
Monroe Crk. Irr. Dist. vs.		
Gann, Claud et ux	NR/Water Resources	Pending
Anderton, Bardell vs.		
Hargraves, Geo.	AL/Judiciary	Pending
Olsen, Ronald vs. State	CJ/Corrections	Closed
State vs. Moon, Charlene	AP/Other (Misc)	Pending
State vs. Hagey, John	HW/Welfare	Closed
Bonnors Ferry, city of vs. State	AL/Employment	Pending
State vs. Fenton, David	AP/Other (Misc)	Pending
State vs. Tracy, Anna	HW/Other (Misc)	Closed
In the interest of Taylor, Baby Boy	HW/Terminations	Closed
Medina, Pete vs. State	CJ/Corrections	Closed
State vs. Guidinger, Nick & June	HW/Other (Misc)	Pending

* Month Totals * 60 Listed, 60 Filed, 30 Closed . . . for Jun — 1983

* Report Totals * 918 Listed, 918 Filed, 553 Closed . . . 1,284 Currently Pending

ATTORNEY GENERAL OPINION NO. 83-1

TO: Mr. Martin L. Peterson
Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Must fines levied as part of the conditions of a withheld judgment for violations of a local ordinance be apportioned according to the requirements of Idaho Code § 19-4705 or may the court in its discretion deposit the funds in the district court fund?

ANSWER:

Idaho Criminal Rule 33(d) and Idaho Misdemeanor Criminal Rule 10(d) require that any monies paid as a condition of a withheld judgment be distributed in the manner provided for in Idaho Code § 19-4705. That section requires a distribution of ten percent of the money to the state general fund and ninety percent to the local entity whose ordinance was violated; in the case of cities, ninety percent to the city; in the case of counties, ninety percent to the district court fund.

DISCUSSION:

There are two separate approaches to this question. One is along the lines that the legislature has plenary authority in this area and its policies must be given effect. The other deals primarily with the supervisory authority of the Supreme Court in establishing rules and procedures for inferior courts. Both approaches reach the same result but will be discussed separately.

The legislature has the plenary power to enact statutes which not only provide penalties for acts or omissions, but also designate where the fines levied thereunder shall go. As stated in the case *Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542 (1969):

[T]he state constitution is a limitation, not a grant, of power. We look to the state constitution not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden by the state or federal constitutions, it must be held valid.

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

It is a traditional function of the legislature to establish what acts are unlawful and to provide penalties for those acts. Art. II, § 1, Idaho Constitution; *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432 (1959); *State v. Mc-*

Mahan, 57 Idaho 240, 65 P.2d 156 (1937). The legislature also has the authority under its appropriation powers to determine where receipts from fines are to be distributed. *Leonardson v. Moon*, *supra*: 72 Am. Jur.2d States § 75. This elemental principle of law is embodied in Idaho Code § 19-4705 entitled "Payment of Fines and Forfeitures — Satisfaction of Judgment — Disposition — Apportionment." Subparagraph (e) of that statute requires that:

Fines and forfeitures remitted for violation of county ordinances shall be apportioned ten percent (10%) to the state treasurer for deposit in the state general account and ninety percent (90%) to the district court fund of the county whose ordinance was violated.

Subparagraph (f) of that statute requires that:

Fines and forfeitures remitted for violation of city ordinances shall be apportioned ten percent (10%) to the state treasurer for deposit in the state general account and ninety percent (90%) to the city whose ordinance was violated.

Subparagraph (a) of that statute requires that all fines and forfeitures so collected:

[P]ursuant to the judgment of any court of the state shall be remitted to the court in which such judgment was rendered. Such judgment shall then be satisfied by entry in the docket of the court. The clerk of the court shall daily remit all fines and forfeitures to the county auditor who shall at the end of each month apportion the proceeds according to the provisions of this act. Every other existing law regarding the disposition of fines and forfeitures is hereby repealed to the extent such law is inconsistent with the provisions of this act.

It is clear from the foregoing that any fines and forfeitures levied by a court in the State of Idaho for violation of any local ordinances must be paid over to the county auditor for disposition according to the terms of the statute. Therefore, in answer to your question, since the legislature has clearly spoken in this area and has provided that monies collected for violation of city ordinances shall be paid over to the county auditor for distribution on the basis of ninety percent to the city and ten percent to the state, the court has no choice but to dispose of the funds collected in the manner provided by law.

Moreover, the solution to the issue can also be found within the court structure. According to the constitution of the State of Idaho art. V, § 2,

The judicial power of the state shall be vested in . . . a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature . . .

In addition Idaho Code § 1-212 states that:

The inherent power of the Supreme Court to make rules governing procedure in all courts of Idaho is hereby recognized and confirmed.

Furthermore, Idaho Code § 1-213 provides that:

The Supreme Court shall prescribe by general rules for all the courts of Idaho . . . the practice and procedure in all actions and proceedings . . .

The Supreme Court has provided for the administration of withheld judgments in Idaho Criminal Rule 33(d). That rule provides in part that:

[T]he conditions of a withheld judgment or probation may also include the requirement of payment of a specific sum of money to the county for the prosecution of a criminal proceeding against the defendant, which sum of money shall be paid to the court and distributed and dispensed in the same manner as provided for the distribution of fines or forfeitures under § 19-4705, Idaho Code . . .

As previously discussed, section 19-4705 requires that any fines or forfeitures levied for the violation of a local ordinance be paid over in the manner provided: in the case of a county ordinance, ten percent to the state general fund and ninety percent to the district court fund in the county; in the case of a city ordinance, ten percent to the state general fund and ninety percent to the city.

A thorough review of Rule 33 discloses no grant of authority to direct the payment of monies in ways other than those specified therein. This point is emphasized by the provision in the rule which states that:

[T]he conditions of a withheld judgment or of probation shall not include any requirement of the contribution of money or property to any charity or any other nongovernmental organization . . .

It is our opinion that Rule 33(d) clearly limits the discretion of the court in directing the distribution of monies levied as part of a withheld judgment for purposes other than those enumerated in the rule. Furthermore, it is our opinion that pursuant to Rule 33(d), any fines levied by a court as part of a withheld judgment must be turned over to the county auditor for distribution under the terms of Idaho Code § 19-4705.

Additional support for the foregoing conclusion is found in the words of Misdemeanor Criminal Rule 10 entitled "Withheld Judgments in the Magistrates Division-Conditions." In particular, Rule 10(d) provides the form for a withheld judgment. It states in part that:

For any withheld judgment which is granted in the magistrates division, the court *shall* enter its order withholding judgment on the following form; . . . (Emphasis added.)

The form is printed in its entirety in the rule. Part 5 of the form reads as follows.

That the defendant shall pay to the clerk of this court the following sums of monies:

(a) a fee of \$10 pursuant to Idaho Code § 31-3201A(b); (Must be assessed on all withheld judgments, except where counsel has been appointed by the court.)

(b) _____ dollars *for expense incurred in this prosecution, to be distributed in the same manner as the payment of fines and forfeitures, pursuant to the Idaho Code § 19-4705.* Said sum shall be paid within _____ from this date;

(c) _____ dollars for restitution to _____, the party injured by defendant's crime herein for restitution to said party. Said sum shall be paid within _____ from this date;

(d) _____ dollars for reimbursement for public defendant or appointed counsel services, pursuant to Idaho Code § 19-854(c). (Emphasis added.)

A thorough review of the form reveals no other provisions for the payment of money by the defendant to the court. It should also be noted that the provisions under part 5 of the form are the same as those contained in Idaho Criminal Rule 33(d).

Since Rule 10 requires the use of the form and since the form makes no provision for distribution of monies on any basis other than those contained in the form, it is our opinion that monies paid by any defendant into court as part of a withheld judgment must be paid over to the county auditor for distribution as provided for in the rule. In this case any monies which were levied for purposes other than the ten dollar court fee, reimbursement for services of counsel, or for restitution must be distributed according to the requirements of Idaho Code § 19-4705. That section requires that any monies levied for the violation of a local ordinance must be paid over according to the distribution formula contained in the statute.

In summary, it is our opinion that any fines or forfeitures levied as part of the conditions of a withheld judgment must be paid over to the county auditor of the county in which the court sits for distribution pursuant to the formula provided for in Idaho Code § 19-4705. Although the courts has discretion in whether to levy any additional fines or forfeitures as part of a withheld judgment, it has no discretion to designate where those fines and forfeitures will go. That discretion has been eliminated both by legislative enactment and adoption of rules of procedure by the Supreme Court.

AUTHORITIES CONSIDERED:

Cases

1. *Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542 (1969)
2. *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432 (1959)
3. *Davis v. Moon*, 77 Idaho 146, 289 P.2d 614 (1955)
4. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937)

Codes

1. Idaho Code §§ 1-212, 1-213
2. Idaho Code § 19-4705

Constitutions

1. Idaho Constitution art. II, § 1
2. Idaho Constitution art. V, § 2

Rules

1. Idaho Criminal Rule 33(d)
2. Idaho Misdemeanor Criminal Rule 10(d)

DATED this 5th day of January, 1983.

ATTORNEY GENERAL
State of Idaho
/s/ JIM JONES

ANALYSIS BY:

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

RGR/tl

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

ATTORNEY GENERAL OPINION NO. 83-2

TO: Senator Mark Ricks
Representative Walter Little
Idaho State Legislature

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Can the legislature constitutionally authorize the sale of state buildings to the State Building Authority or another entity and place the proceeds from such sales in the state's general fund?
2. Has the legislature enacted legislation authorizing the sale of state buildings to the State Building Authority or any other entity?
3. Is additional legislation necessary or desirable to accomplish the sale of state buildings to the Idaho State Building Authority?

CONCLUSIONS:

1. The legislature can authorize the sale of certain state buildings to the State Building Authority or any other entity and place the proceeds in the state's general fund.
2. The legislature has enacted legislation authorizing the sale of public buildings which are surplus property, and has authorized the grant of properties to the State Building Authority.
3. While the sale of state buildings to the State Building Authority may be permitted by existing legislation, additional legislation would be desirable to clarify certain ambiguities in the existing statutes and may be required as a practical matter by any potential purchaser in order to ensure the legality of the transaction.

ANALYSIS:

1. Art. III, sec. 1, Id. Const., vests the legislative power of the state in the senate and house of representatives. The Idaho Supreme Court has interpreted that power to be plenary except as limited by the state or federal constitutions. *State v. Cantrell*, 94 Idaho 653, 496 P.2d 276 (1972); *Smith v. Cenarrusa*, 93 Idaho 818, 475 P.2d 11 (1970); *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934). Additionally, it is fundamental that legislative acts are presumed constitutional and will not be invalidated unless they are clearly not susceptible to a valid constitutional interpretation. See *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979); *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976); and *Board of County Com'rs. v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975).

Several constitutional provisions are relevant to the discussion of the state's authority to sell buildings to the State Building Authority or any other entity. First, the buildings in question must be owned by the state in its own right. The legislature may not sell buildings owned, for example, by the State Insurance Fund or Public Employees Retirement System as such are held in trust for the beneficiaries of those funds. A sale of such buildings by the state, with the proceeds to be placed in the general fund, would violate not only the trust provisions governing the two funds but would clearly violate art. I, sec. 13, Id. Const., and the Fourteenth Amendment to the United States Constitution.

Similarly, if the buildings or the land they are located on belong to the Public School Endowment Fund or granted land protected by art. IX, sec. 8, Id. Const., they may be sold in accordance with Idaho Code § 58-313, but the proceeds may not be placed in the general fund as art. IX, sec. 8 states, in part:

. . . the general grants of land made by Congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made . . .

Finally, it should be noted that the Idaho Supreme Court has not affirmed the validity of the State Building Authority in light of art. VIII, sec. 1 (which limits the state's ability to incur liabilities and which prohibits the simple mortgaging of state buildings), art. III, sec. 19, and art. XI, sec. 2. Id. Const. (which prohibit the creation of certain types of corporations). From a reading of *Board of County Com'rs. v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975) and *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976), in addition to Attorney General Opinions 76-35, 77-49, and 80-4, it should be apparent that in all likelihood the validity of the State Building Authority would be upheld and none of the aforementioned constitutional provisions would be violated by the sale of appropriate state buildings to the State Building Authority. Thus, except where the constitution limits the authority of the legislature with respect to the sale of state property as with respect to endowment and trust property, the legislature may authorize the sale of state buildings and may place the proceeds thereof in the general fund.

2. As noted above, the legislature is limited in its disposition of endowment and trust lands. Endowment lands are constitutionally entrusted to the care of the State Board of Land Commissioners, pursuant to art. IX, sec. 7, Id. Const., and the disposition of such endowment lands is governed by art. IX, sec. 8, Id. Const., and Idaho Code § 58-313. The legislature has provided for the disposition of other state property if it is surplus or if it is granted to the State Building Authority. Idaho Code § 58-331 provides:

Real property of the State of Idaho, the use of which by any department, officer, board, commission or other administrative agency of the state shall be terminated by law, and real property in the custody

and control of any such agency which the agency shall declare to be no longer useful to or usable by it, shall be deemed surplus, and custody and control thereof shall thereupon be vested in and title be transferred to the state board of land commissioners, subject to disposition by said board in accordance with the provisions of this act.

Idaho Code § 58-332 provides that upon such a transfer to the State Board of Land Commissioners, the commissioners determine if such property is suitable for use by other state agencies and if so it relinquishes control and custody of the property to the agency it determines can best use the property. If no such use is determined, then the State Board of Land Commissioners can sell the property. The sale can be either a public sale to the highest, best bidder, or the commissioners can sell the property to any tax supported agency or unit of the State of Idaho or the United States other than the State of Idaho or its agencies. Such a sale to a governmental entity may be negotiated provided that the transfer is for adequate and valuable consideration. In either event, the statute requires publication of notice of intent to sell for six consecutive weeks. At the end of such time if a tax supported entity wishes to purchase the property it has sixty additional days to complete the sale. Obviously this is a cumbersome procedure which as a practical matter may not permit a sale to be completed prior to the end of this fiscal year.

The other method of transferring state real property is provided by the Idaho Building Authority Act, the provisions of which supplement the Idaho Surplus Real Property Act. As stated in the Idaho Building Authority Act, Idaho Code § 67-6423:

Neither this act nor anything herein contained is or shall be construed as a restriction or limitation upon any powers which the authority might otherwise have under any laws of this state, and this act is cumulative to any such powers. This act does and shall be construed to provide a complete, additional and alternative method for doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws.

Also, Idaho Code § 67-6424 provides:

Insofar as the provisions of this act are inconsistent with the provisions of any other law, general, specific or local, the provisions of this act shall be controlling.

Consequently, the Idaho State Building Authority Act provides an alternative method of granting state real property to the Building Authority, provided that the terms of the Building Authority Act are met. Idaho Code § 67-6409 provides a number of general powers to the Building Authority. Among other things it enables the Building Authority *without limitation* to:

(g) acquire real or personal property, or any interest therein, on either a temporary or long term basis in the name of the authority by gift, purchase, transfer, foreclosure, lease or otherwise . . .

By this section, therefore, the Building Authority may purchase *any interest* in real property which is defined by Idaho Code § 67-6402(f) as:

(f) "Real property" means all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto, or used in connection therewith, and every estate, interest and right, legal or equitable, therein, including terms of years and liens by way of judgment, mortgage or otherwise and the indebtedness secured by such liens.

Because this section specifically includes improvements and fixtures (i.e. buildings) it should be clear that the Building Authority may, *if it chooses*, purchase state buildings.

Finally, Idaho Code § 67-6421 authorizes the state to:

. . . make grants of money or property to the authority for the purpose of enabling it to carry out its corporate purposes and for the exercise of its powers . . . This section shall not be construed to limit any other power the state may have to make such grants to the authority.

Because the purpose of the Building Authority is to provide government buildings (Idaho Code § 67-6404) and the acquisition of such would be in furtherance of the Building Authority's powers provided in § 67-6409(g), it appears that the state may sell (i.e. grant for consideration) existing state buildings to the Building Authority. It should be noted also that such a sale could be consummated without the requirement of public advertisement or competitive bidding, in a relatively streamlined transaction outlined in Idaho Code § 67-6410, discussed *infra*.

3. If a sale were to be made to anyone other than the State Building Authority, it appears that the sale would be made pursuant to the Surplus Real Property Act. As discussed above, that Act requires that the property to be sold be surplus property. Consequently, the sale to an entity other than the State Building Authority of buildings currently being used and currently needed by state agencies is not authorized by existing statutes. If such sales are desired, the statutes should be amended to permit the sale of state buildings in the event of financial exigency or other circumstances as declared by the legislature.

Similarly, legislation would be desirable to facilitate a sale to the Idaho State Building Authority. As discussed above, it is clear that the State Building Authority is authorized to purchase property from the state necessary to carry out the Authority's purposes. However, it is not clear that the purposes of the Building Authority include the purchase of existing state office buildings. Rather, a reading of the statement of purpose contained in Idaho Code § 67-6404 together with a reading of the entire Idaho State Building Authority Act indicates that the primary purpose of the Authority is

the construction and operation of facilities to meet the needs of the state government. While there is language in the Act which could be read broadly enough to include a purpose of buying existing state office buildings, we would recommend that the statement of purpose be amended specifically to authorize such a purchase by the Building Authority.

It may also be desirable to enact a statute authorizing the specific transaction contemplated to avoid certain practical problems which may be caused by the existing statute. For example, Idaho Code § 67-6410 sets forth the procedure to be used prior to financing of buildings by the State Building Authority. That section provides:

Notwithstanding any other provision of this act, the Authority is not empowered to finance any facility pursuant to § 67-6409, Idaho Code unless:

(a) Prior approval by the legislature has been given by concurrent resolution authorizing a state body to have the authority to provide a specific facility;

(b) A state body has entered into an agreement with the authority for the authority to provide a facility;

(c) The authority finds that the building development or building project to be assisted pursuant to the provisions of this act, will be of public use and will provide a public benefit.

This statutory procedure may be too time consuming as a practical matter to solve the fiscal problems currently being addressed by the legislature. Also, the existing statutes leave some doubt as to who has the authority to execute the sale to the Authority and on what conditions. Attorney General Opinion 82-3 would seem to imply that either the Land Board or a particular state agency may execute such a sale depending upon how title was acquired. A specific statute would solve these problems.

Also, there are several other legal limitations to such a sale which should be noted briefly. First, it is important to emphasize that the transaction must be structured in such a manner so as not to create a debt or liability in violation of art. VIII, sec. 1, Id. Const. For example, after the sale the state could lease the buildings back provided that the lease creates no obligation upon the state beyond the annual appropriation for the lease. If a purchase option is included in the lease, it should be exercisable at the sole discretion of the state and the amount of the option must be an amount which represents reasonable value for the property. In *Constitutionality of Chapter 280, Or Laws 1975*, 276 Or. 135, 554 P.2d 126 (1976), the Supreme Court of Oregon held that Oregon's State Building Authority Act was unconstitutional. Among other reasons, the Court held that a purchase option at the end of the lease for nominal consideration indicates that the transaction, although in form was a lease, was in substance a conditional sales contract. Thus, the substance of the arrangement indicated an intention to create a state liability in violation of Oregon's constitution. While other courts have held to the contrary (see, eg., *Gude v. City of Lakewood*, 636 P.2d 691 (colo. 1981), such a

provision would create a substantial risk. Such a transaction begins to look prohibitively similar to a simple mortgage which is squarely prohibited by art. VIII, sec. 1, Id. Const. Attorney General Opinion No. 51-75 discusses these problems in more detail.

Other limitations upon the sale of property may be included in particular covenants and conditions applying with respect to certain properties. For example, it is our understanding that the L.B.J. Building is partially funded with federal funds and that certain conditions were imposed upon the state in return for the funding. Consequently, prior to the sale of buildings, it would be necessary to evaluate any limitations upon the transfer of each particular building to which the state may have agreed.

Finally, it should be kept in mind that the Building Authority is not merely the alter-ego of the state. Rather, it is an independent public body. Such independence is critical to its validity as any indication that it is simply an arm of the state could cause its bond financing to violate art. VIII, sec. 1, and therefore destroy its utility to the state.

AUTHORITIES CONSIDERED:

U.S. Constitution:

1. Fourteenth Amendment, U.S. Constitution

Idaho Constitution:

- A. Art. I, sec. 13, Id. Const.
- b. Art. III, sec. 1, Id. Const.
- c. Art. III, sec. 19, Id. Const.
- d. Art. VIII, sec. 1, Id. Const.
- e. Art. IX, sec. 7, Id. Const.
- f. Art. IX, sec. 8, Id. Const.
- g. Art. XI, sec. 2, Id. Const.

Idaho Statutes:

Idaho Code §§ 58-313, 58-331, 58-332, 67-6402(f), 67-6404, 67-6409, 67-6409(g), 67-6410, 67-6410(a) (b) (c), 67-6421, 67-6423, 67-6424.

Idaho Attorney General Opinions:

82-3, 80-4, 77-49, 76-35, and 51-75.

Idaho Cases:

State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979) *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 538 P.2d 35 (1976)
Board of County Com'rs. v. Idaho Health Facilities Authority, 96

Idaho 498, 531 P.2d 588 (1975) *State v. Cantrell*, 94 Idaho 653, 496 P.2d 276 (1972) *Smith v. Cenarrusa*, 93 Idaho 818, 475 P.2d 11 (1970), *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934)

Other Cases:

Gude v. City of Lakewood, 636 P.2d 691 (colo. 1981) *Constitutionality of Chapter 280, Or. Laws 1975*, 276 or. 135, 554 P.2d 126 (1976)

DATED this 17th day of January, 1983.

ATTORNEY GENERAL
State of Idaho
/s/ JIM JONES

ANALYSIS BY:

DAVID HIGH
Deputy Attorney General

KENNETH R. McCLURE
Deputy Attorney General

DH/KM/be

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

ATTORNEY GENERAL OPINION NO. 83-3

TO: Mr. John Rooney
Director
Department of Law Enforcement
STATEHOUSE MAIL

Per Request For Attorney General's Opinion

1. *Regarding liens on motor vehicles and disposition of abandoned motor vehicles under Chapters 35 and 36, Title 49, Idaho Code.*

QUESTIONS PRESENTED:

a. In light of enactments by the Second Regular Session of the Forty-Sixth Idaho Legislature, which agency is authorized to administer the chapters?

- b. Did the Legislature provide appropriations to the authorized agency to administer the chapters and, if not, did such failure repeal or suspend any duty to administer the chapters?
- c. Do inconsistencies in the chapters and other enactments relieve the purportedly authorized agency of its duty to administer the chapters?
- d. Does the agency have discretion to give priority to certain programs when faced with elimination of or reduction in funding?
- e. If the duty to administer the chapters is not repealed or suspended by practical inconsistencies or lack of funding, can citizens compel performance of the duty by legal action?

CONCLUSIONS:

- 1a. The Idaho Transportation Department. While a court could strictly construe the wording of Chapters 35 and 36 to find the Idaho Department of Law Enforcement to be authorized, such construction would render the chapters non-administrable since other enactments removed necessary administrative capabilities and appropriations from the Department of Law Enforcement. Those capabilities and appropriations were instead reposed in the Transportation Department. Thus, it is probable that a court would construe Chapters 35 and 36 to effectuate legislative intent that they be administered and find the Transportation Department to be the authorized agency. It is also suggested, without affecting this opinion, that the discussed statutory deficiencies be corrected legislatively.
- 1b. It is unclear whether appropriations for administration of Chapters 35 and 36 were provided the Transportation Department. The Legislature did not provide the department with appropriations from the specific account dedicated to funding of the chapters' programs, yet did provide the department with appropriations for integral administrative functions. A court would probably not find an implied repeal of the department's authorization in light of such repeals being disfavored as a matter of law, apparent legislative intent that the chapters' programs be administered by some agency, and the Transportation Department being the only agency which was given the necessary administrative capabilities.
- 1c. No. The Transportation Department possesses the necessary administrative capabilities to discharge Chapters 35 and 36, provided that a court construes those chapters in harmony with other enactments. If, on the other hand, the Department of Law Enforcement

were determined to be the authorized agency, inconsistencies would prevent it as a practical and financial matter from administering the chapters.

1d. Yes. The Transportation Department may in its discretion give priority to certain programs and see a reallocation of funds from or to programs within the agency.

1e. As a matter of law, citizens may compel performance of statutory duties by mandamus. Mandamus would not lie here, however, if a court found the Transportation Department's duty to administer Chapters 35 and 36 to be discretionary in light of practical or financial constraints.

2. Regarding snow parking permits under Chapter 31, Title 49, Idaho Code.

Same questions as those presented in 1a. through 1e.

CONCLUSIONS:

2a. The Department of Law Enforcement. Enactments by the 1982 Legislature did not amend, repeal, or transfer the Department's duties under Chapter 31, Title 49.

2b. There is no evidence that the Legislature did not provide appropriations for administration of the chapter through the same source of funding as the previous fiscal year. Accordingly, a court probably would not find an implied repeal or suspension of the department's authorization.

2c. No. The Department of Law Enforcement can still discharge its duties under Chapter 31, Title 49, despite amendments to other statutes.

2d. Yes. The Department of Law Enforcement may in its discretion give priority to certain programs and seek a reallocation of funds from or to programs within the agency.

2e. Yes, provided that performance is not discretionary.

3. Regarding suspension and revocation of drivers' licenses under Title 49, Idaho Code.

QUESTIONS PRESENTED:

a. In light of enactments by the Second Regular Session of the Forty-sixth Idaho Legislature, which agency is authorized to suspend or revoke drivers' licenses?

- b. Does the Idaho Department of Law Enforcement have authority to suspend or revoke licenses after July 1, 1982, if proceedings to suspend or revoke were initiated by the department prior to July 1, 1982?
- c. What is the effect of an agreement by which the Idaho Transportation Department, effective July 1, 1982, conducts administrative hearings to suspend or revoke licenses in the name of the Idaho Department of Law Enforcement?

CONCLUSIONS:

- 3a. The Idaho Transportation Department. Enactments by the 1982 Legislature repealed conflicting authorizations found in earlier legislation.
- 3b. No. The Department of Law Enforcement cannot act absent statutory authorization and its authorization was transferred to the Transportation Department as of July 1, 1982. The Transportation Department can continue and act upon proceedings initiated prior to July 1, 1982, by the Department of Law Enforcement.
- 3c. The agreement is void.

STATEMENT OF FACTS

1. Liens on motor vehicles and disposition of abandoned motor vehicles.

a. Prior statutes

Chapters 35 and 36 of Title 49, Idaho Code, concerning labor and material liens on motor vehicles and disposition of abandoned motor vehicles, respectively, were enacted in 1982 by the Second Regular Session of the Forty-Sixth Idaho Legislature (1982 Legislature). Prior to that enactment, both liens and abandoned vehicles were addressed under Idaho Code § 49-592. Under that section, the Department of Law Enforcement (Law Enforcement) was charged with notifying owners and lienholders of the location and storage of abandoned vehicles and processing title subsequent to lien foreclosures. These functions were implicitly dependent on Law Enforcement being the agency responsible for registering motor vehicles and issuing certificates of title under the Idaho Motor Vehicle Title Act, Idaho Code §§ 49-401 et seq. See I.C. § 49-592 (5) (b) (1). Fees collected pursuant to the Motor Vehicle Title Act were placed in the "motor vehicle fund." I.C. § 49-423.

b. Prior Appropriations

Appropriations to Law Enforcement prior to the 1982 Legislature (FY 1983) included funding for these services. The Department's budget recom-

mendation for FY 1982 was based in part on the providing of "driver and vehicle services," which category included "registrations and vehicle titles." Joint Finance-Appropriations Committee, *Legislative Budget Book*, FY 82, p. 11-7. Law Enforcement's final appropriation for FY 1982 included money for driver and vehicle services. 1981 Sess. Laws, ch. 170 at 302. Those services were purportedly administered by the Motor Vehicles Division (MVD) within Law Enforcement. Employee positions within the MVD were not allocated to specific programs in budget materials considered by the Joint Finance-Appropriations Committee (JFAC).

c. 1982 Legislative Enactments

The 1982 Legislature passed several bills affecting Law Enforcement's duties under Section 49-592. House Bill 554 repealed the section and added Chapter 35 to Title 49, regarding labor and material liens on motor vehicles. 1982 Sess. Laws, ch. 351 at 868. House Bill 520 added Chapter 36 to Title 49, regarding abandoned vehicles. 1982 Sess. Laws, ch. 267 at 690. The two chapters expand and clarify the definitions and procedures which were set forth in the repealed section. For instance, Chapter 35 expressly defines labor and material liens on motor vehicles. I.C. § 49-3502, provides for lien sales, I.C. § 49-3506(2), and requires notice of lien sales. I.C. § 49-3508. Chapter 36 provides for certification and bonding of tow truck operators, I.C. § 49-3605, clarifies an officer's powers and duties regarding abandoned vehicles, I.C. § 49-3608, and requires opportunity for post-storage hearing, I.C. § 49-3609. Former Section 49-592 did not include these provisions. In both chapters, Law Enforcement is denoted the administering agency, I.C. § 49-3501 and 3601(5), and given specific duties. See, e.g., I.C. §§ 49-3506(2) and (3), 49-3602(1)(B), 49-3605(1) and (2) [director], 49-3608(b), 49-3609(1), 49-3614, and 49-3615. As to several other duties in both chapters, however, the MVD is specifically denominated instead of Law Enforcement. See, e.g., I.C. §§ 49-3506(1), 49-3508, 49-3510(1)(b) and (2), 49-3606(a)(1), 49-3615, 49-3616(4), and 49-3618. The chapters refer to the record-keeping function of the administering agency. See I.C. §§ 49-3506(3), 49-3608(1)(b), 49-3609, and 49-3615. Costs of administration and payment of claims under the chapters are appropriated from an "abandoned vehicle trust account." I.C. §§ 49-3510(3), 49-3602. The account is funded by fees accompanying lien sale applications. I.C. §§ 49-3506(5) and 49-3621, and the balance of lien sale proceeds. I.C. §§ 49-3510, 49-3602, and 49-3622.

The 1982 Legislature also passed House Bill 645. 1982 Sess. Laws, ch. 95 at 185. This bill amended numerous sections of Chapter 49 to the end of transferring the administration of certain functions from Law Enforcement to the Idaho Transportation Department (Transportation). Among other things, the bill amended the Motor Vehicle Title Act to charge Transportation with duties of registration, I.C. § 49-401(i), certification of title, I.C. §§ 49-405 and 49-407, and maintenance of records of certifications and liens, I.C. §§ 49-407 and 49-412 — all of which duties were previously charged to Law Enforcement or nominally still are charged to Law Enforcement in the newly-

enacted Chapters 35 and 36. House Bill 645 did not expressly transfer the MVD into Transportation or by definition specifically charge the MVD with any duties under the Motor Vehicle Title Act. After passage of House Bill 645, however, the division was in fact moved to Transportation. As pointed out above, all record and title functions, including the processing of liens and abandoned vehicles, were historically the responsibility of the MVD. The account into which fees collected under the act are deposited was changed in name from the "motor vehicle fund" to the "state highway account." I.C. § 49-423.

d. *1982 Legislative History*

The legislative history of House Bills 520, 554, and 645 shows that each originated in the House Transportation and Defense Committee. *House Journal*, 46th Leg., 2d Reg. Sess. 1982, at 391, 395, 405. House Bill 520 was first read on the floor on January 22, 1982, and was passed by the House on March 9 and the Senate on March 19, 1982. *House Journal*, *supra*, at 26, 194; *Senate Journal*, 46th Leg., 2d Reg. Sess. 1982, at 207. House Bill 554 was first read on January 27, 1982, and was passed by the House on March 9 and the Senate on March 22, 1982. *House Journal*, *supra*, at 37, 194; *Senate Journal*, *supra*, at 220. House Bill 645 was not introduced and given first reading in the House until February 9, 1982, *House Journal*, *supra*, at 66, but was passed by the House and Senate on February 24 and March 9, 1982, respectively, *House Journal*, *supra*, at 132; *Senate Journal*, *supra*, at 131, prior to passage of House Bills 520 and 554.

At hearings of the House Transportation and Defense Committee, the transfer of functions from Law Enforcement to Transportation (H.B. 645) was discussed and testimony was presented by the directors of both departments that the transfer would entail moving the MVD to Transportation. House Transportation and Defense Committee, *Minutes*, February 8 and 16, 1982; Departments of Law Enforcement and Transportation, Report to the House Transportation and Defense Committee (Feb. 8, 1982). Almost concurrently, Law Enforcement staff presented testimony to the Senate Transportation Committee regarding House Bills 520 and 554. Senate Transportation Committee, *Minutes*, January 20, February 2, February 18, February 26, 1982. The senate committee minutes contain no indication that the imminent transfer of titling functions to Transportation under House Bill 645 was discussed. Legislative debates are not recorded in Idaho, and there are no reports in contemporaneous newspaper accounts of discussions of the bills on the Senate and House floors.

e. *FY 1983 Appropriations*

The FY 1983 appropriations bills for Law Enforcement and Transportation proceeded apace House Bills 520, 554, and 645. The original budget recommendations for the departments did not reflect any proposed transfer. JFAC, *Legislative Budget Book*, FY 1983, pp. 11-11, 20-3, 20-5; see also Office of

the Governor, *Executive Budget*, FY 1983, pp. 11-03, 11-11, 20-03. As mentioned above, House Bill 645 was passed by the House on February 24. JFAC considered the budgets for Law Enforcement and Transportation on March 5, four days prior to senate passage of House Bill 645. The tapes and minutes of that committee hearing show that the committee was aware of and discussed the impact of House Bill 645 and that the motion sheet upon which the committee affirmatively voted reflected the transfer of the MVD to Transportation. *Tape*, JFAC hearing, March 5, 1982; *JFAC Minutes*, at p. 161. The minutes and record indicate that the committee did not consider allocation of employee positions to specific programs within the MVD and did not discuss House Bills 520 or 554.

Transportation's appropriation bill was introduced in the Senate on March 10, *Senate Journal*, *supra*, at 150, the same day House Bills 520 and 554 were introduced in the Senate and one day after House Bill 645 was passed by the Senate. Transportation's appropriation bill was passed by the Senate on March 15 and the House on March 18. *Senate Journal*, *supra*, at 174; *House Journal*, *supra*, at 285. Law Enforcement's appropriations bill was introduced in the House on March 11. *House Journal*, *supra*, at 215, and passed by the House on March 17 and the Senate on March 23. *House Journal*, *supra*, at 261; *Senate Journal*, *supra*, at 234. Transportation's appropriation as approved included funding from the "state highway account." 1982 Sess. Laws, ch. 294 at 749. Law Enforcement's final appropriation omitted funding for driver and vehicle services. 1982 Sess. Laws, ch. 335 at 843, which category had been included in the department's FY 1982 appropriation. 1981 Sess. Laws, ch. 170 at 302. Neither departments' appropriation included the abandoned vehicle trust account as a source of expenditure.

2. *Snow Parking Permits.*

a. *Existing Statutes*

Chapter 31 of Title 49, Idaho Code, provides for the establishment and maintenance of winter recreational parking locations through a parking permit system. Under Section 49-3105, Law Enforcement is responsible for the printing of the snow parking permits. Law Enforcement then distributes permits by issuing them to snowmobile owners at no cost concurrent to registration of snowmobiles with Law Enforcement, I.C. §§ 49-2605 and 49-3104(4), or by selling them directly or through vendors to cross-country skiers who intend to park vehicles at the parking locations. I.C. § 49-3104(1). A percentage of the permit fees is allotted to Law Enforcement through the motor vehicle account for costs of producing the permits. I.C. § 49-3107(2).

The major percentage of the fee revenue goes to the "cross-country skiing recreation account," which is administered by the Idaho Department of Parks and Recreation for the removal of snow and other winter recreational development. I.C. § 49-3107(3).

b. 1982 Legislative Enactments

The 1982 Legislature did not amend the provisions of Chapter 31, Title 49. House Bill 645 did, however, amend Sections 49-2601, et seq., under which Law Enforcement was authorized to register snowmobiles. House Bill 645 nominally transferred that function to Transportation. I.C. § 49-2603(6). 1982 Sess. Laws, ch. 95 at 261. Thus, Transportation currently is authorized by statute to register snowmobiles, Law Enforcement is authorized to issue snow parking permits to snowmobiles and cross-country skiers, and the Department of Parks and Recreation is authorized to administer snow removal at parking areas open to snowmobiles and cross-country skiers.

c. 1982 Legislative History and FY 1983 Appropriations

The legislative history of House Bill 645 and the appropriation bills for Law Enforcement and Transportation do not contain any reference to administration of the snow parking permit program. Law Enforcement's appropriation does include funding from the motor vehicle account. 1982 Sess. Laws, ch. 335 at 843. Prior to passage of House Bill 645, printing and distribution of permits was purportedly administered by the MVD within Law Enforcement. The FY 1983 appropriation for the Department of Parks and Recreation includes funding from the cross-country skiing recreation account. 1982 Sess. Laws, ch. 239 at 623.

3. Suspension and Revocation of Driver Licenses

a. Prior Statutes

Prior to the 1982 legislature, Section 49-306(b) authorized Law Enforcement to suspend or revoke drivers' licenses under Chapter 3, Title 49. Suspension and revocation was authorized upon, among other things, conviction of offenses for which mandatory revocation of licenses was required, I.C. § 49-330(a)(1), conviction of driving under the influence of alcohol or drugs, I.C. § 49-330(a)(6), and conviction of reckless driving, I.C. § 49-330(a)(7). The same grounds for revocation were set forth independently in I.C. § 49-1102(3) [DUI conviction] and I.C. § 49-1103(b) [reckless driving conviction]. Law Enforcement was also authorized to revoke drivers' licenses upon conviction of leaving the scene of an accident. I.C. § 49-1001(c). Section 49-330 sets forth the procedure for revocation or suspension and required Law Enforcement to provide hearings. I.C. § 49-330(d).

b. Prior Appropriations

Law Enforcement's appropriation for FY 1982 reflected these responsibilities. Expenditures were authorized for "driver and vehicle services," 1981 Sess. Laws, ch. 170 at 301, which category included the processing of suspensions and revocations. JFAC, *Legislative Budget Book* FY 1982, p. 11-7.

c. *1982 Enactments*

The 1982 Legislature by House Bill 645 repealed Section 49-306 and defined Transportation as the responsible agency under Chapter 3, Title 49, I.C. § 49-301(3). House Bill 645 deleted all references to Law Enforcement in Section 49-330 so that Transportation, by Section 49-301(3), became authorized to suspend, revoke, and hold hearings under that section, effective July 1, 1982. 1982 Sess. Laws, ch. 95 at 220. However, House Bill 645 did not amend or repeal Sections 49-1001, 49-1102 or 49-1103. Authority to suspend and revoke licenses for identical offenses thus remains, nominally, in both Law Enforcement and Transportation.

d. *FY 1983 Appropriations*

As pointed out above, Law Enforcement's original budget recommendation for FY 1983 included expenditures for suspensions and revocation. JFAC *Legislative Budget Book*, FY 83 p. 11-11; see also Office of the Governor, *Executive Budget*, FY 1983, p. 11-11, but its final appropriation reflected transfer of the MVD to Transportation and did not include driver and vehicle services. 1982 Sess. Laws, ch. 335, at 843, 844: JFAC *Minutes*, March 5, 1982.

e. *Inter-Agency Agreement*

On June 30, 1982, the directors of the Departments of Law Enforcement and Transportation entered a memorandum of agreement regarding suspensions and revocations. The memorandum recited that the intent of House Bill 645 was to transfer responsibility for conducting administrative hearings of suspensions and revocations to Transportation; that, by inadvertence or mistake, House Bill 645 did not amend sections 49-1001, 49-1102, or 49-1103; and, that funds for conducting hearings were transferred to Transportation effective July 1, 1982.¹ The parties by the memorandum agreed that, effective July 1, 1982, Transportation would at its own expense conduct hearings under Sections 49-1001, 49-1102, and 49-1103, in the name of Law Enforcement.

ANALYSIS

Several rules of statutory interpretation are generally applicable to discussion of the questions outlined above.

In construing a statute, the primary function of a court is to ascertain and give effect to the legislative intent. *Gavica v. Hanson*, 101 Idaho 48, 60, 608 P.2d 861 (1980) *Smith v. Dept. of Employment*, 100 Idaho 520, 522, 608 P.2d 18 (1979). To do so, the court will look first to the literal wording of the statute. *Local 1494 of International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346 (1978). If the wording is unambiguous, there is no occasion for further interpretation and the statute

will be given effect as expressly stated. *Worley Highway Dist. v. Kootenai Cty.*, 98 Idaho 925, 928, 536 P.2d 206 (1978).

Should a statute's wording be ambiguous, however, the court will apply certain canons of construction and look to various external aids to interpretation. For instance, the statute will be construed so as to give it effect rather than to nullify it. *Maguire v. Yanke*, 99 Idaho 829, 836, 590 P.2d 85 (1978). The consequences of alternative constructions will be considered and the construction effecting the statute will be favored. *State ex rel. Evans v. Click*, 102 Idaho 443, 448, 631 P.2d 614 (1981); *Higginson v. Westergard*, 100 Idaho 687, 691, 604 P.2d 51 (1979). The court will avoid a construction which would produce harsh or absurd results. *Gavica*, 101 Idaho at 60. Sections within the statute will be construed so far as reasonable to be in harmony with each other, *Magnuson v. Idaho State Tax Comm'n*, 97 Idaho 917, 920, 556 P.2d 1197 (1976), as will the subject statute and other statutes concerning the same subject matter. *Stearns v. Graves*, 61 Idaho 232, 242, 99 P.2d 955 (1940). Where two statutes are in irreconcilable conflict, however, the one enacted later in time will govern. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542 (1980); *Owen v. Burcham*, 100 Idaho 441, 444, 599 P.2d 1012 (1979).

The external aids which a court will employ when a statute is ambiguous include the context, public policy, contemporaneous construction, and legislative history of the statute. *Local 1494*, 99 Idaho at 639. The report of the committee which introduces a bill to the legislature is given weight. See, *Mastro Plastic Corp. v. NLRB*, 350 U.S. 270, 288 n.22 (1956); *Southern California Gas Company v. Public Utilities Comm'n.*, 156 Cal. Rptr. 373, 596 P.2d 1149, 1152 (1979). Indeed, some courts presume, if a bill is enacted into law without changes in the bill as it was introduced by the committee, that the legislature in effect adopted the intent of the committee. See, *International Telephone & Telegraph Corp. v. GT&E Corp.*, 518 F.2d 913, 922 (9th Cir. 1975). While as a general rule statements made at such a committee's hearings without recorded indication of committee approval or disapproval are not considered admissible legislative history, *McDonald v. Best*, 186 F. Supp. 217, 221 (ND Cal. 1960), some courts have looked to such statements in aid of construction. *IT&T*, 518 F.2d at 921; *Maiter v. Chicago Bd. of Education*, 82 Ill. 2d 373, 415 N.E. 2d 1034 (1980).²

Another aid to interpretation is the relation of appropriations legislation to the substantive statute being construed. *Hodgson v. Bd. of County Comm'rs*, 614 F.2d 601, 614 (8th Cir. 1980); *Sierra Club v. Andrus*, 610 F.2d 581, 601 (9th Cir. 1979). Implied repeal, amendment, or suspension of statutory duties is disfavored. *TVA v. Hill*, 437 U.S. 153, 190 (1978). This rule has been relaxed in the Ninth Circuit, where an appropriations act may have implied substantive effect if it is directly related to the substantive statute and the legislature was aware of the appropriation act's possible implications. *Sierra Club v. Andrus*, 610 F. 2d at 601; see also, *Hodgson*, 615 F.2d at 614;³

The specific questions can now properly be discussed in light of these general rules of construction.

1. *Liens on Motor Vehicles and Disposition of Abandoned Motor Vehicles.*

Determination of the agency authorized to administer Chapters 35 and 36, Title 49, presents the difficult question of whether strict adherence to technical rules of statutory construction would be required or whether those rules would be relaxed in order to reach a result which is not harsh or absurd. Chapters 35 and 36 unambiguously authorize Law Enforcement to process liens and disposition of abandoned vehicles. I.C. § 49-3601(5). A court might accordingly hold itself constrained to give effect to the literal wording of the statutes and avoid any further examination of them. *Worley*, 98 Idaho at 928. Several considerations, however, militate against this strict approach.

Most important is the assignment of specific duties in the chapters to the MVD and the apparent transfer of the MVD from Law Enforcement to Transportation by House Bill 645. While it was not expressly set forth in House Bill 645, the transfer would probably be implied to have been intended by the Legislature. The legislative history of the bill shows that the House Transportation and Defense Committee discussed and received testimony concerning the transfer and then recommended passage of the bill. Through there is no Idaho case so holding, the committee's awareness and approval of the transfer would probably be given some weight. *IT&T Corp.*, 518 F.2d at 921; see *Local 1494*, 99 Idaho at 641. JFAC discussion and accommodation of the transfer in the FY 1983 appropriation bills for Law Enforcement and Transportation might support an interpretation that House Bill 645 transferred the MVD by implication.⁴ The final appropriations would buttress such an implication, since registration and titling funds under driver vehicle services were deleted from Law Enforcement's budget and those services historically were administered by the MVD. *Hodgson*, 614 F.2d at 614; *Sierra Club*, 610 F.2d at 601. Finally, a court would likely give deference to both departments' representations that the transfer was the object of the legislation, see *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309 (1979), especially in light of the MVD in fact being transferred to Transportation with passage of House Bill 645.

The transfer of the MVD to Transportation under House Bill 645⁵, probably would not be sufficient in itself to affect the express authorizations of Law Enforcement set forth in House Bills 520 and 554. The three bills were introduced by the same committee, which must have been aware of which agencies were named in each bill. Staff members of Law Enforcement presented testimony on all three bills before House and Senate committees throughout the session. The Legislature must have been aware of House Bills 520 and 554 even while enacting House Bill 645, since they were read on the floors of both houses prior to introduction of House Bill 645 and were passed subsequent to passage of House Bill 645. Yet, the apparent inconsistency regarding the role of the MVD was not clarified and the express authorization of Law Enforcement as to liens and abandoned vehicles was retained.

The impact of the MVD transfer, however, probably would lead a court to reexamine administration of Chapters 35 and 36. As pointed out above, the statutory scheme of Chapters 35 and 36 is premised on the administering agency maintaining and having access to records of registration and title. For instance, upon application for a lien sale or removal of an abandoned vehicle, the agency must notify the "registered and legal owners at their addresses of record with the department," I.C. 49-3506(3), or "[t]he owner of any vehicle . . . which has current license plates and registration as shown on the records of the department . . ." I.C. § 49-3608(1)(b). Opportunity for a post-storage hearing must be provided to "the vehicle's registered and legal owners of record . . ." I.C. § 49-3609(1). Prior to the 1982 Legislature, Law Enforcement maintained such records under the Motor Vehicle Title Act. That act was amended by House Bill 645 so that Transportation now administers registration and certification of title. Funding for registration and titling was deleted from Law Enforcement's FY 1983 appropriation. Thus, if Law Enforcement were found to be the agency authorized to administer Chapters 35 and 36, it would be faced with the task of administering the chapters' programs without the records, funding, and staff formerly allocated to it incident to duties under the Motor Vehicle Title Act. Any attempt by Law Enforcement to discharge the duties set forth in Chapters 35 and 36 would be a vain and useless act — as a practical matter or as a financial matter — which a court would probably not require to be performed. See *Doolittle v. Morley*, 76 Idaho 135, 137, 278 P.2d 996 (1955); *State Tax Comm'n. v. Johnson*, 75 Idaho 105, 111, 269 P.2d 1080 (1954); *Cowan v. Lineberger*, 35 Idaho 403, 408, 206 P.805 (1922). See also Idaho Att'y Gen. Op. No. 81-13. The Department would also be restrained in attempting to discharge those duties by Idaho Code § 59-1015, which prohibits a state agency from incurring expenses or liabilities in excess of appropriations. See also *State ex rel. Hansen v. Parsons*, 57 Idaho 775, 69 P.2d 788 (1937); *State v. National Surety Co.*, 29 Idaho 670, 685, 161 P. 1026 (1916); Idaho Att'y Gen. Op. No. 82-11.⁶

The result of the above analysis is that, if a court were to rely solely on the express wording of Chapters 35 and 36 to find Law Enforcement to be the chapters' administering agency, the state would nonetheless be left without an agency to administer the chapters due to Law Enforcement's lack of appropriations, staff, and related necessary statutory powers under the Motor Vehicle Title Act. This result would be harsh, in that the state and the public would be left without means to collect liens and dispose of abandoned vehicles, and absurd, in that another agency, Transportation, stands endowed with the money and administrative mechanism to process liens and abandoned vehicles. A court thus probably would attempt to avoid such a result by making every effort to find statutory authorization in Transportation. It could look to the authorization of Transportation under the Motor Vehicle Title Act for maintenance of records or registration and title. These records are integral to administration of Chapters 35 and 36. Chapters 35 and 36 and the Motor Vehicle Title Act thus could be construed as in pari materia, *Stearns*, 61 Idaho at 242, and references in Chapters 35 and 36 to Law Enforcement perhaps could be deleted while references to the MVD could be retained in order to make the statutes harmonious.

Such a construction would be further supported by examination of the obvious purposes behind enactment of House Bills 520, 554, and 645. House Bills 520 and 554 were what might be characterized as house-cleaning bills. The focus of the Legislature was upon the improvement of enforcement and administration regarding liens and abandoned vehicles, not the authorization of any particular agency. Conversely, House Bill 645's sole purpose was to authorize administration by a particular agency in place of another. The intent of the Legislature was to make Transportation responsible for functions involving registration, certification of title, and maintenance of records for motor vehicles. A court could reasonably find that this responsibility logically was intended to extend to *all* programs requiring motor vehicle records. Chapters 35 and 36 require such record-keeping capabilities. It is apparent that when it considered House Bills 520 and 554 the Legislature was more concerned that the chapters be administered efficiently than with which agency would administer them.

Admittedly, holding that Transportation — not Law Enforcement — is authorized under Chapters 35 and 36 would conflict with the express wording of the statute and the failure of the Legislature to provide Transportation with appropriations from the abandoned vehicle trust account. But such a construction would be the only one which would effectuate the statute, *Click*, 102 Idaho at 448, and avoid the harsh and absurd alternative. *Gavica*, 101 Idaho at 60. The consequences of alternative constructions are proper matters of inquiry, *Higginson*, 100 Idaho at 691, including the social, economic, and policy results which would be entailed. *Smith v. Dept. of Employment*, 100 Idaho at 522; *Herndon v. West*, 87 Idaho 335, 339, 393 P.2d 35 (1964). As stated in *Smallwood v. Jeter*, 42 Idaho 169, 184, 244 P. 149 (1926) and quoted in *Smith*, 100 Idaho at 522, the court:

[M]ust look to the intention of the Legislature as gathered from the whole act, and when a literal reading of a provision will work an unreasonable or absurd result, if a reasonable intent of the Legislature can be arrived at, the court should so construe the act as to arrive at such intention rather than an absurdity.

42 Idaho at 184; see also *Acheson v. Fujiko Furusho*, 212 F.2d 284, 295 (9th Cir. 1954). Moreover, while the Legislature's intent as to which agency is authorized to administer Chapters 35 and 36 is clouded by the conflicting enactments of its 1982 session, there is no evidence of legislative intent that the chapters not be administered at all. With these considerations in mind, it is probable that a court would hold that Transportation is authorized to administer Chapters 35 and 36. Notwithstanding this conclusion as to a court's probable ruling, it is suggested that the conflicting statutory provisions discussed above be corrected legislatively at the earliest possible opportunity. See *Smith v. State*, 93 Idaho 795, 805, 473 P.2d 937 (1970); cf., *Anstine v. Hawkins*, 92 Idaho 561, 563, 447 P.2d 677 (1968).

If both statutory and spending authority were found to be in Transportation, the department could give the chapters' programs priority and seek a transfer of funds from other programs within the agency to those programs.

I.C. § 67-3511(2). Such reallocation would be discretionary and not subject to mandamus. See *Lisher v. City of Potlatch*, 100 Idaho 343, 345, 612 P.2d 1190 (1980); cf., *Kolp v. Board of Trustees of Butte Cty. Joint Schools*, 102 Idaho 320, 323, 629 P.2d 1153 (1981).

Snow Parking Permits

As pointed out above, the 1982 Legislature did not amend Chapter 31, Title 49, under which Law Enforcement is charged with the printing and distribution of snow parking permits. The Legislature did amend Sections 49-2601, et seq., by House Bill 645, to transfer the registration of snowmobiles from Law Enforcement to Transportation. There is no evidence, however, in the bill or its history that the Legislature intended to amend or repeal the authorization of Law Enforcement found in Chapter 31.

Nor is there evidence that the Legislature failed to provide appropriations so that Law Enforcement's duties under the snow parking program might be considered suspended or repealed by implication. The motor vehicle account through which Law Enforcement recoups its costs in the administration of the program, I.C. § 49-3107(a), still exists in the department's FY 1983 appropriation, 1982 Sess. Laws, ch. 335 at 843. The program arguably is self-funding since revenues from permit sales go into the motor vehicle account. Even if those revenues were to fall short of administrative costs, this shortfall would not be tantamount to legislative withdrawal of appropriations and Law Enforcement would still have authority to seek reallocation of funds within the agency. I.C. § 67-3511(2). While it could be argued that the department's appropriations for the program were transferred to Transportation with the MVD pursuant to House Bill 645 and related appropriations bills, there is simply no evidence that JFAC or the Legislature was aware that the MVD historically administered the snow parking permit program and that appropriations for its administration were to be deleted from the motor vehicle account or transferred elsewhere. Finally, the FY 1983 appropriations for the Department of Parks and Recreation included funding from the department's cross-country skiing recreation account, which account is funded by sales of permits. This evinces an intent that revenues continue to be generated by distribution of permits as set forth in Chapter 31, Title 49.

While statutory authority and probably appropriations would be found to reside in Law Enforcement, the department might encounter difficulties in its administration of the program due to the transfer of snowmobile registration to Transportation under House Bill 645. It is doubtful, however, that these difficulties would be considered to render administration impossible so as to relieve Law Enforcement of its duties. Cf. *Doolittle*, 76 Idaho at 137. The distribution of snow parking permits need not be undertaken by the same agency that registers snowmobiles. Law Enforcement could continue to distribute the permits to snowmobile owners in a number of ways — for instance, by supplying the permits to Transportation for issuance upon registration or by issuing permits directly to snowmobile owners upon proof of registration.

Since Law Enforcement possesses the authority and practical capability to administer Chapter 31, Title 49, it could be subject to mandamus actions to compel performance of its duties. Cf., *Felton v. Prather*, 95 Idaho 280, 281, 282, 506 P.2d 1353 (1973). The department would not be liable if it were found that nonperformance was due to a discretionary allocation of scarce funding. See *Lisher*, 101 Idaho at 345.

Suspension and Revocation of Drivers' Licenses

With passage of House Bill 645, Transportation unambiguously is authorized to suspend and revoke drivers' licenses and to conduct appropriate hearings under Chapter 3, Title 49. I.C. §§ 49-301(3), 49-330(d). A court probably would not find it necessary to examine other sources of legislative intent. *Worley*, 98 Idaho at 928.

While administrative authority clearly rests in Transportation by House Bill 645, there remains the express authorization of Law Enforcement in Sections 49-1001, 49-1102, and 49-1103. There is no way that the statutes can be construed harmoniously in light of the unambiguous and contrary authorizations. Cf., *Stearns*, 61 Idaho at 60. Rather, a court would likely find the statutes to be in irreconcilable conflict and hold the amendments of House Bill 645 to govern since they were enacted later in time. *Mickelsen*, 101 Idaho at 307.⁷

Since Transportation would be found to be the agency authorized to suspend and revoke licenses, the interagency agreement between Transportation and Law Enforcement would be unnecessary to the extent it purports to endow Transportation with such authority and probably be null and void to the extent it provides for hearings in the name of Law Enforcement. An agency's powers are dependent upon and exclusively derived from statute. *Stark v. Wickard*, 321 U.S. 288, 309 (1944). Once a statutory duty is clearly conferred, no other agency or entity can perform it. *State v. Hereford*, 148 W. Va. 92, 133 S.E. 2d 86, 90 (1963); See, *Dick v. Roberts*, 8 Ill. 2d 215, 133 N.E. 2d 305, 308 (1956). As stated in *Taylor v. Michigan Public Utilities Comm'n.*, 217 Mich. 400, 186 N.W. 485 (1922):

Where a statute creates and regulates, and prescribes the mode and *names* of the parties granted the right to invoke its provisions, that mode must be followed and none other, and *such parties only* may act.

186 N.W. at 487 (emphasis added). Accordingly, as of the effective date of House Bill 645 — July 1, 1982 — Law Enforcement lawfully could not suspend or revoke licenses and Transportation could suspend and revoke licenses in its name only. The interagency agreement would be ultra vires and without effect.⁸ See, *Forbes Pioneer Boatline v. Board of Comm'rs.*, 258 U.S. 338, 339 (1922); *Tate v. Johnson*, 32 Idaho 251, 254, 181 P. 523 (1919).

The question of whether Law Enforcement has authority to continue

suspension or revocation proceedings commenced by Law Enforcement prior to July 1, 1982, presents a slightly different problem. Since the Department has no FY 1983 appropriations to suspend or revoke licenses, it cannot lawfully incur expenditures by continuing such proceedings. I.C. § 59-1015. The question instead should be whether Transportation has authority to continue proceedings commenced prior to July 1, 1982, by and under Law Enforcement authority. The general rule in this regard is that a new law which is procedural in nature and which does not create a new cause of action or deprive a party of defenses on the merits applies to pending actions. *Buckalew v. City of Grangeville*, 100 Idaho 460, 463, 600 P.2d 136 (1979); *Jenson v. Shank*, 99 Idaho 565, 566, 567, 585 P.2d 1276 (1978); cf., *Ford v. City of Caldwell*, 79 Idaho 499, 508, 321 P.2d 589 (1958). The State of Idaho is the real party in interest in license proceedings and Transportation would be, in effect, merely stepping into the shoes of Law Enforcement in continuing the proceedings in the state's behalf. This change in agency is remedial and of a procedural nature only and would not affect the substantive rights of the defendant. Thus, Transportation would not be prohibited from exercising its authority to suspend and revoke licenses when proceedings were commenced prior to the effective date of Transportation's authorization.

¹The memorandum did not make clear whether it was the agencies' interpretation that the Legislature intended to so transfer the funds or whether the funds were simply transferred by agency action.

²While Idaho Code § 67-4351(6) requires JFAC to submit reports on its findings and recommendations, there is no indication that it did so regarding Law Enforcement and Transportation's appropriations for FY 1983. Meetings of JFAC and other legislative committees are not transcribed, though some are taped. A written record is kept on motions, discussion topics, and witnesses, which notes appear in the committee minutes.

The Idaho Supreme Court has not had occasion to apply or refuse to apply the presumption that a committee's intent is adopted by the legislature upon passage of the committee's bill without amendment. Nor has the Court had occasion to rule on the admissibility and weight of statements made at committee hearings. It is possible, under dicta pronounced in *Local 1494*, 99 Idaho 630, that the Court would consider such statements under almost any circumstances, though they would "be carefully scrutinized and their weight and authenticity evaluated." 99 Idaho at 641; see also 81 Idaho Op. Att'y. Gen. 13 (1981) at 6.

³Again, the Idaho Supreme Court has not had occasion to apply or refuse to apply appropriations legislation in a similar fashion.

⁴It might be argued that a court would hesitate to find such implication based on the actions of JFAC, because of the questionable admissibility of

committee discussions, *McDonald*, 186 F. Supp. at 221, the disfavor of substantive effect by appropriations legislation, *TVA v. Hill*, 437 U.S. at 190, and the fact that there is no indication that JFAC adhered to its own rules if intending substantive effects. See JFAC, *Rules of Procedures*, Rule 8 (December 1980). In the absence of other recorded legislative history, however, an Idaho court might very well turn to JFAC actions as an aid to ascertaining legislative intent. See *Local 1494*, 99 Idaho at 641; see also, Idaho Att'y. Gen. Op. No. 83-13 at 6.

⁵A contrary argument would be that the Legislature intended the MVD to remain in Law Enforcement. House Bill 645 does not expressly transfer the MVD to Transportation, while House Bills 520 and 554 expressly refer to the MVD as a division within Law Enforcement. Even if an express conflict existed, House Bills 520 and 554 arguably would govern since they were enacted later in time. *Mickelsen*, 101 Idaho at 307.

A court might also, in an attempt to construe sections within House Bills 520 and 554 harmoniously and to thus save the bills' potency, treat the bills' references to "the Motor Vehicle Division" as nothing more than an identification of an organizational unit within the parent agency, Law Enforcement. By this construction, the name of the division within the department would not be as important as the name of the department expressly authorized to administer the chapters.

Despite this possible interpretation as a matter of law, it remains that the MVD was in fact transferred to Transportation after passage of House Bill 645.

⁶It should again be noted that Law Enforcement was not expressly appropriated funds from the abandoned vehicle trust account, which account is dedicated to funding the administration of Chapters 35 and 36.

Finding that Law Enforcement might be relieved or statutorily prohibited from discharging its duties because of lack of appropriations is not the same as finding those duties to be repealed by implication. Such a repeal would be disfavored, *TVA v. Hill*, 437 U.S. at 190, and there is no evidence here that the Legislature was aware of the possible impact of the appropriations bills on the liens and abandoned vehicles programs. Cf., *Hodgson*, 614 F.2d at 614; *Sierra Club*, 610 F.2d at 601. However, this would not necessarily prevent a result-oriented court from finding the duties to be suspended by lack of appropriations, see *City of Camden v. Byrne*, 92 N.J. 133, 411 A.2d 462, 474 (1980); *Ex parte Williamson*, 116 Wash. 560, 200 P. 329 (1921) or finding that the appropriations and spending authority were given to different departments.

⁷Concurrent jurisdiction between the departments probably was not intended by the Legislature since it deleted funding for suspensions and revocations from Law Enforcement's FY 1983 appropriation. 1982 Sess. Laws, ch. 335 at 843; compare, 1981 Sess. Laws, ch. 170 at 302.

⁸This conclusion does not necessarily apply to those interagency agreements which may provide for the administration of marginal or overlapping responsibilities as a pragmatic matter in particular circumstances, as opposed to total abdication or transfer of statutorily-prescribed duties. See, *F.P.C. v. Louisiana Power and Light Co.*, 406 U.S. 621, 642 (1972). Statutes must be construed with regard to changing conditions and not every departure from the strict letter of the law will be considered unlawful. *Sharp v. Brown*, 38 Idaho 136, 145, 221 P. 139 (1923).

AUTHORITIES CONSIDERED:

1. Idaho Code §§ 49-301, 306, 330
2. Idaho Code §§ 49-401, 405, 407, 412, 423
3. Idaho Code § 49-592
4. Idaho Code § 49-1001
5. Idaho Code §§ 49-1101, 1102, 1103
6. Idaho Code §§ 49-2601, 2603, 2605
7. Idaho Code §§ 49-3104, 3105, 3107
8. Idaho Code §§ 49-3501, 3506, 3508, 3510
9. Idaho Code §§ 49-3602, 3605, 3606, 3608, 3609, 3614, 3615, 3616, 3618, 3621, 3622
10. Idaho Code § 59-1015
11. Idaho Code § 67-3511
12. 1982 Sess. Laws, chs. 95, 170, 239, 267, 294, 335, 351
13. 1981 Sess. Laws, ch. 170
14. *TVA v. Hill*, 437 U.S. 153 (1978)
15. *F.P.C. v. Louisiana Power and Light Co.*, 406 U.S. 621 (1972)
16. *Stark v. Wickard*, 321 U.S. 288 (1944)
17. *Mastro Plastic Corp. v. NLRB*, 350 U.S. 270 (1956)
18. *Forbes Pioneer Boatline v. Board of Comm'rs.*, 258 U.S. 338 (1922)
19. *Hodgson v. Bd. of County Comm'rs.*, 614 F.2d 601 (8th Cir. 1980)

20. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979)
21. *International Telephone & Telegraph Corp. v. GT&E*, 518 F.2d 913 (9th Cir. 1975)
22. *Acheson v. Fujiko Furusho*, 212 F.2d 284 (9th Cir. 1954)
23. *McDonald v. Best*, 186 F. Supp. 217 (ND Cal. 1960)
24. *State ex rel. Evans v. Click*, 102 Idaho 443, 531 P.2d 614 (1981)
25. *Kolp v. Board of Trustees of Butte Cty. Joint Schools*, 102 Idaho 320, 629 P.2d 1153 (1981)
26. *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980)
27. *Lisher v. City of Potlatch*, 100 Idaho 343, 612 P.2d 1190 (1980)
28. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 612 P.2d 542 (1980)
29. *Higginson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979)
30. *Smith v. Dept. of Employment*, 100 Idaho 520, 608 P.2d 18 (1979)
31. *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979)
32. *Ower v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979)
33. *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979)
34. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978)
35. *Local 1494 of International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978)
36. *Jenson v. Shank*, 99 Idaho 565, 585 P.2d 1276 (1978)
37. *Worley Highway Dist. v. Kootenai Cty.*, 98 Idaho 925, 536 P.2d 206 (1978)
38. *Magnuson v. Idaho State Tax Comm'n.*, 97 Idaho 917, 556 P.2d 1197 (1976)
39. *Felton v. Prather*, 95 Idaho 280, 506 P.2d 1353 (1973)
40. *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970)
41. *Anstine v. Hawkins*, 92 Idaho 561, 447 P.2d 677 (1968)

42. *Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964)
43. *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589 (1958)
44. *Doolittle v. Morley*, 76 Idaho 135, 278 P.2d 996 (1955)
45. *State Tax Comm'n. v. Johnson*, 75 Idaho 105, 269 P.2d 1080 (1954)
46. *Stearns v. Graves*, 61 Idaho 232, 99 P.2d 955 (1940)
47. *State ex rel. Hansen v. Parson*, 57 Idaho 775, 69 P.2d 788 (1937)
48. *Smallwood v. Jeter*, 42 Idaho 169, 244 P. 149 (1926)
49. *Sharp v. Brown*, 38 Idaho 136, 221 P. 139 (1923)
50. *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922)
51. *Tate v. Johnson*, 32 Idaho 251, 181 P. 523 (1919)
52. *State v. National Surety Co.*, 29 Idaho 670, 161 P. 1026 (1916)
53. *Southern California Gas Company v. Public Utilities Comm'n.*,
156 Cal. Rptr. 373, 596 P.2d 1149 (1979)
54. *Maiter v. Chicago Bd. of Education*, 82 Ill.2d 373, 415 N.E.2d
1034 (1980)
55. *Dick v. Roberts*, 8 Ill.2d 215, 133 N.E.2d 305 (1956)
56. *Taylor v. Michigan Public Utilities Comm'n.*, 217 Mich. 400, 186
N.W. 485 (1922)
57. *City of Camden v. Byrne*, 92 N.J. 133, 411 A.2d 462 (1980)
58. *Ex parte Williamson*, 116 Wash. 560, 200 P. 329 (1921)
59. *State v. Hereford*, 148 W. Va. 92, 133 S.E.2d 86, 90 (1963)
60. *House Journal*, 46th Leg., 2d Reg. Sess. 1982 at 26, 37, 66, 132,
194, 215, 261, 391, 395, 405
61. *Senate Journal*, 46th Leg., 2d Reg. Sess. 1982, at 131, 150, 174,
207, 220, 234, 285
62. Joint Finance-Appropriations Committee, *Rules of Procedures*,
Rule 8 (December 1980)
63. House Transportation and Defense Committee, *Minutes* (February
8 and 16, 1982)

64. Senate Transportation Committee, *Minutes* (January 20, February 2, 18, 26, 1982)
65. *Tape*, Joint Finance-Appropriations Committee hearing, March 5, 1982.
66. Joint Finance-Appropriations Committee, *Minutes*
67. Departments of Law Enforcement and Transportation, Report to the House Transportation and Defense Committee (Feb. 8, 1982)
68. Joint Finance-Appropriations Committee, *Legislative Budget Book*, FY 1983
69. Joint Finance-Appropriations Committee, *Legislative Budget Book*, FY 1982
70. Office of the Governor, *Executive Budget*, FY 1983
71. Idaho Att'y Gen. Op. No. 82-11
72. Idaho Att'y Gen. Op. No. 81-13

DATED this 22nd day of February, 1983.

ATTORNEY GENERAL
State of Idaho
/s/ JIM JONES

ANALYSIS BY:

KURT BURKHOLDER
Deputy Attorney General
Division of Natural Resources

KB/tl

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ATTORNEY GENERAL OPINION NO. 83-4

TO: The Honorable Joe R. Williams
State Auditor of the State of Idaho
Statehouse
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does Idaho Code § 20-415, which grants to the correctional industries commission authority to implement separate and exclusive checking accounts for the prison industries betterment fund, conflict with the prescribed constitutional and statutory duties of the state auditor?

CONCLUSION:

The transfer of the prison industries betterment fund from the aegis of the state auditor to the separate and exclusive control of the correctional industries commission is a constitutionally impermissible violation of Idaho Const. art. IV, § 1.

ANALYSIS:

The statute in question is Idaho Code § 20-415 which states:

Correctional industries betterment fund — Transfer of Funds. — Funds held by the Treasurer of the State of Idaho on the effective date (July 1, 1980) of this act in the "state penal betterment fund" shall be, and hereby are, transferred therefrom to the depository or depositories selected under this act by the Board of Corrections, and the Treasurer of the State of Idaho is hereby directed to transfer such funds, equipment, supplies and other personal property belonging to the State of Idaho presently being used by correctional industries and located at the Idaho State Penitentiary on the effective date of this act (shall be, and hereby are, transferred) to the Board of Correction. *All state departments, agencies, and offices affected by such transfer are authorized and directed to enter such transfer on their books, records and accounts.* (emphasis added).

This statute clearly directs the state treasurer to transfer funds belonging to the State of Idaho to a depository selected by the board of corrections, and directs all affected state departments, agencies and offices, including the state auditor, to enter such transfer on their books, records and accounts. Our assessment of whether this statute is either a constitutionally or statutorily impermissible intrusion upon the duties of the state auditor is predicated upon a review of the history and authority of that office.

The office of state auditor, a part of the executive department of the state, is recognized as the state accounting and fiscal office. With reference to all the constitutionally-created executive offices, Idaho Const. art. IV, § 1, provides:

§ 1. Executive Officers listed — Term of Office — Place of Residence — Duties. — The executive department shall consist of a governor,

lieutenant governor, secretary of state, *state auditor*, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election, commencing with those elected in the year 1946, except as otherwise provided in this Constitution. The officers of the executive department, excepting the lieutenant governor, shall, during their terms of office, reside within the county where the seat of government is located, there they shall keep the public records, books and papers. *They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law.* (Emphasis added)

Accordingly, it appears the framers of our constitution created two types of duties for the constitutional offices (including the state auditor): (a) such duties “as are prescribed by this Constitution,” and (b) such duties “as may be prescribed by law.”

In the latter category our legislature stated the duties of the auditor in Idaho Code § 67-1001. Idaho Code § 67-1001(6) prescribes that it is the duty of the auditor “to keep and state all accounts in which the state is interested.” To the extent necessary, the legislature may carve out exceptions to the statutorily-prescribed duties of the state auditor. However, while the legislature by statute may enlarge, it may not derogate from nor diminish any duties or responsibilities vested in a constitutional officer by the Idaho Constitution. For example, the Idaho Supreme Court in *Givens v. Carlson*, 29 Idaho 133, 138, 157 P. 1120 (1916), quoted the following statement with approval: “The legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to that office, and devolve them upon an officer of its own creation.” See also *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924). Thus, it is particularly pertinent to determine the extent of the state auditor’s constitutionally-prescribed duties.

Where constitutional provisions create the office of auditor without defining its duties, the constitutional duties of the state auditor are precisely those which his or her territorial counterpart performed at the time of adoption of the state constitution. In the landmark case of *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 1961 (1940), our state supreme court ruled that the legislature could not give to the state legislative controller duties impliedly prescribed for the state auditor by the state constitution. In reaching this result, the court stated that the framers of the state constitution simply gave the office of territorial controller the new but synonymous name, “auditor,” and lifted the office out of the 1887 Rev. Stat. (together with its pertinent powers and duties) and, in summary form, incorporated the office in Idaho Const. art. IV, § 1. Thus, the framers of the state constitution only changed the name of its former territorial controller to that of “auditor.” See also *Gilbert v. Moody*, 3 Idaho 7, 25 P. 1092 (1891).

1887 Rev. Stat. §§ 205-222 define the duties of the territorial controller. Section 205(6) is particularly pertinent. It states that it was the duty of the

territorial controller “to keep and state all accounts in which the territory is interested.” A further review of the 1887 Revised Statutes strongly indicates that the fiscal responsibility for the territorial prison was specifically placed in the office of the territorial controller. 1887 Rev. Stat. §§ 8502, 8509-12.

Consequently, the rationale of the *Wright* and *Gilbert* cases, *supra*, leads to the conclusion that the state auditor must keep and state all accounts in which the state is interested, including that of the prison industries betterment fund.

We note that there are situations in which the state auditor does not have exclusive constitutional control of state accounts. For example, Idaho Const. art. IV, § 18 provides in pertinent part that the legislature “may prescribe any method of disbursement required to obtain the benefit of federal laws.” Pursuant to the exception, the department of employment is permitted to maintain a separate account necessary to obtain unemployment compensation funds from the federal government pursuant to 42 U.S.C. § 503. See Attorney General Opinion No. 74-33. No such exception exists which would authorize a separate account for the prison industries betterment fund.

It should also be noted that the court’s analysis of implied constitutional duties set forth in *Wright v. Callahan*, *supra*, differs from the court’s analysis of implied constitutional duties of certain other state constitutional officers. For example, in *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960), the court held that the office of attorney general is not constitutionally vested with any common law powers and duties that are immune to legislative change. Similarly, in *Union Pacific Railroad Co., v. Board of Tax Appeals*, 103 Idaho _____, 654 P.2d 901 (1982), the court held that the state tax commission performs legislatively delegated duties and is not vested with any implied constitutional duties. Nevertheless, the cases decided to date dealing with the state auditor’s office clearly hold that the statutory duties formerly performed by the territorial controller are now implied constitutional duties of the state auditor.

This difference in the court’s analysis of the auditor’s implied constitutional duties appears to have been influenced by statements as to the nature and purpose of the auditor’s office made at Idaho’s constitutional convention. In *Wright*, *supra*, the court states:

Though not binding, it may nevertheless materially aid in the determination of that question to examine the debate in our Constitutional Convention upon the proposal to strike the word “auditor” and insert the word “controller” . . . 61 Idaho at 174.

The court then quoted portions of the debate including the following:

“Mr. AINSLIE: . . . A state auditor is one of the most necessary of officers we can have. How are the accounts of the state to be kept unless we have an auditor, so as to have a system of checks and balances

between him and the state treasurer, protective to both officers? They have found it necessary — or the Congress of the United States found it necessary, to authorize the legislatures of the territories to create such offices, which it did in the case of those three, I believe. We have found that the office of territorial controller, or auditor, as it used to be, is one of the wisest positions established in the territorial government . . .

* * *

Mr. McCONNELL: I desire to ask for information of the chairman of this committee, whether it would be possible for the secretary of state to audit these accounts?

Mr. AINSLIE: No sir, I don't think he can . . . You might as well say that the governor or some of the clerks could attend to the duties of the controller's office. If you want to consolidate all these offices, have nothing but a governor and have nothing but clerks — but we propose to have a state government of some dignity, not for any one man . . .” 61 Idaho at 174-175.

From these quoted sections, it appears that both the constitutional framers and the court recognized the importance of the office of state auditor in order to have an effective system of checks and balances. Also, there is a recognition of the policy of centralizing the audit functions in one office of some dignity.

Based upon the prior cases and the policies which appear to underlie them, it is our conclusion that the transfer of the prison industries betterment fund from the aegis of the state auditor is a constitutionally impermissible violation of Idaho Const. art. IV, § 1.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. IV, §§ 1 and 18
2. Idaho Code §§ 20-415 and 67-1001
3. 1887 Revised Statutes §§ 205-222, 8502, 8509-8512
4. 42 U.S.C. § 503
5. *Gilbert v. Moody*, 3 Idaho 7, 25 P. 1092 (1891)
6. *Givens v. Carlson*, 29 Idaho 133, 138, 157 P. 1120 (1916)
7. *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960)
8. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924)

9. *Union Pacific Railroad Co., v. Board of Tax Appeals*, 103 Idaho _____, 654 P. 2d 901 (1982)

10. *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 1961 (1940)

11. Attorney General Opinion No. 74-33

DATED this 23rd day of February, 1983.

ATTORNEY GENERAL
State of Idaho
/s/ JIM JONES

ANALYSIS BY:

DAVID G. HIGH
Deputy Attorney General

STEPHEN J. LORD
Deputy Attorney General

JOHN ERIC SUTTON
Special Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 83-5

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

Per Request for Attorney General Opinion

Dear Governor Evans:

QUESTIONS PRESENTED:

1. "Although the Legislature clearly intended by the passage of House Bill No. 246 to increase the gasoline tax upon enactment of that bill, does the absence of an emergency clause in both Senate Bill No. 1049 and House Bill No. 281 create a conflict as to the effective date of the tax increase?"
2. "If so, how may the Legislature cure this conflict?"

CONCLUSION:

1. There is some conflict of the language created by the interaction of

House Bill 246, House Bill 281 and Senate Bill 1049, even though when these three bills are examined together, legislative intent is apparent. While no effort at reconciling these bills completely eliminates the doubt, it appears probable that the tax rate was effectively increased on April 15, 1983, but may revert to the old rate on July 1, 1983.

2. The conflict can best be cured by corrective action by the legislature. The planned special session provides an opportunity to enact technical corrections to the statutes if the matter is included in the call of the session.

ANALYSIS:

The question about the effective date of the motor fuels tax rate increase arises due to the interaction of three different legislative enactments relating to motor fuels taxes. All of these bills passed the legislature and were signed by the governor.

The first bill enacted was Senate Bill 1049, *Session Laws 1983*, Chapter 91. This bill recodified motor fuels tax laws applying to gasoline, aircraft engine fuel and special fuels, except special fuels used in vehicles of more than 16,000 pounds maximum gross weight. The bill repealed all of the existing statutes relating to those subjects and enacted a new Chapter 24 to Title 63, Idaho Code, thereby effecting a comprehensive recodification of the motor fuels tax statutes. The bill was signed by the governor on March 29, 1983. It contains no provision as to the effective date of the recodification and, therefore, would become effective on July 1, 1983. See, Idaho Code § 67-510. Idaho Code § 63-2405, as enacted by Senate Bill 1049 to be effective on July 1, 1983, provided, in pertinent part:

An excise tax is hereby imposed upon all gasoline and/or aircraft engine fuel received. The tax is to be paid by the licensed distributor, and measured by the total number of gallons received by him, at the rate of twelve and one half cents (12½c) per gallon . . .

The rate established by that section is also made applicable to taxes on special fuels. See Idaho Code § 63-2416, as enacted by Senate Bill 1049. This is the same rate of taxation in existence at the time Senate Bill 1049 was passed. See, Idaho Code § 63-2406. Thus, Senate Bill 1049 did not propose an increase in the tax rate.

House Bill 246 was signed by the governor on April 14, 1983, *Session Laws 1983*, Chapter 242. Section 3 of the bill is an emergency clause providing that the act shall be in full force and effect on and after its passage and approval. It was implemented by the State Tax Commission on April 14, 1983. Section 2 of House Bill 246 reads as follows:

SECTION 2. That Section 63-2405, Idaho Code, as enacted by Senate Bill No. 1049, as amended in the House First Regular Session, Forty-seventh Idaho Legislature, be, and the same is hereby amended to read as follows:

63-2405. IMPOSITION OF TAX. — An excise tax is hereby imposed upon all gasoline and/or aircraft engine fuel received. The tax is to be paid by the licensed distributor, and measured by the total number of gallons received by him, at the rate of ~~twelve~~ fourteen and one half cents (~~12½¢~~) per gallon . . .

The third bill, House Bill 281, *Sessions Laws 1983*, Chapter 158, is substantially similar to Senate Bill 1049. It was signed by the governor on April 8, 1983. Because the bill carries no provision as to effective date, it becomes effective on July 1, 1983. This bill supersedes Senate Bill 1049 in that it is another comprehensive recodification of the motor fuels tax laws. The difference between House Bill 281 and Senate Bill 1049 is that House Bill 281 includes provisions for payment of special fuels taxes by motor vehicles over 16,000 pounds gross weight through a permit system administered by the State Tax Commission, rather than through the present ton mile tax administered by the Department of Transportation. House Bill 281 enacts a new Idaho Code § 63-2405 which is identical to § 63-2405, as enacted by Senate Bill 1049 before its amendment by House Bill 246.

Thus, three separate statutory provisions relating to the motor fuel tax rates were enacted. Senate Bill 1049 enacted the section to impose the tax at the rate of twelve and one half cents to be effective on July 1, 1983. Next in order of time was House Bill 281, which apparently replaces Senate Bill 1049 but enacts a new Idaho Code § 63-2405 which is identical to the section as enacted by Senate Bill 1049, effective July 1, 1983. Third in time was House Bill 246, which became law at a time when House Bill 281 had already been signed. It amended § 63-2405 as enacted by Senate Bill 1049 — but not as enacted by House Bill 281 — to increase the motor fuels tax rate. Thus, House Bill 246 amended another bill rather than an existing code section. Because of the emergency clause in House Bill 246, the bill was to be effective immediately upon its passage, approval and implementation on April 15, 1983.

The specific issue requiring resolution is which version of Idaho Code § 63-2405 becomes effective and when. Is it the version in House Bill 281, which provides a tax rate of twelve and one half cents per gallon, as of July 1, 1983; or is it the version in Senate Bill 1049, as amended by House Bill 246, which provides a rate of fourteen and one half cents per gallon? If it is the latter, what is the effective date of the new rate? Is it April 14, 1983, the date House Bill 246 with its emergency clause was signed by the governor; or is it July 1, 1983, the effective date of Senate Bill 1049 as amended by House Bill 246?¹

To confuse matters further, House Bill 246, as enacted, made no attempt to expressly repeal the existing statutory provision in Idaho Code § 63-2406 providing a tax rate of twelve and one half cents per gallon. Both Senate Bill 1049 and House Bill 281 expressly repeal Idaho Code § 63-2406 but only as of July 1, 1983. House Bill 246 contains no express repeal of the existing rate statute. It only provides that Idaho Code § 63-2405, as enacted by Senate Bill 1049, is amended to establish a tax rate of fourteen and one half cents per

gallon. Indeed, an examination of the journals of the house and senate show that House Bill 246, as originally introduced in the house on February 23, 1983, called for an amendment of the previous § 63-2406. The bill was amended in the senate on April 1, 1983, to delete the reference to the existing code section and changed to amend Idaho Code § 63-2405 as enacted by Senate Bill 1049.

A reconciliation of the statutory quagmire created by this trilogy of statutes must begin with several basic rules of statutory construction.

The first relevant rule is that codified by Idaho Code § 73-102(2) which states:

If multiple amendments to a single section of the Idaho Code has been made or are made during a legislative session, and if the amendments can be read into the section without conflict, such sections shall be effective and shall be compiled as if made by a single enactment.

This statutory provision, enacted in 1978, merely restates previously existing judicial determinations. See, for example, *Valente v. Mills*, 93 Idaho 212, 458 P.2d 84 (1969); *Buck v. Board of Trustees*, 28 Idaho 923, 154 P 272 (1917); *Peavy v. McCombs*, 26 Idaho 143, 140 P 965 (1914). A corollary to the rule is that if the statutes cannot be reconciled, then the version most recently passed must be given effect. The rule and its corollary are stated in *Valente v. Mills, supra*:

When two acts, each amending a previous act, are passed at the same session of the legislature and the two amendatory acts conflict with each other, but the latter act is reconcilable with the original act, for the purpose of determining the intention of the legislature, the first amendment will be deemed to have been superseded and repealed by the latter . . . [Citations omitted] The two acts passed in 1967 are inconsistent with each other and hence the latter act . . . is the one to be relied upon . . .

The second rule of statutory construction is that those who are charged with construing and applying statutory expressions of the legislature should try, to the extent possible, to reach a conclusion which is consistent with legislative intent. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978). Any final determinations of legislative intent necessarily must be made by the courts. There is a strong judicial policy toward construing and applying statutes to effect the legislative intent. That policy is perhaps most strongly expressed by the United States Supreme Court case of *Hawaii v. Mankishi*, 190 U.S. 1983, 212 (1903):

A thing may be within the letter of a statute but 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 the language of a particular statute to find legislative intent. In *Keenan v. Price*, 68 Idaho 423, 438, 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 mere letter of the law, but may look behind the letter to determine its purpose and affect, the object being to determine what the legislature intended and to give effect of that intent . . .

See, also, *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). However, the Idaho Supreme Court has been equally clear that before executive agencies or the judiciary can examine various evidences of legislative intent, there must first be some ambiguity in the statutes which lend some doubt to the intent of the legislature. In *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965), the court stated:

This court has long adhered to the rule that we must accept the statutes as we find them and construe them as they read, where they are plain and unambiguous, and are not permitted to apply rules of construction in the absence of ambiguity.

Thus, if these three statutes can be reconciled in a manner that is consistent and admits of no ambiguity, the various rules of statutory construction intended to determine legislative intent are of no avail.

A third relevant rule of statutory construction relates to the effect to be given to the emergency clause found in Section 3 of House Bill 246. The effect of the emergency clause is to cause the bill to become effective on the date it is signed by the governor. *State, ex rel., Gallett v. Cleland*, 42 Idaho 803, 248 P 831 (1926).

Finally, there is in this state a very strong policy against a repeal by implication. Repeal of a statute by implication is not favored. In order to presume that by a later act the legislature intended to repeal a former one, in absence of expressed terms, the two acts must be irreconcilable, and so inconsistent that the two cannot have concurrent operation. See, *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1958); *Idaho Wool Marketing Ass'n v. Mings*, 80 Idaho 365, 330 P.2d 337; *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957). Statutes should be construed, if possible, in such a way as not to nullify a legislative enactment but rather to save it. *DeHousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). See, also, Attorney General Opinion No. 81-13.

It is apparent from these rules that we must first attempt to seek some

reconciliation of these three bills in order to try to give effect to each of them. There are four theoretical possibilities:

(1) The first possibility is that the increase in rate went into effect on April 14, 1983, and will stay in effect until such time as the legislature acts to amend it. This possibility, however, ignores the provision of § 63-2405, as enacted by House Bill 281, which provides that the rate shall be twelve and one half cents on and after July 1, 1983. This possibility, therefore, fails to reconcile all of the bills in such a manner as to give full force and effect to all of the provisions of each.

(2) The second possibility is that the rate went into effect on April 14, 1983, but will expire on July 1, 1983, when House Bill 281 becomes effective. This appears to be the method of reconciliation which would give effect to most of the provisions of most of the bills. It does, however, ignore the opening provision of Section 2 of House Bill 246 which says that that bill intended only to amend § 63-2405, as enacted by Senate Bill 1049, and not by House Bill 281. It also ignores the fact that House Bill 246 was amended in the senate to delete references to the rate provisions of Idaho Code § 63-2406, which is the previously existing statute.

(3) A third possibility is that the rate increase is not to go into effect until July 1, 1983. This possibility, of course, ignores and renders as a nullity the emergency clause in Section 3 of House Bill 246, and therefore does not give full force and effect to all of the provisions of that bill.

(4) The last possibility is that the rate increase will never go into effect. Such an interpretation renders House Bill 246 a complete nullity and, therefore, also does not effect a reconciliation of legislative intent.

It can be seen that there is no way to completely reconcile these three pieces of legislation in such a manner that all of the provisions of all three bills are given their full force and effect. Accordingly, we must undertake to determine which of the inconsistent provisions are actually controlling. As we have already seen in the case of conflicting statutes, the latest enactment is presumed to be the version intended by the legislature to be effective. Among these three statutes the latest one approved was House Bill 281, which becomes effective on July 1, 1983. It enacts § 63-2405 with a twelve and one half cent per gallon tax rate. The latest enactment rule would mean that on and after July 1, 1983, the effective motor fuels tax rate would be twelve and one half cents per gallon. If a court were required to resolve this conflict, it is highly likely this is the conclusion it would reach.

However, this conclusion does not resolve the problem of what tax rate is in effect from April 14, 1983, through June 30, 1983, since no part of House Bill 281 is in effect during that time period. In order to determine the tax rate in effect during the interim period we must try to determine how the conflict among House Bill 246, Senate Bill 1049 and the previously existing Idaho Code § 63-2406 is to be resolved. Simple application of the rule of

latest enactment is insufficient to resolve the conflict. House Bill 246 was enacted after Senate Bill 1049 and carries an emergency clause. However, on its face the bill only amends Senate Bill 1049 which does not become effective until July 1, 1983, and in any event, as we have seen above, is repealed by implication by the subsequent enactment of House Bill 281. If we say that House Bill 246 caused the increased motor fuel tax rate to go into effect on April 14, 1983, we are in effect saying that the legislature repealed by implication the provisions of § 63-2406, which was in effect up to that date. This conclusion is contrary to the action taken when House Bill 246 was amended in the senate. If we say that House Bill 246 only has the effect of amending § 63-2405 to become effective on July 1, 1983, we are rendering as a nullity the provisions of the emergency clause in Section 3 of House Bill 246, a result we must avoid if possible. Faced with such an unresolvable ambiguity, we must try to define legislative intent and give effect to that intent.

There are two strong indicators of legislative intent present. The first is the emergency clause contained in House Bill 246. The existence of the emergency clause can be explained only by an intention to increase the tax rate immediately upon the passage and approval of the bill. The second indicator is the contemporaneous construction of the State Tax Commission, which is the agency charged with the administration of the statute. The commission implemented the tax increase effective on the approval of House Bill 246. Contemporaneous construction of the agency charged with administering the statute is a valid indicator of legislative intent. See, *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979); *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965); *Messenger v. Burns*, 80 Idaho 206, 327 P.2d 677 (1958); *Idaho Public Utilities Commission v. V-1 Oil Co.*, 90 Idaho 415, 214 P.2d 581 (1966). Since we can, with some confidence, determine that the legislature intended the motor fuels tax rate to increase upon approval of House Bill 246, it is reasonable to construe the statutes to the effect that the rate, in fact, has been in effect since that date. We think a court would most likely so conclude if the issue were placed before it.

We cannot conclude our analysis of these three statutes without examining the possibility that the increased tax rate never has and never will go into effect. A literal reading of the language of these three statutes can lead to that conclusion. House Bill 246 does not amend the statute which governed the imposition of the tax rate at the time it passed, i.e., Idaho Code § 63-2406. It amends only an Idaho Code section which had not yet become effective because it was part of Senate Bill 1049 which cannot become law until July 1, 1983. That is, Idaho Code § 63-2405 as enacted by Senate Bill 1049. However, because House Bill 281 is later in time than Senate Bill 1049, the version of Idaho Code § 63-2405 enacted by House Bill 281 will take precedence over the version enacted by Senate Bill 1049, as amended by House Bill 246. In such a case, the motor fuels tax rate would never take effect at all regardless of its emergency provision. Such a literal reading of the statutes is contrary to the apparent legislative intent and implies that House Bill 246 is a nullity -- a result to be avoided if possible. *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). But absent sufficient ambiguity to

justify investigation of legislative intent, a court may well feel itself compelled to reach such a conclusion.

Given the doubt as to the effective date of the motor fuels tax increase, we strongly recommend corrective legislation. It is likely that, given the opportunity, courts would give effect to a motor fuels tax rate increase as of April 15, 1983, but such a conclusion cannot be predicted with complete confidence. Given the amounts of potential revenue loss which could be suffered by the state in the event of a contrary conclusion, prudence requires that we recommend elimination or limitation of the risk by corrective legislation. The special session of the legislature presently planned for May 9, 1983, provides an opportunity for such action. The subject matter must, of course, be included in the call of the special session.

¹Incidentally, at issue is not only the effective date of the tax rate, but also the clause of House Bill 246 which makes permanent the provision that one cent of the tax collected on motor fuels shall be dedicated to local units of government for use in the maintenance and construction of local roads and streets.

AUTHORITIES CONSIDERED:

Idaho Code § 67-510
Idaho Code § 73-102(2)

Session Laws 1983, Chapter 91 (S.B. 1049)
Session Laws 1983, Chapter 242 (H.B. 246)
Session Laws 1983, Chapter 158 (H.B. 281)

Attorney General Opinion No. 81-13

Acheson v. Fujiko Furusho, 212 F.2d 284 (9th Cir., 1954)
Buck v. Board of Trustees, 28 Idaho 923, 154 P 272 (1917)
DeRousse v. Higginson, 95 Idaho 173, 505 P.2d 321 (1973)
Hawaii v. Mankishi, 190 U.S. 193, 212 (1903)
Idaho Public Utilities Commission v. V-1 Oil Co., 90 Idaho 415, 214 P.2d 581 (1966)
Idaho Wool Marketing Ass'n v. Mings, 80 Idaho 365, 330 P.2d 337 (1958)
Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948)
Knight v. Employment Sec. Agency, 88 Idaho 262, 398 P.2d 643 (1965)
Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979)
Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1978)
Messenger v. Burns, 80 Idaho 206, 327 P.2d 677 (1958)
Messenger v. Burns, 86 Idaho 26, 382 P.2d 913 (1963)
Peavy v. McCombs, 26 Idaho 143, 140 P 965 (1914)
Roe v. Hopper, 90 Idaho 22, 408 P.2d 161 (1965)

State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957)
State, ex rel., Gallett v. Cleland, 42 Idaho 803, 248 P 831 (1926)
Storseth v. State, 72 Idaho 49, 236 P.2d 1004 (1958)
Valente v. Mills, 93 Idaho 212, 458 P.2d 84 (1969)

DATED THIS 6th day of May, 1983.

ATTORNEY GENERAL

State of Idaho

JIM JONES

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
 Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 83-6

TO: Glen E. Walker
 Prosecuting Attorney
 Kootenai County
 P.O. Box 1829
 Coeur d'Alene, ID 83814

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is a county ordinance which regulates lake encroachments preempted by the Lake Protection Act?

CONCLUSION:

Although authorized generally to establish zoning ordinances under the Local Planning Act, a county is preempted from regulating lake encroachments by the Lake Protection Act.

ANALYSIS:

A detailed comparison of the Lake Protection Act and the county ordinances is necessary to resolve the question of preemption. The Lake Protection Act establishes a broad regulatory framework for ". . . all encroachments upon, in or above the beds or waters of navigable lakes . . ." Idaho Code § 58-142. Such encroachments should be regulated:

[I]n order that the protection of property, navigation, fish and wild-life habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.

Idaho Code § 58-142.

Under the act, the Board of Land Commissioners has the responsibility for regulating lake encroachments. Idaho Code § 58-144. The board is authorized to adopt administrative rules to effect the purposes and policy of the act. Idaho Code § 58-145. The act requires a lake encroachment permit and includes provision for applications, board procedures, consent of adjacent property owners in certain instances, and public notice and hearing upon objection by an adjacent property owner. The board must consider unreasonable adverse effects upon adjacent property and undue interference with navigation:

[A]s the most important factors to be considered in granting or denying an application for either a nonnavigational encroachment or a commercial navigational encroachment not extending below the natural or ordinary high water mark.

Idaho Code § 58-147.

In addition, the act provides for penalties for violation, injunctive relief, restoration, and mitigation of damages. Idaho Code §§ 58-149 and 58-150. Also, the act expressly disclaims any intent to impair existing or vested water rights or riparian property rights. Idaho Code §§ 58-151 and 58-142. Further, the act defines and exempts certain "grandfathered" rights. Idaho Code § 58-153. In 1974, the land board adopted rules and regulations pursuant to Idaho Code § 58-145, incorporating and consonant with the enabling authority in the Lake Protection Act.

Turning to the Kootenai County Ordinances, No. 32 is entitled:

An ordinance establishing restrictions on condominium and communal encroachments on the waters of Lake Coeur d'Alene and the Spokane River and providing for county permits . . .

Ordinance No. 33 regulates commercial encroachments, and Ordinance No. 34 governs private encroachments. Section 1 of each ordinance states this common purpose:

This ordinance is enacted in order to provide for the safety and welfare of the public in the use of Lake Coeur d'Alene and the Spokane River from its mouth to the Post Falls Dam, and to insure that desirable features of the lake or river are maintained.

These ordinances are expressly intended to operate prospectively only and not retroactively. Section 2. Definitions, procedures, permits, fees and other related matters are set forth in § 3. Section 4 describes the required permits. Section 5 states the following criteria for reviewing an application: compliance with applicable zoning ordinances; compatibility with surface water use and carrying capacity of the lake; compatibility of the type and location of the structure with physiographic conditions; and protection of navigational, aquatic, environmental and ecological interests. Also, § 5(c) requires that moorage facilities be of a floating open-pile design to avoid impeding water movement and to prevent nutrient build up. Section 5 further precludes encroachments in areas of fish and wildlife significance and for non-water dependent uses. According to § 6(k) of Ordinance No. 32, encroachments cannot extend more than 400' from the 2128' shoreline level; and § 6(l) requires a setback of 25' from all adjacent property lines. Both the statute and the ordinances contain a comprehensive regulatory scheme for lake encroachments.

The primary test for determining whether the state act preempts the county ordinance is to examine the act for express intent of preemption and for evidence of a pervasive, exclusive regulatory scheme. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976); *Bishop v. City of San Jose*, 460 P.2d 137 (Cal. 1969). In this regard, the last sentence of § 58-142 contains pertinent language:

No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made *unless approval therefor has been given as provided in this Act*.

Idaho Code § 58-142 (emphasis added).

This language definitely precludes installation of any encroachment without a permit granted under the act. The phrase ". . . as provided in this Act," can further be construed as legislative intent to preempt the field of lake protection by requiring that all encroachments be approved or rejected by the land board *under the criteria of the act*. Other sections reveal similar language. Idaho Code § 58-144 declares that the board ". . . shall regulate, control and may permit encroachments . . . as provided herein . . ." Idaho Code § 58-145 empowers the board to adopt rules and regulations ". . . as may be necessary to effectuate the purposes and policy of this chapter *within the limitations and standards set forth in this chapter*." (Emphasis added.) In addition the act provides explicit recognition of and protection for private water and riparian rights, as well as certain "grandfathered" rights. Idaho Code §§ 58-151, 58-152, and 58-153. The act also contains specific procedural requirements for processing applications and for using required forms developed by the board. Idaho Code §§ 58-146 and 58-147. There is no authority in the act for deviating from these procedural and substantive provisions or any express provision that decisions under the act can be made by a body other than the land board or its agency, the Department of Lands. Nor is there any delegation, express or implied, to counties or municipalities.

The Idaho Supreme Court recently considered an analogous issue in *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980). The question was whether a municipal ordinance requiring handrails in stairwells was preempted by state law regulating state-owned buildings which did not require handrails. Several statements of the court are applicable to the instant question.

The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern . . . Nor may it act in an area where, to do so, would conflict with the state's general laws.

"Generally . . . those functions considered governmental or public in nature are considered to be of statewide concern, and not purely municipal or local."¹

¹Quoted from Moore, "Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?," 14 Idaho L. Rev. 143, 166 (1977).

Presumably, it follows that those fields of activity fully occupied by the legislature reflect an intention that they will not be occupied by municipalities. It thus becomes necessary to review relevant statutory language . . . Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of municipalities, a municipal ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state.

Caesar v. State, 101 Idaho 158 at 161-162 (citations omitted). The Idaho Supreme Court concluded that state law completely covered the area of state-owned buildings and prevailed over an ordinance purely local in nature.

Although the county ordinances specify certain concerns not particularized in the Lake Protection Act or rules thereunder, the majority are mandatorily considered in a decision under the act, including effects upon navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, water quality, and others. In addition, Rule 6.14 of the act requires a 25' setback from adjacent property lines, which is identical to the ordinance. On the other hand, Ordinance No. 32 in § 5(n) specifically addresses condominium encroachments, which the Lake Protection Act does not.

This comparison of the act and the ordinances demonstrates no express conflict between the substantive provisions of the two enactments. However, the ordinances require county consideration of impact upon navigation, fisheries, wildlife, and other environmental factors. The legislature has directed the Idaho Land Board to weigh environmental interests against navigational or economic necessity. Since the county and the board consider identical or similar factors, there is the potential for conflicting conclusions. It is clear from the act that the legislature explicitly authorized the board to

consider and weigh these issues and render its decision. It is equally clear from the act that the legislature established specific criteria, definite procedures, and a broad regulatory plan for lake encroachments. It is appropriate that the act placed responsibility for granting or denying encroachment permits upon the board coincidental with its ownership and public trust duties.

The land board and its executive agency, the Department of Lands, has responsibility over the beds and waters of navigable lakes as landowner and as public trustee. Idaho Code §§ 58-104(9), 67-4304. The board and the department have specific authority in addition to the Lake Protection Act to "regulate and control the use or disposition of lands in the beds of navigable lakes . . . so as to provide for their commercial, navigational, recreational, or other public use . . ." Idaho Code § 58-104(9). It is therefore appropriate and necessary that the public trustee, the board through the Department of Lands, administers the regulatory program for navigable lakes.

A related factor indicating preemption is that the issues at stake are of statewide concern and can therefore be implemented only by the state legislature. Court decisions from other jurisdictions have held attempts to regulate the use of navigable waters by a municipality and a state public services commission, respectively, unconstitutional. *City of Madison v. Tolzmann*, 97 N.W.2d 513 (Wis. 1959); *Muench v. Public Service Commission*, 53 N.W.2d 514 reh., 55 N.W.2d 40 (Wis. 1952). In *Muench*, the Wisconsin court held unconstitutional a delegation by the legislature on the grounds that a public trust is a matter of statewide concern and authority thereover could not be so delegated.

The remaining question is, has the Idaho Legislature delegated the regulation of lake encroachments to local governments? Clearly, there is no delegation to counties or cities in the Lake Protection Act. The most likely enabling authority for the county ordinances is the Local Planning Act. Idaho Code §§ 67-6601, et seq. This act directs counties and cities to prepare a comprehensive plan and zone(s) of use in harmony with the plan. It authorizes *planning* for waters, harbors, fisheries, beaches and shorelines. Idaho Code §§ 67-6508; 67-6502(i, j, k). Standards may be adopted for *access to lakes*, but there is no authority for regulating lake beds. Accordingly, the Local Planning Act does not contain an express or implied delegation of authority to local governments to regulate lake encroachments or the beds of navigable waters. Nor have we found any other enactments delegating such powers.

The controlling rule of law is that a county has only such powers as are expressly or impliedly conferred by constitution or statutes. *Shillingford v. Benewah Count*, 48 Idaho 447, 292 P. 864 (1929); 20 C.J.S. *Counties* § 82, pp.850, 851. This rule, as well as the preemption doctrine, apply in this instance notwithstanding the analysis in *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965), in which the court sustained the validity of a county subdivision ordinance. In that case, the court quoted Idaho Const. art. XII, § 2. Art.

XII. § 2, also relevant to this opinion, provides:

Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations *as are not in conflict with the general laws.*

State v. Clark did not involve a question of preemption by an enactment substantively and procedurally as broad and specific as the Lake Protection Act. In view of the specific delegation in the act to the board and the board's public trust duties over navigable waters, the *Shillingford* rule should control. See also *Ritchie v. Markley*, 597 P.2d 449 (Wash. App. 1979), where the court held a section of a county ordinance unconstitutional because of a conflict with the state Shoreline Management Act, and *State v. Barsness*, 102 Idaho 210, 628 P.2d 1044 (1981), holding that a county traffic ordinance must yield to a state statute if in conflict.

A basic rule of statutory construction is that in the event of a conflict, specific legislation controls over general legislation. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 612 P.2d 542 (1980). Thus, the specific authority of the board and the department under the Lake Protection Act, prevails when the two are in conflict. In this instance, the legislature has given the board, not the counties, specific responsibility to regulate the beds and surface of navigable waters. The Local Planning Act, therefore, affords at best a general planning function, power to set standards for access to lakes, and zoning authority over uplands. But when compared to the specific procedural and substantive directives of the Lake Protection Act, the general authorizations of the Local Planning Act are subordinate.

Regulation of the beds and surface of navigable waters is an area of statewide concern, appropriately regulated by the board and the Department of Lands. The scope and specificity of the Lake Protection Act demonstrate complete coverage by the state law precluding regulation by local government.

Applying these principles to the issue of this opinion leads us to the conclusion that the language of the act establishes a basis for a pervasive, exclusive regulatory program. The Idaho Lake Protection Act therefore is exclusive in authorizing the board to render decisions according to the criteria and procedures of the act, and preempts the county ordinances.

The conclusions reached in this opinion are intended to deal with the narrow issue of jurisdiction over encroachments below the ordinary or artificial high water mark. No attempt has been made to discuss the questions of planning and zoning jurisdiction over uplands or the need, if any, for state compliance with local zoning ordinances generally.

AUTHORITIES CONSIDERED:

Constitutions

1. Idaho Const. art. XII, § 2

Idaho Statutes

1. Idaho Code §§ 58-104(9), 58-142 through 58-153, inclusive
2. Idaho Code § 67-4304
3. Idaho Code §§ 67-6501, et seq.

Cases

1. *Bishop v. City of San Jose*, 460 P.2d 137 (Cal. 1969)
2. *State v. Barsness*, 102 Idaho 210, 628 P.2d 1044 (1981)
3. *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980)
4. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 612 P.2d 542 (1980)
5. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976)
6. *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965)
7. *Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929)
8. *Ritchie v. Markley*, 597 P.2d 449 (Wash. App. 1979)
9. *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972)
10. *City of Madison v. Tolzmann*, 97 N.W. 2d 513 (Wis. 1959)
11. *Muench v. Public Service Commission*, 53 N.W.2d 54, reh. 55 N.W.2d 40 (Wis. 1952).

County Ordinances

1. Kootenai County Ordinance Nos. 32, 33, 34

DATED this 27th day of May, 1983.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

L. MARK RIDDOCH
Deputy Attorney General
Department of Lands

LMR/tl

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

ATTORNEY GENERAL OPINION NO. 83-7

TO: Honorable Marjorie Ruth Moon
State Treasurer
State of Idaho
BUILDING MAIL

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Are there constitutional or statutory restrictions on the State of Idaho's ability to meet the federally mandated "delay of drawdown" procedures implemented under 5 U.S.C. § 301 and 31 C.F.R. Part 205?

CONCLUSION:

The answer depends on the particular circumstances of the fund involved. The constitutional restrictions of fiscal management do not appear to affect participation in the delay of drawdown procedures. Statutory restrictions on some of the funds combine with practical problems to hinder participation.

ANALYSIS:

The issue involves cash management in joint federal and state programs. The prevailing practice in these programs has been either that the state incurs the expenses and seeks periodic reimbursement from the federal agency for the federal agency's share of the program, or the state periodically draws down the money in its federal appropriation in anticipation of state expenditures. Increasing pressure from the federal government regarding cash management has pushed the occurrence of these drawdowns toward the time of warrant issuance. Nevertheless, the federal government has been unsatisfied with giving the states the benefit of the "float" between the time of warrant issuance and the time when the warrants clear the account in question. Accordingly, the federal government has selectively implemented

what, for shorthand purposes, may be called a “delay of drawdown” procedure. This delay of drawdown procedure is set up with the intent of timing the deposit of the federal funds at the appropriate bank to coincide with the anticipated arrival of the warrants that have been drawn on that account. The mechanics of this program affect the various relevant funds in different ways. These effects are considered in the context of the constitutional and statutory restrictions on cash management in state government.

Idaho Const. art. VII, § 11 provides as follows:

No appropriation shall be made, nor any expenditure authorized by the legislature, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war.

This provision requires a balanced budget. During the course of the fiscal year this provision would not appear to prohibit implementation to the delay of drawdown procedures. In *Stein v. Morrison*, 9 Idaho 426, 75 P. 246 (1904), the Idaho Supreme Court held that all sources of revenue could be considered in determining whether the budget was balanced. The federal contributions in these joint programs are properly treated as revenue. Therefore, expenditures match revenues, the budget is balanced, and no violation of this constitutional provision is involved.

At year end there could be a small problem because warrants would be issued in one fiscal year, but the anticipated receipt of the federal funds would not be until the next fiscal year. However, the receipt of federal funds is backed by an irrevocable letter of credit as provided at 31 C.F.R. Part 205.5. Pursuant to this regulation, the irrevocable federal letter of credit becomes obligated at the time the recipient organization has obligated funds in good faith. Although it does not appear to be the literal equivalent of *cash* in the account at the time of obligation, it does seem to constitute *revenue* to be considered in the fiscal year in which the funds were obligated. See, e.g., *Bennett v. City of Mayfield*, 323 S.W.2d 573 (Ct. App. Ky. 1959). There does not appear to be any conflict with Idaho Const. art. VII, § 11.

The second possibly relevant Idaho constitutional provision — Idaho Const. art. VII, § 13 — provides as follows:

No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

The intent of this section is clearly to make the legislature the only appropriative body in the State of Idaho and to prohibit the executive and judicial branches from spending money not appropriated by the legislature. No conflict exists between the delay of drawdown procedures and this provision as all of the expenditures are authorized by the legislature pursuant to appropriation.

Idaho Const. art. VIII, § 1, in relevant part, reads as follows:

The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, and exclusive of debts or liabilities incurred subsequent to January 1, 1911, for the purpose of completing the construction and furnishing of the state capitol at Boise, Idaho, and exclusive of debt or debts, liability or liabilities incurred by the eleventh session of the legislature of the state of Idaho, exceed in the aggregate the sum of two million dollars (\$2,000,000) . . .

The pertinent provision of this section is the restriction on creating debt or liability. The question is whether the delay of drawdown procedures can create a prohibited debt. Debt, in the constitutional sense, has been interpreted by almost every state. Recently, the Colorado Supreme Court discussed, in helpful language, the meaning of debt. In *In re Interrogatories by Colorado State Senate*, 566 P.2d 350 (Colo. 1977), the court stated as follows:

The purpose of article XI, section 3 of the Colorado constitution is to 'prevent the pledging of [state] revenues of *future years*' (Citation omitted) . . . To constitute a debt in the constitutional sense, one legislature, in effect, must obligate a future legislature to appropriate funds to discharge the debt created by the first legislature.

566 P.2d at 355.

This is substantially the same definition the Idaho Supreme Court has endorsed. In *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548, P.2d 35 (1976), the Court stated:

As used in art. VIII, § 1 of the State Constitution, a "debt" refers to an obligation incurred by 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.

548 P.2d at 556.

As noted in the previous discussion, the revenues for these programs are generated at the time the warrants are issued, even though the cash to cover those warrants might not arrive until the warrants are to clear. Since the revenues and expenditures are balanced in the same fiscal year, the constitutional prohibitions on debt should not prohibit implementation of the delay of drawdown procedures. This is different from the questions addressed in *State, ex rel., Hansen v. Parsons*, 57 Idaho 775, 69 P.2d 788 (1937) and Attorney General Opinion 82-11. Those opinions were concerned with the issuance of warrants as exhaustion of the appropriation approached. Those opinions declare it improper to issue further warrants where previously issued warrants expend all appropriated moneys, regardless of whether or not the previously issued warrants have cleared. Money in the account is not the determinant of whether an appropriation has been exhausted. This lends some support for treating accruals of federal contributions under the irrevocable letter of credit as proper revenues.

The last of the possibly relevant constitutional provisions — Idaho Const. art. VIII, § 2 — prohibits the lending of state credits in the following manner:

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, provided, that the state itself may control and promote the development of the unused water power within this state.

The “delay of drawdown procedures” do appear to be a lending of state credit from the time the warrants are issued until funds are received in payment of the warrants. However, in *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972), the Idaho Supreme Court found that a lending of credit to effectuate a broad public purpose was not prohibited by this section. The intent of this section was to prevent the state from lending credit to particular individuals, associations or smaller groups than the public in general. The programs currently under the delay of drawdown procedures easily fit within the broad public purpose exception to this constitutional provision. In summary, none of the constitutional fiscal management restrictions appear to conflict with the delay of drawdown procedures.

Although sound fiscal management was clearly an objective of the framers of the constitution, it is predictable that the constitutional restrictions would not restrict implementation of the delay of drawdown procedures. The delay of drawdown procedures are basically cash, as opposed to fiscal, management programs. The drafters of the constitution presumably were concerned with broader issues than cash management. More in point would be the statutory law dealing with cash management and fiscal policy applicable to the specific funds in question. The statutes governing the auditor’s and treasurer’s job performances are a relevant starting point.

Idaho Code § 67-1001, et seq., and § 67-1201, et seq., direct the affairs of the chief fiscal officers of the state; the auditor and treasurer, respectively.

These statutes govern the funds managed by the auditor and treasurer, and impose policy restrictions on fiscal cash management. Idaho Code § 67-1011 provides as follows:

In all cases of specific appropriations, salaries, pay and expenses, ascertained and allowed by law, found due to individuals from the state, when audited, the auditor must draw warrants upon the treasury for the amount; but in cases of unliquidated accounts and claims, the adjustment and payment of which are not provided for by law, no warrants must be drawn by the auditor, or paid by the treasurer, until appropriation is made by law for that purpose, nor must the whole amount drawn for and paid for any purpose or under any one (1) appropriation ever exceed the amount appropriated, or the cash balance in the account charged, whichever is less.

This specific restriction on the auditor must be read in *pari materia* with Idaho Code § 67-1212 on how the treasurer will handle warrants for which there are insufficient funds. 2A Sutherland, Statutory Construction § 51.01 (4th Ed. 1973).

(1) All warrants upon funds the balance in which is insufficient to pay them must be turned over to the state treasurer by the state auditor. All of such warrants shall be registered by the state treasurer as follows: he shall date and sign such warrants on the back thereof underneath the words "Presented for payment and not paid for want of moneys" and return the same to the state auditor for delivery to the respective payees. It is the duty of the state treasurer to keep a register of all warrants not paid for want of moneys, in which register such warrants shall be listed in numerical order, and when paid the treasurer shall note on such register the amount of interest paid and the date of payment. Any such warrants, registered by the state treasurer, shall from date of registration until paid bear interest at the rate of six percent (6%) per annum, unless the state board of examiners shall have theretofore, by resolution, fixed a lesser rate of interest, in which event said warrant shall draw such lesser rate.

(2) In lieu of registering warrants as provided in subsection (1) above, the state treasurer shall have authority to:

(a) Pay such warrants out of any moneys available if it appears that money sufficient to pay such warrants will, within thirty (30) days be available in the fund, or account in the case of accounts in the agency asset fund, rotary fund, or any other fund maintained on the account level, upon which such warrants are drawn; the state treasurer shall charge the fund or account for which such moneys are advanced a service fee and an amount of interest substantially equal to what would have been earned had the advanced money, been invested, and the amount of the service fee and interest shall constitute an appropriation from the fund account for which the advancement was made; or

(b) Issue tax anticipation notes as provided by chapter 32, title 63, or section 57-1112, Idaho Code.

These general statutes govern the Aid to Families with Dependent Children (A.F.D.C.) Program, which is one of the programs affected by the delay of drawdown procedures. The delay of drawdown procedures have already been implemented in the A.F.D.C. Program. This implementation has apparently been successful, as the auditor has not been called upon to draw warrants on an account where there are no funds. The account in question is a mixed account with other funds that maintain a cash balance. Even if the auditor is called upon to issue warrants on the A.F.D.C. account when there are insufficient moneys in that account to pay the warrants, it appears that Idaho Code § 67-1212(2)(a) provides a mechanism by which, with the approval of the state treasurer, the warrants could be issued and paid. The federal letter of credit can be drawn on by wire. This puts moneys in the fund in a timely manner to cover the warrants that are presented that day for payment. In the ordinary course, no funds would be required to be advanced and no service fee need be charged. There does not appear to be any statutory impediment to the current participation by the A.F.D.C. fund in the delay of drawdown procedures.

The Employment Security Fund is controlled by an entirely different set of statutes. The primary statute which must be investigated is Idaho Code § 72-1346. Pertinent portions of that section are abstracted below:

(a) Establishment and control. There is hereby established in the state treasury a special fund, separate and apart from all public moneys or funds of this state, an "Employment Security Fund," which shall be administered by the director exclusively for purposes of this act . . .

(b) Accounts and deposits. The state auditor shall maintain within the fund three (3) separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the director, shall be promptly forwarded to the state treasurer for immediate deposit in the clearing account. All moneys in the clearing account after clearance thereof, shall, except as herein otherwise provided, be deposited promptly with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, . . .

(c) Withdrawals. Moneys requisitioned by the director through the treasurer from this state's account in the unemployment trust fund shall be used exclusively for the payment of benefits and for refunds pursuant to the provisions of this act, duplicated, except that money credited to this state's account pursuant to section 903 of the Federal Social Security Act, as amended, shall be used exclusively as provided in subsection (3) of this section. *The director through the trea-*

surer shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to this state's account therein, as he deems necessary for the payment of such benefits and refunds for a reasonable future period. Upon receipt thereof such moneys shall be deposited in the benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody, nor shall such expenditures require the approval of the state board of examiners. All warrants issued for the payment of benefits and refunds shall bear the signature of the director or his duly authorized agent for that purpose. Upon approval and agreement by and between the director and state auditor, amounts in the benefit account may be transferred to a revolving account established and maintained in a depository bank from which the director may issue checks for the payment of benefits and refunds in accordance with the provisions of this act, and for no other purpose. Moneys so transferred shall be deposited subject to the same requirements as provided with respect to moneys in the clearing and benefit accounts in this section, subd. (b). Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account or revolving account referred to herein, after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of benefits and refunds during succeeding periods, or, in the discretion of the director, shall be redeposited with the secretary of the treasury of the United States of America to the credit of this state's account in the unemployment trust fund, as provided in subsection (b) of this section.

* * *

(Emphasis added).

(3) Money credited to the account of this state in the unemployment trust fund by the secretary of the treasury of the United States of America pursuant to section 903 of the Federal Social Security Act, as amended, may not be withdrawn or used except for the payment of benefits and for the payment of expenses incurred for the administration of this act . . .

This statute contains a presumption that the previous cash advance cash management system would continue. This presumption is so deeply embedded in the statute that there is no prohibition on drawing warrants or checks on an account which has no funds. The delay of drawdown procedures do not appear to be prohibited by the statutes in question. However, the requirement that withdrawals from the unemployment trust fund (the federal contribution) be deposited in the benefit account, while the warrants are drawn on a separate revolving account, creates a system where the wire transfers of funds do not reach the revolving account on the same day that

the warrants are presented for payment. There is typically a one day lag. This has caused a problem because there have been some large temporary overdrafts on the depository bank, in violation of the state's agreement with the bank. These practical problems do not appear susceptible to resolution under the current statutes. Enabling legislation is necessary before the Employment Security Fund can conform to delay of drawdown procedures.

Although the delay of drawdown procedures are less favorable to the State of Idaho than the previous advance payment provisions, the federal regulations have withdrawn advance payments as an option and leave only the periodic reimbursement scheme as an alternative. The state may wish to seek change of the delay of drawdown procedures and regulations but, failing that, it may want to enact legislation that would facilitate such procedures. In conjunction with such facilitating legislation, the state could consider mandatory direct deposit to the recipients' accounts. This would give the recipients the benefit of the earlier cash receipt rather than allowing the federal government the benefit of the "float".

AUTHORITIES CONSIDERED:

Idaho Const. art. VII, § 11
Idaho Const. art. VII, § 13
Idaho Const. art. VIII, § 1
Idaho Const. art. VIII, § 2

5 U.S.C. § 305
31 C.F.R. Part 205

Idaho Code § 67-1011
Idaho Code § 67-1212
Idaho Code § 72-1346

Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976)
Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972)
State, ex rel., Hansen v. Parsons, 57 Idaho 775, 69 P.2d 788 (1937)
Stein v. Morrison, 9 Idaho 426, 75 P. 246 (1904)
In re Interrogatories by Colorado State Senate, 566 P.2d 350, (Colo. 1977)
Bennett v. City of Mayfield, 323 S.W.2d 573 (Ct. App. Ky. 1959)

Attorney General Opinion No. 82-11
2A Sutherland, Statutory Construction § 51.01 (4th Ed. 1973)

DATED this 21st day of June, 1983.

ATTORNEY GENERAL
of the State of Idaho
JIM JONES

ANALYSIS BY:

C.A. DAW

Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 83-8

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

Per Request for Attorney General Opinion

Dear Commissioner Dick:

QUESTION PRESENTED:

When taxes are received by a County tax collector in this State and there are delinquent taxes, can current taxes be paid in order to avoid penalty, leaving prior taxes delinquent?

CONCLUSION:

Idaho Code § 63-1119 does not establish a priority for payment of current and delinquent taxes. It expresses only a priority when taxes for more than one year are delinquent. There are no statutory or judicial authorities establishing whether a priority exists for delinquent over current taxes or vice versa. In the face of such an ambiguity, it is within the scope of the Tax Commission's authority to establish such a priority by regulation. However, to date the Tax Commission has not done so. In the absence of any legal guidance, we recommend that county treasurers follow a consistent procedure which limits the possibility of subjecting the county to unfavorable litigation results. We recommend that when a taxpayer makes a written demand that a payment be applied to current taxes rather than delinquent taxes the written demand should be honored by the county. Otherwise any payment should be applied to the oldest delinquency then unpaid.

ANALYSIS:

Your question arises because in some circumstances a taxpayer may gain economic advantage by paying property taxes for a current year as they fall due while electing to leave unpaid a prior year's tax liability on the same property. The advantage arises from the fact that by paying the current

year's taxes the taxpayer will avoid the 2% delinquent charge that otherwise would accrue. Idaho Code § 63-1102. This advantage could arise if the taxpayer is unable to pay taxes for both the current year and any years that may be delinquent. Avoiding the penalty on the current year's taxes will leave interest accruing at the statutory rate on the unpaid delinquency. However, interest would also accrue on the current year's taxes at the same rate if the payment is attributed only to the older year's liability. Unless the county is close to the statutory time for taking a tax deed on the property to which the delinquent taxes relate, a taxpayer may well gain economically if he leaves the delinquent taxes unpaid assuming he expects to be able to pay the delinquent tax before a tax deed is issued.

The specific issue is whether a taxpayer is allowed to make the election to leave a prior year's taxes unpaid while paying in full the taxes due for the current year on the same property.

We are advised that various counties in this state have applied conflicting interpretations of Idaho Code § 63-1119. This is the only statutory provision that specifically relates to the issue presented by your request. The section states:

Payment of one-half of yearly tax delinquency — Order — Receipt.
— Whenever a tax shall be delinquent for any year, the taxpayer may pay to the tax collector of the county wherein such tax is delinquent, one-half of such delinquency for such year together with the penalty and interest thereon; provided, however, that such payment shall only be made and accepted upon the oldest delinquency standing on the records of the county tax collector wherein such payment is made and upon such payment the tax collector shall issue to the taxpayer a receipt for the sum so paid. In the event payment is mailed to the tax collector, the cancelled check may serve as receipt.

This statute was originally passed in 1937. 1937 Idaho Sess. Laws ch. 92, p. 124. Examination of the title of the original bill gives the impression that its primary purpose was to permit a taxpayer to pay half of the delinquent taxes of a particular year in order to avoid the issuance of a tax deed. Thus, it appears principally to have been intended to provide some relief for the difficulties taxpayers experienced as a result of the Great Depression of the early 1930's. The requirement that the one-half installment must be applied to the oldest year of delinquent taxes is consistent with the apparent tax relief purpose of the original statute. The exact language of this section deals only with the payment of *delinquent* taxes. Nothing in the language of the statute expressly addresses current year's taxes nor is it necessary to imply any legislative intent to current year's taxes in order to give effect to the apparent purpose of the original statute. Accordingly, we must conclude that Idaho Code § 63-1119 establishes a priority system for payment of taxes in cases where more than one year's taxes are delinquent. In such a case, the oldest delinquency must be paid first. However, when the question is application of a payment to either the current year's taxes or delinquent taxes, Idaho Code § 63-1119 provides no guidance.

We must therefore look elsewhere to determine whether there is an established rule for applying a payment either to a current year or a delinquent year's taxes. Examination of Idaho statutes and judicial decisions reveals no statutory or case law specifically addressing this issue., Research has not revealed cases directly in point from any other jurisdiction. There is, however, some substantial authority on a closely related question. It is well established that a taxpayer may direct application of his payment as between different taxes imposed on the same property for the same year. The general rule is stated in 3 Cooley, *The Law of Taxation* § 1255:

The owner, on paying, has the right to direct its application as between different taxes or different properties . . .

See also *Union School District v. Bishop*, 76 Conn. 695, 58 A. 13 (1904); *Milney v. Hess*, 141 Or. 469, 18 P.2d 229 (1933). Thus, a taxpayer may, for example, pay the taxes levied on his property by the city and county in which he resides but refuse to pay the tax levied by a school district. This rule developed because in some states this was the only convenient method by which a taxpayer could challenge the validity of a tax he believed to be illegal or void. A corollary to this rule is that if neither the taxpayer nor the tax collector attribute the tax as between specific taxes then a court should apply the tax, "as the justice of the case may require." See *Union School District v. Bishop*, 76 Conn. 695, 58 A. 13 (1904), and Cooley, *supra*, at sec. 1255.

In the absence of any clear legal rule on the subject, a county would be prudent to adopt a consistent course which eliminates or minimizes the possibility of the county experiencing an unfavorable litigation result. The policy which seems best suited is to apply any payments to the oldest delinquency outstanding on a specific parcel of property first before paying any more recent delinquencies or current year taxes *unless* the taxpayer specifically requests in writing that the payment be attributed to current year's taxes. (Because of Idaho Code § 63-1119, a taxpayer could not elect to pay a more recent delinquency and leave an older delinquency unpaid.) This policy will afford the taxpayer the opportunity to avoid the penalty on the current year's taxes if he believes he will be able to pay the delinquent taxes prior to a tax deed being entered. If a taxpayer chooses not to make that election or makes no election at all, then his payment will be attributed to the oldest delinquency thereby avoiding an inadvertent forfeiture of the property by the taxpayer when the county enters a tax deed.

Your question has revealed an area of the law filled with uncertainty. The uncertainty might be resolved by regulations promulgated by the State Tax Commission pursuant to Idaho Code § 63-315 or by legislation specifically addressing the issue. Since § 63-1119 already partially addresses the area, the Tax Commission is limited in its regulation promulgating options to those which are consistent with that code section. For this reason, a more comprehensive review of the issue could be better performed by the legislature which could amend the relevant statutes to provide a clear rule.

AUTHORITIES CITED:

Idaho Code § 63-1119

Idaho Code § 63-315

1937 Idaho Sess. Laws, ch. 92

Union School District v. Bishop, 76 Conn. 695, 58 A. 13 (1904)

Milney v. Hess, 141 Or. 469, 18 P.2d 229 (1933)

3 Cooley, *The Law of Taxation* § 1255

DATED this 29th day of June, 1983.

ATTORNEY GENERAL
of the State of Idaho
JIM JONES

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 83-9

TO: Sam Nettinga, Directors
Idaho Department of Labor and
Industrial Services
STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Must an individual or firm be licensed as an electrical contractor pursuant to Section 54-1002(1), *Idaho Code*, before the submission of a bid to do electrical work directly to a property owner, general contractor, or contracting agency or before publically advertising one's availability to do electrical work?

CONCLUSION:

An individual or firm submitting a bid to a property owner, general contractor, or contracting agency, to do electrical work, must possess an elec-

trical contractor's license at the time of submission of such a bid, as this conduct would constitute an "attempt" to act as a contractor within the meaning of the statute. On the other hand, a general and relatively widely broadcast advertising is at most a mere "preparation" as opposed to an "attempt", and is not covered by the statute. This is especially true when the advertiser offers his availability for an assortment of other services unrelated to the electrical contracting field. See Exhibit A.

ANALYSIS:

To resolve the issue of whether it is necessary for an individual or firm to possess an electrical contractor's license prior to or at the time of submission of a bid to do electrical work, it is necessary to first examine the pertinent provisions of title 55, chap. 10, Idaho Code, relating to electrical contractors and contractor licensing. Idaho Code § 54-1002(1) establishes that a person or firm acting or attempting to act as an electrical contractor, as defined by the statute, must possess an electrical contractor's license. That section reads as follows:

[1]t shall be unlawful for any person, partnership, company, firm, association or corporation, to act, *or attempt to act*, as an electrical contractor in this state until such person, partnershi, company, firm, association or corporation, shall have received a license as an electrical contractor, as herein defined, issued pursuant to the provisions of this act by the department of labor and industrial services.

(emphasis added)

Idaho Code § 54-1003A(1), in defining the term "electrical contractor," sets out the various types of conduct which will constitute acting as an electrical contractor:

Except as provided in section 54-1016, any person, partnership, company, firm, association or corporation engaging in, conducting, or carrying on the business of installing wires or equipment to carry electric current or installing apparatus to be operated by such current, *or entering into agreements to install such wires, equipment or apparatus*, shall for the purpose of this act be known as an electrical contractor.

(emphasis added)

From a reading of the above-cited sections, it is clear that an electrical contractor's license must be possessed at the time a bid is made, as the submission of a bid to perform electrical work is an attempt to enter into an agreement to install electrical wires, equipment, or apparatus, and is therefore an attempt to act as an electrical contractor. Such an interpretation is consistent with Idaho contract law establishing that submission of a bid constitutes an offer which, once accepted, establishes a contract. *Boise Junior College Dist. v. Mattefs Const. Co.*, 92 Idaho 757, 450 P.2d 604 (1969).

This interpretation is also in accord with the generally accepted legal meaning of the word "attempt," in both statutes and case law, where "attempt" generally means an endeavor to do an act, carried beyond mere preparation, but short of execution. Black's Law Dictionary 162 (rev. 4th ed. 1968); *Columbian Ins. Co. of Indiana v. Modern Laundry*, 277 F. 355 (8th Cir. 1921); *Follett v. Standard Fire Ins. Co.*, 92 A. 956 (N.H. 1915). In our opinion, the submission of a bid goes beyond mere preparation. The bidder has "endeavored," in fact has done all he can do, to complete the execution of the contract, by the act of bidding. All that remains is an acceptance, which depends on the bidding authority.

By the same token, since the courts have held that the act committed in furtherance of the intent must go beyond mere preparation, *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981), we do not believe an advertising is actionable under your code.

A general advertising addressed to no one in particular is at best an expression of one's availability to do that kind of work. It is at most a "preparation," because at that stage there is no identifiable "person" with whom to endeavor to complete the act. To illustrate that an advertising is too premature to constitute an attempt, we cite two examples: one, if nobody answers it, there is no contracting party to which to submit a bid; two, if the advertisement is answered calling for an electrical contractor, the advertiser may become qualified before submitting a bid (attempt).

Though the type of conduct which is the subject of this opinion (bidding) may not in and of itself constitute acting as an electrical contractor, a distinction must be made between *acting* and *attempting to act* as an electrical contractor. As discussed above, bidding a job would fall into the latter category. It is necessary that this distinction in Idaho Code § 54-1002(1) not be overlooked, for it is a general rule of statutory construction that the language of a statute must be construed to give force and effect to every part thereof. *Norton v. Dept. of Employment*, 94 Idaho 924, 500 P.2d 825 (1972); *Stucki v. Loveland*, 94 Idaho 621, 495 P.2d 571 (1972). As stated in *Norton*, the purpose of this rule is to insure that no part of a statute will be inoperative or superfluous, void or insignificant. 94 Idaho 924, at 928. To conclude that the legislature did not intend to make a distinction between conduct which would constitute acting as an electrical contractor (set out in Idaho Code § 54-1003A), and conduct which would constitute an attempt to act as an electrical contractor, would have the effect of negating and rendering as superfluous the prohibition of such attempts. It would also be contrary to the generally accepted interpretation of the word "or" which is as a disjunctive that marks an alternative generally corresponding to "either." *Filer Mutual Telephone Co. v. Idaho State Tax Commission*, 76 Idaho 256, 281 P.2d 478 (1955).

It should be noted that this opinion addresses only the question of what title 54, chap. 10, Idaho Code, relating to electrical contractors and journeymen, requires relative to when an electrical contractor's license must be

obtained. It does not address the issue of whether the public works contracting law (title 54, chap. 19, Idaho Code) or the subcontractor naming law (Idaho Code § 67-2310), imposes the requirement of an electrical contractor's license on a subcontractor named on a general contractor's bid. This office previously concluded in Attorney General Opinion No. 77-24, dated March 25, 1977, that neither the public works contracting law nor the subcontractor naming law requires electrical subcontractors to possess an electrical subcontractor's license at the time of submission of the bid. That opinion did not, however, address the question of whether the submission of such a bid would constitute an attempt to act as an electrical contractor under the provisions we have construed here. Moreover, since that opinion (No. 77-24), the public works contractors law has been amended as to this subject, 1982 Idaho Sess. Laws, ch. 147, p. 409, which, of course, would now control over opinion No. 77-24 as to any conflict.

AUTHORITIES CONSIDERED:

Idaho Statutes

1. Idaho Code § 54-1002(1)
2. Idaho Code § 54-1003(1)
3. Idaho Code § 54-1017
4. Title 54, chap. 19, Idaho Code
5. Idaho Code § 67-2310

Cases

1. *Columbian Ins. Co. of Indiana v. Modern Laundry*, 277 F. 355 (8th Cir. 1921)
2. *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981)
3. *Norton v. Dept. of Employment*, 94 Idaho 924, 500 P.2d 825 (1972)
4. *Stucki v. Loveland*, 94 Idaho 621, 495 P.2d 571 (1972)
5. *Boise Junior College Dist. v. Mattefs Const. Co.*, 92 Idaho 757, 450 P.2d 604 (1969)
6. *Filer Mutual Telephone Co. v. Idaho State Tax Commission*, 76 Idaho 256, 281 P.2d 478 (1955)
7. *Follett v. Standard Fire Ins. Co.*, 92 A. 956 (N.H. 1915)

Other Authority

1. Black's Law Dictionary 162 (rev. 4th ed. 1968)
2. Attorney General Opinion No. 77-24 (3-25-77)

DATED this 11th day of July, 1983.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

Thomas C. Frost
Deputy Attorney General
Chief, Administrative Law and
Litigation Division

THOMAS SWINEHART
Deputy Attorney General
Dept. of Labor and Industrial Services

TCF:TS:lb

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

ATTORNEY GENERAL OPINION NO. 83-10

TO: Delbert L. Byers, Administrator
Unclaimed Property Section
Idaho State Tax Commission
BUILDING MAIL

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does the State of Idaho, acting through the Idaho State Tax Commission, have authority to take possession of unclaimed property recovered from safe deposit boxes or other safekeeping repositories of national banks closed during the 1930's and before, which property is now in the custody of the United States Comptroller of the Currency?
2. If the State of Idaho and the Idaho State Tax Commission possess such authority, what procedure must the State Tax Commission follow in order to claim such property?

CONCLUSIONS:

1. The State of Idaho and the Idaho State Tax Commission do possess such

authority under the provisions of chapter 5, Title 14, Idaho Code, the "Uniform Unclaimed Property Act."

2. In order the claim such property, the State Tax Commission must file a claim with the United States Comptroller of the Currency in accordance with the procedures established by that authority. State law does not impose upon the State Tax Commission procedural steps to be taken prior to receipt of unclaimed property. The act does establish procedures which must be followed by the State Tax Commission once unclaimed property is received.

ANALYSIS:

Section 408 of the Garn-St. Germain Depository Institutions Act of 1982 (P.L. 97-320), establishes a process for the disposition of property in the possession and custody of the Office of the United States Comptroller of the Currency that was acquired from receivers of national banks closed before and during the 1930's, and has since remained unclaimed. We understand the nature of this property to be the contents of safe deposit boxes and other safekeeping repositories. The act specifically authorizes the Comptroller to provide final notice of the availability of unclaimed property and to dispose of the property for which no claim is filed and validated. The act bars the rights of all claimants to obtain the property after a twelve month filing period following the publication of final notice. The act provides at 12 U.S.C.A. 216a(3):

[T]he term "claimant" means any person or entity, *including a state under applicable statutory law*, asserting a demonstrable legal interest in title to, or custody or possession of, unclaimed property.

[Emphasis added] The act grants to the Comptroller the authority to determine the validity of all claims for such property and grants to the Comptroller the authority to promulgate necessary rules and regulations to carry out its duties. Pursuant to that authority, the Comptroller has established the procedures and requirements for filing claims. Among these are the following procedures to be met by claimants which are states:

If the claimant is a state — A legal opinion must be provided by the state's highest legal official (for example, the attorney general) that interprets applicable state statutory law and certifies the authority of the state thereunder to take possession of the unclaimed property. The official also must attest to the state's compliance with procedures required for the state to take possession.

You have estimated that approximately fifteen hundred potential claimants held property located in Idaho banks. These claimants are listed at 48 Federal Register, 30,025-30,028 (June 29, 1983). To comply with the requirement of the Comptroller of the Currency quoted above, you have requested this opinion to determine whether, under Idaho law, you may file a claim on behalf of the State of Idaho.

The Idaho statutes do include provisions for disposition of unclaimed property. The relevant statutory provisions are found in chapter 5, title 14, Idaho Code, the "Uniform Unclaimed Property Act." The statute vests in the Idaho State Tax Commission the authority to take custody of unclaimed property subject to the jurisdiction of the state. See, Idaho Code § 14-501(1) and § 14-503. Insofar as safe deposit boxes or other safekeeping repositories are concerned, Idaho Code § 14-516 provides:

CONTENTS OF SAFE DEPOSIT BOX OR OTHER SAFEKEEPING REPOSITORY. — All tangible and intangible property held in a safe deposit box or any other safekeeping repository in this state in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, which remain unclaimed by the owner for more than seven (7) years after the lease or rental period on the box or other repository has expired, are presumed abandoned.

Any holder of such unclaimed or abandoned property is required to report the property to the State Tax Commission. See, Idaho Code § 14-517. Specifically included in this reporting requirement are the contents of safe deposit boxes or other safekeeping repositories. See, Idaho Code § 14-517(2)(c).

Idaho's unclaimed property law appears to be the kind of statute contemplated by Congress when it enacted 12 U.S.C.A. 216a(3). The final Senate Committee Report (Senate Report No. 97-536) states:

A state may assert a right to possession of any unclaimed property during the twelve month claim period if it has a law, when ever adopted, that permits it to take custody of such property.

1982 U.S. Code Cong. & Ad News 3083

Accordingly, we conclude that the State of Idaho does have statutory provisions allowing the state to take custody of property which was abandoned in the State of Idaho and has been unclaimed for the requisite statutory seven (7) year period. The State Tax Commission is the agency of the State of Idaho charged with the administration of the unclaimed property laws.

Your second question relates to procedures. The instructions promulgated by the Comptroller of the Currency state that the legal opinion by the state's highest official must attest to the state's compliance with any procedures required for the state to take possession. In the case of the Idaho Uniform Unclaimed Property law, the Tax Commission is not required to meet any procedural conditions precedent before obtaining custody of unclaimed property. Instead, the holder of the property is required to pay over or deliver the property to the State Tax Commission within six months after the final date for filing of the report of unclaimed property. See, Idaho Code §

14-519 and § 14-517. The State Tax Commission is required to meet statutory requirements relating to publication of notice of names of persons appearing to be owners of the abandoned property in the manner required in Idaho Code § 14-518. This must be accomplished not later than March 1st of each year, but no obligation to provide such notice arises prior to receipt of the report of unclaimed property by the State Tax Commission.

AUTHORITIES CONSIDERED:

P.L. 97-320 (12 U.S.C.A. 216-216d)

Idaho Code § 14-516

1982 U.S. Code Cong. & Ad News 3883

48 Federal Register, 30,025-30,028 (June 29, 1983)

DATED this 19th day of August, 1983.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 83-11

TO: Greg Bower
Ada County Prosecuting Attorney
103 Ada County Courthouse
Boise, ID 83702

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Who bears the responsibility and expense of transporting an inmate from the state prison to a county court where the prisoner's attendance is required either for further proceedings or as a material witness?

CONCLUSION:

The statutes of the State of Idaho establish a clear, albeit inconsistent, procedure: It is the responsibility of the sheriff and an expense to his county to transport an inmate from the prison back to the county where the inmate's attendance in court is required; however, in the case of female prisoners, clear statutory language places the responsibility upon the state board of corrections.

ANALYSIS:

Initially, it is helpful in understanding the issue presented and the conclusion reached to examine the Idaho Code provisions dealing with the confinement of prisoners in general.

It is one of the basic, enumerated duties of the county sheriff to "take charge of and keep the county jail and the prisoners therein." Idaho Code § 31-2202 (6). It is a specific charge of the county to provide "the expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail." Idaho Code § 31-3302 (3). Harmonious with the above cited code provisions dealing with counties and county expenditures, are the provisions of the criminal code. Idaho Code § 20-612 states that the sheriff must receive any persons committed to jail by competent authority; and that it is the duty of the board of county commissioners to:

Furnish all persons committed to the county jail with necessary food, clothing and bedding, and the Board of County Commissioners is authorized to pay therefor out of the county treasury.

Idaho Code § 20-604 provides for a district judge or magistrate to order a person to be confined or detained within any county or municipal jail or other confinement facility within the judicial district and Idaho Code § 20-605 prescribes that the county in which the court entered the order confining a prisoner shall pay all of the direct and indirect costs of the detention or confinement to the governmental unit operating the jail. If the person is confined or detained on a city ordinance violation or an infraction of the motor vehicle code initiated by city police officers, the city shall bear the costs of detainment or confinement.

A perusal of title 20, chapter 2, Idaho Code, clearly indicates that the responsibility for costs of confining a prisoner in the state penitentiary belongs to the state board of corrections. See, for instance, Idaho Code § 20-505. This even includes the costs of providing a discharged or paroled prisoner with necessary clothing and transportation to the place designated for parole along with sufficient cash to procure meals in transit when the prisoner is released from the state penitentiary. Idaho Code § 20-238.

Thus, the law clearly allocates to the various counties and to the state the

responsibility and cost for maintaining the inmates in their respective custodial institutions.

Turning now to the question of who bears the responsibility and costs of transporting prisoners from the counties in which they are convicted to the state penitentiary, the answer is found in the provisions of Idaho Code § 31-3203 and Idaho Code § 20-237.

The sheriff is allowed and may demand and receive certain costs specified in the code. Among these is the fee for:

. . . traveling to execute any warrant of arrest, subpoena, venire or other process in criminal cases, or for taking a prisoner from prison, before a court or magistrate, *or for taking a prisoner from the place of arrest to prison*, or before a court or magistrate, for each mile actually and necessarily traveled, in going only . . . \$.40.

Idaho Code § 31-3203. (emphasis supplied)

Giving “prison” its usual meaning of state penal institution or state penitentiary, (See 33A Words and Phrases “Prison”, pp. 362, 363), this statute *authorizes* the expenditure of county funds to reimburse the sheriff for taking a prisoner from place of arrest to prison. By contrast, there is no concomitant *duty* to be found in any titles of the Idaho Code requiring that the county sheriff transport a prisoner from the place of conviction to the state penitentiary. There is, however, a clear duty placed upon the sheriff to “immediately, upon passing of sentence, notify the director [of the state board of corrections] that a person is in his custody” who has been convicted and sentenced to imprisonment in the custody of the state board of corrections. Idaho Code § 20-237. Idaho Code § 20-243 also charges the sheriff with the responsibility of transferring custody of a person convicted in his county to the state board of corrections along with documents of conviction and medical records for the inmate. From these statutes it would appear that the sheriff has authorization to expend funds in transporting prisoners from county jail to prison, however, his only clear legal duty is to make the proper *transfer of custody* of the prisoner, to the department of corrections.

It is, however, the express legal duty of the department of corrections to transport the prisoner from the county jail in which he is housed to the state penitentiary. This duty is clear from Idaho Code § 20-237. When the sheriff has notified the director that a person in his custody has been sentenced to imprisonment in the custody of the state board of corrections, then,

as soon as possible upon receipt of such notice, the director shall dispatch one or more guards, as may be necessary, from said prison to the place where the said convicted person is detained, to secure and convey said convicted person to the state penitentiary, or other facility within the state designated by the state board of corrections.

Idaho Code § 20-237.

In summary, it is clear that the board of corrections *shall* transport or the sheriff *may* transport a prisoner to the correctional institution from a county jail in which he is confined when a court sentences him to the state penitentiary. Idaho Code § 31-3203 and Idaho Code § 20-237 make it clear that the duty placed upon the board of corrections to transport a prisoner to prison is mandatory while the sheriff's transportation of a prisoner is permissive. Moreover, as one examines these two statutes it is clear that Idaho Code § 20-237 was enacted later in time and is, therefore, controlling as to any conflict which might be perceived between these two statutes. *Employment Section Agency v. Joint Class "A" School District No. 151*, 400 P.2d 377, 88 Idaho 384 (1965). It should also be noted that Idaho Code § 20-237 is specific in the manner in which it addresses the transportation of prisoners to prison while Idaho Code § 31-3204 deals not with the topic of transporting prisoners to prison but with the subject of fees which may be reimbursed to a sheriff. Because of its specificity, Idaho Code § 20-237 as it bears upon the responsibility to transport prisoners to prison would be controlling as to any conflict which one might perceive between it and the general provisions of Idaho Code § 31-3204. *State v. Roderick*, 375 P.2d 1005, 85 Idaho 80 (1962). 1A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.16 (4th ed. 1972)

In order to carry out its duty under Idaho Code § 20-237 the state board of corrections has developed a policy of dispatching the travelling guard to the various outlying areas of the state for the purpose of receiving and transporting prisoners who have been sentenced to the state penitentiary. As a courtesy to the counties and in an effort to save taxpayers money, the travelling guard has frequently transported prisoners from the prison back to the counties when they have been needed in further court proceedings or as material witnesses. It is this cooperation which, unfortunately, has led some counties to believe that there is a legal duty on the part of the department of corrections to transport prisoners back to the county. Whenever the issue has arisen as to who bears the responsibility and costs of transporting prisoners from the prison back to the counties for further proceedings or as witnesses, the state board of corrections has consistently and correctly maintained that it has no legal duty to transport the prisoners, yet it has cooperated as much as possible with the various counties in securing the attendance of inmates in court. (See correspondence from Deputy Attorney General P. Mark Thompson to Mr. Ralph Newberg at the Idaho State Correctional Institution dated July 31, 1979.)

Turning to the crux of who bears the responsibility for transporting a prisoner from the state penitentiary back to any of the counties for further proceedings or as a material witness, one must examine three statutes: Idaho Code §§ 19-4601, 19-3012, and 20-503. These appear to be the only statutes dealing with this question. Title 19, Idaho Code, deals with criminal procedure. Chapter 46 thereof bears the title "Proceedings for the Production of Prisoners," and consists of one section, Idaho Code § 19-4601. This section deals with "Order for Production of Prisoner." In its entirety it reads:

When it is necessary to have a person imprisoned in the state prison brought before any court or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court *and executed by the sheriff of the county where it is made.*

Idaho Code § 19-4601 (Emphasis supplied)

It would appear from this statute that the duty to transport a prisoner from the penitentiary back to the county is broad and clear. It is broad enough to include the production of a prisoner for any purpose the court orders, and it clearly specifies that it is the duty of the sheriff to execute the order to bring the prisoner before the court.

Consistent with Idaho Code § 19-4601 are the provisions of chapter 30 dealing with “Witnesses in Criminal Proceedings.”

When the testimony of a material witness for the people is required in a criminal action before a court of record of this state, and such witness is a prisoner in the state prison or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by a judge thereof . . . *The order must be executed by the sheriff of the county in which it is made, whose duty it is to bring a prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken. The expense of executing such an order must be paid by the county in which the order is made.*

Idaho Code § 19-3012 (Emphasis supplied)

It is difficult to imagine a more explicit command and enumeration of duty than that which is outlined in this section. It clearly requires that a sheriff transport the material witness from the state penitentiary to the county where his testimony is needed, safely keep him, and return him to the state prison. Moreover, the language and intent of Idaho Code § 19-3012 is clearly harmonious with the intent expressed in Idaho Code § 19-4601: the responsibility for transporting a prisoner and the costs belong to the county. These statutes are susceptible of no other reasonable interpretation than that it is the duty of the sheriff and an expense of the county to produce a prisoner needed in a county courtroom from the state penitentiary. The provisions of Idaho Code § 31-3203 authorizing payment to the sheriff for costs incurred in “taking a prisoner from prison, before a court or magistrate” would also seem to contemplate that prisoner transportation costs would be borne by the county.

One cogent reason why the legislature has placed the cost of transporting a prisoner to court upon the county requiring his attendance is that a criminal proceeding in the county is properly a matter of that county’s jurisdiction,

business and interest and the expenses of any criminal cause must be paid by the county where the offense is alleged to have occurred. Idaho Code § 19-2210.

Idaho Code § 19-4601 and Idaho Code § 19-3012 make it sufficiently clear that the county sheriff is to transport a prisoner back to the county. Were it not for an incongruous provision of Idaho Code § 20-503, the issue would merit no further discussion.

Title 20 deals with state prisons and county jails. Chapter 5 thereof is entitled "Care of Female Convicts." Idaho Code § 20-503 addresses the transportation and attendance of a female convict at court and reads:

Should the presence of any such prisoner be required in any judicial proceeding in this state, the state board of correction shall, upon the order or direction, in writing, of any court of competent jurisdiction, or of a judge thereof, procure such prisoner and bring her to the place directed in such order, and hold her in custody subject to the further order and direction of the court or a judge thereof, until she shall be lawfully discharged from custody; or the board may, by direction of said court, or a judge thereof, deliver such prisoner into the custody of the sheriff of the county where such conviction was had, or may, by like order, return such prisoner to the institution from which she was taken.

Clearly Idaho Code §§ 19-4601 and 19-3012 place upon the county sheriff the responsibility and expense of transporting a prisoner from the state penitentiary back to the county. Idaho Code § 20-503, just as clearly, places the burden upon the state board of corrections to transport female prisoners back to the county for further judicial proceedings. It is to be presumed that the legislature, in enacting Idaho Code § 20-503, was aware of its earlier enactments of Idaho Code §§ 19-4601 and 19-3012. *State v. Long*, 423 P.2d 858, 91 Idaho 436 (1967). No reason for this divergence need be ascertained, however, in order to give effect to both of these arrangements. The difference between § 20-503 and §§ 19-4601, 19-3012, does not create an irreconcilable conflict. Where two statutory provisions can be read so as to give effect to both, there is a duty to so construe them by harmonizing and reconciling their provisions. *Sampson v. Layton*, 387 P.2d 883, 86 Idaho 453 (1963). Inconsistency between statutes does not inevitably lead to irreconcilability.

In conclusion, from the foregoing one must conclude that the state board of corrections and the county jails have responsibility for prisoners in their respective custody. While the sheriffs may transport convicted prisoners to the state penitentiary at county expense, it is the duty of the board of corrections to do so. The expense of transporting prisoners back to the county belongs to the county whose sheriff has been ordered to execute the order, except in the case of female prisoners who are to be transported by the guards from the department of corrections.

AUTHORITIES CONSIDERED:

1. Statutes:

Idaho Code § 19-4601,
Idaho Code § 19-3012,
Idaho Code § 20-503,
Idaho Code § 20-505,
Idaho Code § 31-3203,
Idaho Code § 20-237,
Idaho Code § 20-238,
Idaho Code § 20-604,
Idaho Code § 20-605,
Idaho Code § 20-612,
Idaho Code § 31-3302,
Idaho Code § 31-2202

2. Idaho Cases:

Employment Section Agency v. Joint Class "A" School District No. 151, 400 P.2d 377, 88 Idaho 384 (1965)

3. *State v. Roderick*, 375 P.2d 1005, 85 Idaho 80 (1962)

4. *State v. Long*, 423 P.2d 858, 91 Idaho 436 (1967)

5. *Sampson v. Layton*, 387 P.2d 883, 86 Idaho 453 (1963)

6. Other authorities:

1A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.16
(4th ed. 1972)

DATED this 9th day of September, 1983.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice Division

ATTORNEY GENERAL OPINION NO. 83-12

TO: Jerry L. Evans
State Superintendent of Public Instruction
State Department of Education
650 W. State Street
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Is Idaho's compulsory attendance law, Idaho Code § 33-202 *et seq.*, valid and enforceable?
2. If the compulsory attendance law is valid and enforceable, what is the extent of a local school board's authority in the enforcement process?
 - a. Does a local school board have the authority and/or responsibility to review the substantive aspects of non-public school programs to determine whether a child is in fact attending a private or parochial school? Or must a board merely accept an assertion that a child is attending a "school" without further inquiry?
 - b. Does the fact that an individual or group may have incorporated as a "school" prevent the local board from inquiring further for purposes of determining attendance under the statute?
 - c. What are the legal limits on a local board's duty to determine comparability of instruction for students in a home instruction setting who may or may not claim to be attending a "school"?
3. What is the role of the prosecutor and judiciary with respect to enforcement of the compulsory attendance law? What is the extent of prosecutorial discretion? Must a child be expelled as an "habitual truant" before a court obtains jurisdiction under the Youth Rehabilitation Act?

CONCLUSIONS:

1. Idaho's compulsory attendance law is valid and enforceable. The question of whether an individual may be exempt from the attendance requirement, as well as the question of whether the attendance law might be unconstitutional *as applied*, must be dealt with on a case-by-case basis.
2. The local school board must determine whether the requirements of Idaho Code § 33-202 are being met. *I.e.*, school boards must satisfy themselves that all children between the ages of seven and sixteen residing within their districts are either attending a public, private or parochial school, or being comparably instructed, or that they are otherwise exempt from the mandatory education requirement.

a. Since a local school board must make the determination noted above, when questions of attendance arise the board may review the program of the facilities attended in light of the minimum standards, in order to satisfy itself that such facilities are indeed “schools” for purposes of the law. A board is not required to accept an unsupported assertion of “school” attendance when it has legitimate concerns as to whether minimum standards are being met or whether a child is in fact attending.

b. The fact that an individual or group is incorporated as a “school” does not change the local school board’s duty with respect to determining attendance.

c. The statute places the initial responsibility for determining comparability of instruction in a home instruction setting upon the local school board. However, there are due process limits on the exercise of such responsibility, and the courts will often be the final determiner of “comparability.”

3. After a petition is filed under the Youth Rehabilitation Act, it is the prosecutor’s obligation to handle the case. However, the prosecutor does have discretion to evaluate such cases, and may choose to proceed or not, within certain bounds. After the petition is filed, the court makes a preliminary investigation, and may make informal adjustment, dismiss the petition, or set the matter for hearing. If a hearing is held and a violation is found, or if a violation is admitted, the court has considerable latitude in determining the best interests of the child — which could, under Idaho Code § 16-1814 (5), include an order directing the parents or guardians of such child to comply with section 33-202. Provisions of the Child Protective Act, Idaho Code § 16-1601 *et seq.*, may also be applicable. Expulsion is not a prerequisite to proceeding under Idaho Code § 33-206.

ANALYSIS:

QUESTION No. 1: Is Idaho’s compulsory attendance law, Idaho Code § 33-202 *et seq.*, valid and enforceable?

By 1918, all of the states had adopted compulsory school attendance statutes,¹ and as a recent commentary stated, “no court to date has denied a state’s valid and enforceable interest in literate citizenry.”² Indeed, as the United States Supreme Court has stated:

There is no doubt as to the power of a state, having a responsibility for the education of its citizens, to impose reasonable regulations for the control and duration of basic education.

Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). *See also, Ingraham v. Wright*, 430 U.S. 651, 681-82 (1976); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the court held that a state may not limit school attendance to public schools, but also stated that, “no

question is raised concerning *the power of the State reasonably to regulate all schools*, to inspect, supervise them, their teachers and pupils.” (Emphasis added). In *Runyon v. McCrary*, 427 U.S. 160, 178 (1976), the Supreme Court stated that:

. . . while parents have a constitutional right to send their children to private schools . . . they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Other courts have almost unanimously followed the “reasonable regulation” standard set forth by the Supreme Court. For example, in *State v. Faith Baptist Church of Louisville*, 301 N.W.2d. 571, 579 (Neb. 1981), the court stated:

Although parents have a right to send their children to school other than public institutions, they do not have the right to be completely unfettered by *reasonable government regulations as to the quality of the education afforded*.

(Emphasis added). See also, *Grigg v. Commonwealth*, 297 S.E.2d 799, 801 (Va. 1982); *State v. Riddle*, 285 S.E.2d 359, 364 (W.Va. 1981); *State v. M.M. and S.E.*, 407 So.2d 987 (Fla. 1981); *Hanson v. Cushman*, 490 F. Supp. 109, 114 (D. Mich. 1980) (*parents’ desire to teach children at home “does not rise above a personal or philosophical choice, and therefore is not within the bounds of constitutional protection”*); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980); *Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975), *aff’d without opinion* 423 U.S. 907 (1975); *Meyerkorth v. State*, 115 N.W.2d 585 (Neb. 1962); *Stephens v. Bongart*, 189 A. 131 (N.J. 1937); *State v. Bailey*, 61 N.E. 730 (Ind. 1901).

The U.S. Supreme Court in its most recent case dealing with a state’s compulsory education requirement, *Wisconsin v. Yoder*, *supra*, held that the attendance statute was unconstitutional as applied to Amish children beyond the eighth grade. The court found that the long established tradition of home vocational education after eight years of formal Amish school training “in preparation of the child for life in a separated agrarian community that is the keystone of the Amish faith,” *id.*, 406 U.S. at 221, prevailed over the state’s interest in the education of its citizenry.

Most courts which have been faced with religious freedom claims in the context of compulsory education enforcement proceedings, have restricted the scope of the so-called “religious exemption” in a fashion similar to the approach taken by the *Yoder* Court, i.e., a showing of a long-established tradition and religious doctrinal basis has been required to justify nonattendance. E.g., *State v. Riddle*, 285 S.E.2d. 359, 362 (W.Va. 1981) (the unique “religious community” type of facts as presented in *Yoder* were absent); *State v. Faith Baptist Church of Louisville*, 301 N.W.2d 571 (Neb. 1981); *Hill v. State*, 381 So.2d 91 (Ala. Cr. App. 1979) [*the facts [in Yoder] are*

vastly different from those here presented”), *rev’d on other grounds* 381 So.2d 94 (Ala. 1980).³

However, at least one court found that the amount of state regulation was “unreasonable” as applied to particular facts. In *State of Ohio v. Whisner*, 351 N.E.2d 750 (1976), the Ohio Supreme Court reversed truancy convictions of parents who had failed to send their children to a school “which conforms to the minimum standards prescribed by the state board of education.” *Id.* at 752. The parents had asserted a First Amendment religious freedom defense, and the court found that the *comprehensive regulations* sought to be imposed were unconstitutional as applied to defendant’s school as they interfered with their “rights to pursue their religious beliefs.” *Id.* at 767. While the *Whisner* court seems to have gone beyond the rule suggested by the Supreme Court in *Wisconsin v. Yoder*, *supra*, in applying the religious exemption from the compulsory attendance requirement, the case does point out that some courts may be unwilling to require non-public schools to conform to stringent and *comprehensive regulations*, when such regulations are balanced against a First Amendment right.

Another constitutional question that has arisen in connection with compulsory education statutes is that of whether a particular statute is void for vagueness. As the Idaho Supreme Court has stated:

Under the Due Process Clause of the Fourteenth Amendment, a statute is unconstitutionally vague when its language does not convey sufficiently define warnings as to the proscribed conduct, and its language is such that men of common intelligence must necessarily guess at its meaning. *See Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

Wyckoff v. Board of County Commissioners of Ada County, 101 Idaho 12, 607 P.2d 1066 (1980). *See also*, *State v. Barney*, 92 Idaho 581, 448 P.2d 195 (1968). A recent Wisconsin Supreme Court decision held that that state’s compulsory attendance law failed to define “private school” and was therefore unconstitutional as applied to prosecutions involving attendance at private schools. *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983). A careful comparison of the Wisconsin law with Idaho law leads to the conclusion that Idaho’s law, while certainly not lacking brevity, is distinguishable, and would not be declared unconstitutionally vague if an Idaho court were to review it.

The “compulsory school attendance” statute examined by the court in *State v. Popanz*, *supra*, states, in pertinent part, that:

. . . [A]ny person having under control a child who is between the ages of 6 and 18 years shall cause the child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of age.

Wis. Stat. Ann. § 118.15(1)(a).

The court, in reviewing the statute, stated that:

. . . we have searched the statutes, administrative rules and regulations and official Department of Public Instruction writings for a definition of "private school" for purposes of sec. 118.15(1)(a). We have found neither a definition nor prescribed criteria.

State v. Popanz, supra, at 754. The court thus indicated that had it been able to find *either* a "definition" of "private school" *or criteria* upon which such a definition could be discerned from the statutes, rules and regulations or official publications, etc., the statute would have withstood judicial scrutiny.

In contrast to the Wisconsin statute, the Idaho compulsory education statute, along with other Idaho statutes and rules, while not containing a definition of "private school" *per se*, do seem to contain sufficient criteria by which all schools may be judged to determine whether they qualify as schools for purposes of the attendance requirement: in other words, there are "sufficiently definite warnings as to the proscribed conduct," by which a person intent on obeying the law may gauge his conduct.

Idaho's compulsory attendance statute, Idaho Code § 33-202, states that:

The parent or guardian of any child resident in this state who has attained the age of seven (7) years at the time of the commencement of school in his district, but not the age of sixteen (16) years, shall cause the child to be instructed in subjects commonly and usually taught in the public schools of the state of Idaho. Unless the child is otherwise comparably instructed, as may be determined by the board of trustees of the school district in which the child resides, the parent or guardian shall cause the child to attend a public, private or parochial school during a period in each year equal to that in which the public schools are in session; there to conform to the attendance policies and regulations established by the board of trustees, or other governing body operating the school attended.

(Emphasis added). Unlike the Wisconsin statute, then, section 33-202 prescribes a definite standard so that a parent or guardian having a child within the appropriate age category will not have to "guess at its meaning." That is, such a person is required to have the child "instructed in subjects commonly and usually taught in the public schools of the state of Idaho." This may be accomplished by send the child to a public, private or parochial school or by other comparable means of instruction. Idaho Code § 33-118 requires the state board of education "to prescribe the minimum courses," which also represent the subjects commonly and usually taught in the public schools, are found in Rule E.10.3 of the State Board of Education Rules and Regulations. A definition of private or parochial school is unnecessary inasmuch as the fundamental and "prescribed criteria" of the statute is the

same for all parents or guardians regardless of where they seek to have their children educated.

The statute also requires that if a private or parochial schools is attended, the period of attendance "equals . . . that in which the public schools are in session." In addition, Idaho Code § 33-1201 appears to require the employment of certified personnel in all schools.

Thus, the statutes and rules, taken together, provide fair notice of the required conduct, and unlike the situation in *State v. Popanz*, *supra*, at 793, "those who enforce the law will not be relegated to creating and applying their own standards." See, also, *Scoma v. Chicago Board of Education*, 391 F. Supp. 452, 462-63 (N.D. Ill. 1974), in which the court rejected a void for vagueness challenge to a statute which exempted children from public school attendance who attended private schools which teach ". . . the branches of education taught to children of corresponding age and grade in the public schools." The court held that the statutory reference to public schools "should cause no difficulty for citizens who desire to obey the statute." *Id.* at 463.

While Idaho's compulsory education law has not yet been the subject of interpretation by our Supreme Court, given the presumption of validity to which it is entitled, *State ex rel. Brassey v. Hansen*, 81 Idaho 403, 342 P.2d 706 (1959), and given the relatively minimal nature of state regulation imposed upon private and parochial schools, it is reasonable to conclude that the statute is valid and enforceable.

QUESTION No. 2: If the compulsory attendance law is valid and enforceable, what is the extent of a local school board's authority in the enforcement process?

Idaho Code § 33-206, defines "habitual truant," in pertinent part, as:

. . . any child whose parents or guardians . . . have failed or refused to cause such child to be instructed as provided in Section 33-202.

The statutes goes on to state, that:

Whenever it shall come to the attention of the board of trustees of any school district that the parents or guardians of any child are failing to meet the requirements of Section 33-202, a petition shall be filed with the probate court of the county in which the child resides, as provided in Section 33-205.

The local school district board of trustees is thus responsible for the initial identification of instances of violation of section 33-202. When a local board determines that an habitual truancy situation exists, because a child is not attending a public, private or parochial school or being comparably instructed, it is required to file or have a petition filed under the provisions of the Youth Rehabilitation Act. This places the child under the jurisdiction of the court, and if the truancy is admitted or proved, the court has the authority to order

the child to attend a school or to be comparably instructed, or whatever other form of "rehabilitation" it deems necessary.

QUESTION No. 2.a: Does a local school board have the authority and/or responsibility to review the substantive aspects of non-public school programs to determine whether a child is in fact attending a private or parochial school? Or must a board merely accept an assertion that a child is attending a "school" without further inquiry?

Nothing in the law would appear to prevent a school board from reviewing the substance of an educational program in order to determine if the "requirements of section 33-202" are being met, as long as they limit their inquiry to the "criteria" established by statute and regulation. The critical issues in a board's determination of whether or not to file a truancy petition for section 33-202 violations will, of course, be whether the child is attending a "school," and, if not, whether the child is otherwise being comparably instructed. As pointed out above when attendance at a "school" is at issue, the board should consider the following questions:

1. Is a curriculum used which includes the minimum courses prescribed by the State Board of Education?⁴
2. Does the institution or facility operate "during a period in each year equal to that in which the public schools are in session?"
3. In addition, the provision of Idaho Code § 33-1201, requiring employment of certified personnel, appears to be applicable to private and parochial schools.

While various courts have struggled with the definition of "school" in the context of compulsory attendance cases, *e.g.*, *State v. M. M. and S.E.*, 407 So. 2d 987 (Fla. 1981); *State v. Lowry*, 383 P.2d 962 (Kan. 1963) (*minimum course requirements taught by a "competent" instructor for time prescribed by statute constitutes a "school"*); *State v. Hershberger*, 144 N.E.2d 693 (Ohio 1955); *State ex rel. Shoreline School District v. Superior Court for King County, Juvenile Court*, 346 P.2d 999, 1002 (Wash. 1960) (*a "school" includes students, taught by a certified teacher at an institution*); *People v. Turner*, 263 F.2d 685, *app. dismissed* 347 U.S. 972 (1953); Annot., 65 A.L.R. 3d 1222 (1975), if the factors mentioned above are dealt with, a local board needn't become excessively entangled in technical definitions of the word, "school." The board simply reviews the program attended in view of the above-mentioned criteria, and if the criteria are met, need only verify attendance.

The board, then, charged with identifying section 33-202 violations, as outlined above, need not accept a mere assertion that a child is attending a "school" if indeed it has legitimate doubts as to the validity of such assertion.

QUESTION No. 2.b: Does the fact that an individual or group may have incorporated as a "school" prevent the local board from inquiring further for purposes of determining attendance under the statute?

Largely for the same reasons expressed above, mere incorporation as a "private school" should not be a bar to the board's determination of whether children attending such schools are being instructed in accordance with the "requirements of section 33-202." Corporations are subject to governmental regulations just as are other legal entities. The statutes make no exemption for those attending "incorporated" private schools; the parental duty to "cause the child to be instructed" is the same regardless of where the instruction takes place.

QUESTION No. 2.c: What are the legal limits on a local board's duty to determine comparability of instruction for students in a home instruction setting who may or may not claim to be attending a "school"?

Your question refers to the term "home instruction," a phrase not found in the statutes. Thus, an initial question is whether the statement in the statute, "unless the child is otherwise comparably instructed," encompasses the concept of "home instruction."⁵

The Massachusetts Supreme Court, in *Commonwealth v. Roberts*, 34 N.E. 402 (Mass. 1893), held that a statute containing language exempting from school attendance one who is "otherwise instructed," did permit home instruction. In *People v. Turner*, 98 N.Y.S. 2d 886 (1950), the court found that the statute was complied with when parents adequately teach their children at home and their program is not merely designed to evade the compulsory attendance law. The statute under review allowed for education at public schools "or elsewhere" if the education is "substantially equivalent" to that given in the public schools. See also, *State v. Massa*, 231 A.2d 252 (N.J. 1967) (statute allowed for "equivalent instruction elsewhere than at school," and the court held that this indicated legislature's intent to allow for the alternative of home instruction). *Perchemlides v. Frizzle*, slip op. Civil No. 16641 (Mass. Hampshire Super. Ct. Nov. 13, 1978). But see, *State v. Hoyt*, 146 A. 170 (N.H. 1929).

It appears that by the inclusion of the "otherwise comparably instructed" language in the statute, it was the Idaho legislature's intent to allow for instruction in settings other than schools, and that this would include "home instruction," provided that such instruction is "comparable." The statute provides that the question of comparability is to "be determined by the board of trustees of the school district in which the child resides." In making this determination the board must find that the minimum course requirements are being adequately taught by a competent instructor. There is no code provision requiring state certification of home instructors. (In this regard, see *State v. Massa*, *supra*.)

The school board does not have unfettered discretion in making the determination of comparability. Due process concepts must be observed, both in

the procedure employed and in the comparability standards applied. Arbitrary decisions will be subject to court scrutiny and the courts may often be the final determiner of comparability.

QUESTION No. 3: What is the role of the prosecutor and judiciary with respect to enforcement of the compulsory attendance law? What is the extent of prosecutorial discretion? Must a child be expelled as an "habitual truant" before a court obtains jurisdiction under the Youth Rehabilitation Act?

While section 33-206 requires the school board to identify violations of mandatory education requirement, the prosecutors and courts play the major enforcement role after the decision is made to file a petition under the Youth Rehabilitation Act. The board will normally file such petitions through the prosecuting attorney, although it may be able to file directly with the court should the prosecutor not wish to pursue the matter. In any event, the prosecution will be under the direction of the prosecutor. After a petition is filed, the court is to make a preliminary investigation, and thereafter make "informal adjustment," "dismiss the petition" or "set the matter for hearing." Idaho Code § 16-1814(5) allows the court considerable latitude in determining an appropriate order for a child found to be an habitual truant.

Once it has been determined by the court that parents or guardians ". . . are failing, neglecting or refusing to place the child in school . . . or to have the child comparably instructed . . .," misdemeanor proceedings may be brought against such parents or guardians. Idaho Code §§ 33-207, 16-1817. The prosecutor and/or law enforcement officials would be primarily responsible for handling section 33-207 cases.

Prosecutors have traditionally been afforded broad discretion in determining whether or not to pursue a particular case. *State v. Vetsch*, 101 Idaho 595, 596, 618 P.2d 773 (1980); *State v. Horn*, 101 Idaho 192, 610, P.2d 551 (1980); *State v. Wilbanks*, 97 Idaho 346, 509 P.2d 331 (1973); *State v. Harwood*, 94 Idaho 615, 617, 495 P.2d 160 (1972). Prosecutors do have the duty to investigate the evidence and law applicable to a particular set of facts brought to their attention, *Inabler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976); *U.S. v. Napue*, 401 F.2d 107 (1968); Idaho Attorney General Opinion No. 81-7 (1981), although it would appear that a prosecuting attorney who investigates a case would have discretion to decline prosecution, if in his judgment the evidence would not sustain the allegations, and his decision would not generally be subject to judicial interference "unless he is acting illegally or in excess of his powers." *State v. Murphy*, 555 P.2d 1110, 1112 (Ariz. 1976).

With respect to the question concerning the necessity of expulsion as a prerequisite to jurisdiction, the language of sections 33-205 and 33-206 does create some confusion. The statute indicates that when the school board finds a violation a petition is to be filed "as provided in section 33-205." Section 33-205, which describes the expulsion procedure to be used by school boards, states in part:

Any pupil who is within the age of compulsory attendance, who is expelled as herein provided, shall come under the purview of the youth rehabilitation law, and an authorized representative of the board shall file a petition with the magistrate division of the district court of the county of the pupil's residence, in such form as the court may require under the provisions of section 16-1807, Idaho Code.

On its face, the statute might be read as mandating that only those "expelled as herein provided," *and no others*, "come under the purview of the youth rehabilitation law." Such a reading of the statute leads to the anomalous result that the compulsory attendance requirement would only apply to those enrolled in public schools, *i.e.*, those subject to school board expulsion. Therefore, the critical issue becomes whether or not there is a means other than expulsion for placing an "habitual truant" "under the purview" of the youth rehabilitation law.

In a 1982 opinion, District Judge George Granata ruled that while prior expulsion may be one way for the court to obtain jurisdiction over a child in a truancy case, it is not the only way. *Appellate Decision in re Juvenile's Appeal from Magistrate's District*, Case No. 13293-11-81, J. Granata, 5th Judicial District, Cassia County (Jan. 7, 1982). The court noted that the language of section 33-205 quoted above does make it mandatory that a petition be filed *when* a child is expelled. However, Judge Granata further reasoned that under Idaho Code § 16-1801(1), the court also has jurisdiction "[w]here the act, omission or status is prohibited by federal, state, local or municipal law or ordinance by reason of minority only . . ." and therefore a violation of § 33-206 would also place the child "under the purview" of the act, regardless of whether a section 33-205 expulsion has occurred. *Id.* at 34. While the case dealt with the "attendance regulations" clause of section 33-206, the reasoning would also be applicable to the clause dealing with the "requirements of section 33-202." That is, since the section defines "habitual truant" to include "any child whose parents or guardians, or any of them, [who] have failed or refused to cause such child to be instructed as provided in section 33-202," and since truancy is an "act, omission or status prohibited . . . by reason of minority only," the court would have jurisdiction under § 16-1803(1).

Indeed, it would seem contrary to the legislative intent of insuring that all the state's citizens receive a minimum of education, to apply the court's jurisdiction only to those children enrolled in public schools and subject to school board expulsion.

Even if the prior expulsion view is taken, the Child Protective Act may be available as a means of addressing situations in which a child is not or has never been enrolled in a public school, and is therefore not subject to expulsion. That Act, Idaho Code § 16-1601 *et seq.*, establishes " . . . a legal framework conducive to the judicial processing of child abuse, abandonment and neglect cases, and the protection of children whose life, health or welfare is endangered." Under the Act, the court has jurisdiction over any case involving a child "who is neglected," Idaho Code § 16-1603(a), and a child

who is “neglected” is defined to include any child “who is without proper parental care and control, or . . . *education* . . . because of the conduct or omission of his parents, guardian or other custodian . . . ” Idaho Code § 16-1602(n)(1). Idaho Code § 16-1605(2) provides that, “. . . any person or governmental body of this state having evidence of . . . neglect of a child may request the attorney general or prosecuting attorney to file a petition.” Therefore, if the board or its representatives obtain knowledge that a child is likely being neglected in its educational needs, it may request that a petition be filed under the Child Protective Act, thus bringing the case before the court without going through the expulsion process.

¹Nolte, *Home Instruction in Lieu of Public School Attendance*, in *School Law in Changing Times*, pp. 1-15, at 2 (1982).

²Mawdsley & Permut, *Home Instruction for Religious Reasons: Parental Right or State Option?*, 4 Ed.L.Rep. 941, 951 (1982).

³Note, in *State v. Riddle*, *supra*, the court held that a parent may not totally disregard attendance laws and then raise the First Amendment as a defense to prosecution:

. . . is the State . . . required to forbear in the enforcement of the compulsory attendance law upon the suggestion from any parent who wishes to keep his child home from school that there is a conflict between school attendance and freedom of religion? Emphatically we answer this question in the negative.

⁴It might be asked whether state accreditation itself could be used as the sole criteria for distinguishing between “schools” and “non-schools.” While such a device might simplify a board’s task in that it could automatically rule out all unaccredited facilities as “schools,” it is our opinion that the legislature did not intend the phraseology, “public, private or parochial school” of section 33-202, to be synonymous with “accredited school” of section 33-119.

Section 33-119 requires that the state board of education “establish standards for accreditation of any secondary school and set forth the requirements to be met by *public, private and parochial secondary schools . . . for accredited status . . .*,” and allows the state board to “establish such standards for all *public elementary schools* as it may deem necessary.” (Emphasis added). If accreditation were the only means of being classified as a “school” for purposes of compulsory attendance, then attendance at private and parochial elementary “schools” would be ruled out, an apparent violation of the Supreme Court’s ruling in *Pierce v. Society of Sisters*, *supra*, 268 U.S. 510 (1928), that a state may not compel attendance *only* at a public school.

Section 33-119 itself refers to an institution which has accreditation withdrawn, as “*such school*” and states that the board “may reinstate *such school*”

as accredited when in its judgment *such school* has again qualified for accredited status.” (Emphasis added). Thus, it appears that schools failing to meet or apply for accreditation status may nonetheless be called “schools” for other purposes. Indeed, the dictionary definition of “accredit” is “to recognize (an educational institution) as maintaining standards that qualify the graduates for admission to higher or more specialized institutions or for professional practice,” Webster’s New Collegiate Dictionary 8 (1976), indicating that accreditation is a recognized status for particular purposes only, but not necessarily an integral part of the definition of “school” per se. See, *State v. LaBarge*, 357 A.2d 121, 124-25 (Vt. 1976) (*compulsory “school” attendance does not necessarily mean attendance at a school on “approved status”*).

Of course, if the board can verify that a child is attending an accredited school, then the board’s inquiry need not proceed further. An accredited school must be teaching the prescribed courses during the time frame prescribed by the statutes and rules. (See, Idaho Code § 33-512(1); State Board of Education Rules and Regulations For Public Schools K-12, Rules A.4 and E.10 *et seq.* and Idaho Code § 33-1201).

⁵For a more detailed discussion of the legal issues involved in “home instruction,” see Mondschein & Sorenson, *Home Instruction in Lieu of Compulsory Attendance: Statutory and Constitutional Issues*, in *School Law Update — 1982*, pp. 257-68 (N.O.L.P.E., 1983); Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & Ed 189, 206-08 (1983) [*hereinafter*, Lines]; Mawdsley and Permeth, *Home Instruction for Religious Reasons: Parental Right or State Option?*, in 4 Ed. L. Rep. 941-952 (1982); Nolte, *Home Instruction in Lieu of Public School Attendance*, in *School Law in Changing Times*, pp. 1-15 (N.O.L.P.E. 1982); Punke, *Home Instruction and Compulsory School Attendance*, 5 N.O.L.P.E. School L.J. 77 (1975); Moskowitz, *Parental Rights and State Education*, 50 Wash. L. Rev. 623 (1975).

AUTHORITIES CONSIDERED:

1. Constitutions:

U.S. Const. amend. I, XIV.

Idaho Const. art. IX, §9.

2. Statutes:

Idaho Code § 33-202, § 33-205, § 33-206, § 33-207, (1981), § 16-1601 *et seq.* (1979 & Supp. 1983), § 16-1801 *et seq.* (1979 & Supp. 1983).

Wis. Stat. Ann. § 118.15.(1)(a).

Mass. Gen. Laws Ann., ch. 76, § 1.

3. United States Supreme Court Cases:

Ingraham v. Wright, 430 U.S. 651 (1976).

Inabler v. Pachtman, 424 U.S. 409 (1976).

Runyon v. McCrary, 427 U.S. 160 (1976).

Wisconsin v. Yoder, 406 U.S. 206 (1972).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Meyer v. Nebraska, 262 U.S. 390 (1923).

4. Idaho Cases:

State v. Vetsch, 101 Idaho 595, 618 P.2d 773 (1980).

State v. Horn, 101 Idaho 1982, 610 P.2d 551 (1980).

Wyckoff v. Board of County Commissioners of Ada County, 101 Idaho 12, 607 P.2d 1066 (1980).

State v. Wilbanks, 97 Idaho 346, 509 P.2d 331 (1973).

State v. Harwood, 94 Idaho 615, 495 P.2d 160 (1972).

State v. Barney, 92 Idaho 581, 448 P.2d 195 (1968).

Case No. 13293-11-81, J. Granata, 5th Judicial District, Cassia County (Jan. 7, 1982).

5. Other Cases:

U.S. v. Napue, 401 F.2d 107 (1968).

People v. Turner, 263 F.2d 685, *app. dismissed* 347 U.S. 972 (1953).

Bangor Baptist Church v. State of Maine, 549 F.Supp. 1208 (D. Me. 1982).

Hanson v. Cushman, 490 F.Supp. 109 (D.mich. 1980).

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State v. Lowry, 383 P.2d 962 (Kan. 1963).

State v. Priest, 27 So.2d 173 (La. 1976).

Commonwealth v. Roberts, 34 N.E. 402 (Mass. 1893).

Perchemlides v. Frizzle, Slip. op. Civil No. 16641 (Mass. Hampshire Super. Ct., Nov. 13, 1978).

State v. Faith Baptist Church of Louiseville, 301 N.W.2d 571 (Neb. 1981).

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State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

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State v. Riddle, 285 S.E.2d 359 (W.Va. 1981).

State v. Popanz, 332 N.W.2d 750 (Wis. 1983).

6. Other Authorities:

State Board of Education Rules and Regulations for Public Schools K-12, A.4 *et seq.*, E.10 *et seq.*

Atty. Gen. Op. No. 81-7.

Annot., 65 A.L.R.3d 1222 (1975).

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Punke, *Home Instruction and Compulsory School Attendance*, 5 NOLPE School L. J. 77 (1975).

DATED this 16th day of September, 1983

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

BRADLEY H. HALL
Deputy Attorney General
Department of Education

BHH:nc

cc: Idaho Supreme Court
Supreme Court Law Library
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ATTORNEY GENERAL OPINION NO. 83-13

Ms. Ellie Kiser, Chairman
Commission for Pardons and Parole
Board of Corrections, State of Idaho
P.O. Box 8478
Boise, Idaho 83707

Per Request for Attorney General Opinion

QUESTION PRESENTED:

In deciding whether to parole an inmate, is a non-unanimous vote by three of the five members of the commission for pardons and parole valid?

CONCLUSION:

By statute, a majority of the commission for pardons and parole must vote in favor of an inmate parole application before parole can be granted. If two of the five commissioners disqualify themselves then the remaining three must act unanimously in favor of the release.

ANALYSIS:

You have asked for an opinion regarding the legality of a grant of parole by a majority rather than unanimous vote of three members of the commission for pardons and parole. You have placed the question in the context of the commission's handling of a specific case, that of Timothy William McGuire, No. 14022. The facts of the case raise essentially four issues:

- (1) What are the quorum and voting rules of the commission for pardons and parole?
- (2) Of what effect was the unanimous vote of the three commissioners to grant parole at the July 7, 1983, meeting?

(3) Did the commission at its July 8 meeting take valid action to void the tentative parole date extended on July 7, 1983?

(4) Of what effect was the meeting on the 11th of October where two of the three members of the commission voted to affirm the parole date earlier granted?

From a review of the minutes and results of hearings of the commission for pardons and parole on the dates of July 7 and 8, and October 11, 1983, copies of which are attached hereto as Exhibits "A", "B" and "C", respectively, it appears that the following facts are established.

The commission for pardons and parole met on July 7, 1983, to consider the case of Timothy William McGuire, No. 14022. The July 7 meeting was a formal meeting of the five-member commission which meets as such only four times each year. Idaho Code § 20-223; THE POLICIES AND PROCEDURES OF THE IDAHO COMMISSION FOR PARDONS AND PAROLE § II A 1, (revised April 1, 1982) (hereinafter POLICIES AND PROCEDURES MANUAL.) When the *McGuire* case was called, two commissioners, Tony Skoro and Faber Tway, disqualified themselves because they felt they had a conflict of interest. Their recusal left three commissioners to hear the *McGuire* matter: Chairman Ellie Kiser, P. Mark Thompson and Del Ray Holm. After hearing evidence on behalf of the inmate, the three commissioners voted unanimously to grant a parole date to McGuire on or after December 8, 1983. Usually, unless the inmate does something to forfeit the grant, the tentative parole action is a final one and the commission does not reconsider its action. (See, POLICIES AND PROCEDURES MANUAL, §§ II D 6, 7, 8.)

The meeting held the next day was not a regularly scheduled parole hearing date. On the 8th of July one of the three commissioners who voted unanimously in favor of a release of inmate McGuire, Mr. Mark Thompson, was not present, leaving only two commissioners. No other parole hearings were held, but Chairman Kiser expressed to Del Ray Holm her decision to change her vote and to dissent from the unanimous decision rendered in the *McGuire* case the previous day. Although the minutes of the July 8 meeting, like the minutes of the other meetings conducted by the parole commission, are lacking in the detail and substance which would indicate what formal actions, motions, resolutions and discussions were entertained by the parole commission, it appears that Commissioner Kiser's action was treated as a motion to rescind the *McGuire* vote which had been final the day before. Commissioner Holm manifested affirmance of his prior vote. Commissioner Thompson being unavailable, the *McGuire* matter was scheduled for a rehearing at the commission's regular October, 1983, meeting.

When the three commissioners met again in regular quarterly hearing on the 11th of October, 1983, it appears that they ratified the action shown in the minutes of the July 8 meeting which state that . . . "the Commission will void the previously granted tentative parole date of 7/7/83." (Minutes of July 8, 1983, See Exhibit "B".) It appears from the October 11th meeting that the

commission reopened the *McGuire* matter, took new evidence, and voted anew on the parole date. The result of this "lengthy hearing," (Minutes of 11 October, 1983, see Exhibit "C"), was that two of the commissioners voted in favor of reaffirming the December 8, 1983, parole date and one commissioner dissented.

I.

What are the quorum and voting requirements of the Idaho Commission for Pardons and Parole?

In order to understand the quorum and voting principles which are binding upon the commission for pardons and parole, it is necessary to examine the constitutional and statutory authority of the commission as well as its own promulgated rules and regulations. In its function as a parole commission, it is the creation of the legislature. Idaho Code § 20-210 says that the board of correction

shall appoint a state commission of pardons and parole, . . . which shall succeed to and have all rights, powers and authority of said board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho.

The commission shall be composed of five (5) members . . .

In granting *pardons*, the commission of pardons and parole exercises the rights, powers and authority of the board of pardons referred to in art. IV, § 7 of the Idaho Constitution. The authority to *parole* a prisoner is not derived from the constitutional powers of pardon or of commutation of sentences, but rather is predicated upon the legislative authority to establish suitable punishment for various crimes. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975); *State of Idaho v. David Zynn Wilson*, Idaho Ct. App. Case No. 14466, filed November 7, 1983. Thus, the parole board is a creature of the state legislature but looks to art. IV, § 7 of the constitution as well as appropriate statutes in chapter 2, title 20, Idaho Code, for its directions.

In its function as the parole commission it is organizationally and procedurally identical to the board of pardons identified in art. IV, § 7 of the Idaho Constitution. Idaho Code § 20-210. Of critical significance to the case at hand are the constitution's directions pertaining to the voting of the board or commission. "Said *board*, or a *majority* thereof," has the power to carry out its constitutional and statutory duties and it shall take no action "except by the decision of a *majority of said board*, after a full hearing in open session, and until previous notice of the time and place of such hearing . . ." art. IV, § 7, Idaho Constitution, (emphasis supplied).¹

The threshold question is: What is meant by the phrase "a majority of said board?" The answer must be sought in the rules of statutory construction. The fundamental principle of statutory construction is to give effect to the intent of the legislature "as expressed, irrespective of wisdom, expediency, or

possible results.” *Florek v. Sparks Flying Service, Inc.*, 83 Idaho 160, 359 P.2d 511 (1961). Therefore, a statute or constitutional provision that is plain, clear and unambiguous speaks for itself and must be given the interpretation the language clearly implies. *State v. Jonasson*, 78 Idaho 205, 209, 299 P.2d 755 (1956). Giving the language of this law the meaning which is clearly intended, a quorum of the commission consists of three or more members, for three — a majority of the board if acting unanimously — are required in order to transact its business. A majority of the commission must agree in its decisions and not just a majority of a quorum consisting of a majority of the commission.

If the law governing the body provides that certain acts may be done only by a *majority of the members* appointed or elected to the body, it is apparent that the acts specified may not be done legally by a bare majority of a quorum, or of members present.⁴ E. McQuillin, *MUNICIPAL CORPORATIONS*, § 13.31b (3rd ed 1979.) (Emphasis supplied)

In a case similar to the one under consideration, *Talbot v. Board of Education*, 171 Wis. 974, 14 NYS 2d 340 (1939), the court faced a challenge to the validity of a budget set by a public board of seven members where three members of a quorum of four voted for the budget. A Wisconsin statute, similar to but more explicit than art. IV, § 7 of our constitution, provided:

A majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, *if not less than a majority of the whole number of such persons or officers* may perform and exercise any such power, authority or duty.

The court then said and held:

In defense of its procedure, the Board has suggested that the italicized language of the section be interpreted as intending to qualify the word “quorum” and not the word “majority.” Such interpretation, however, would not only do violence to all known rules of legal draftsmanship, but be redundant to the definition of “quorum” given in the preceding clause as “a majority of the whole number.”

⁴Literally, art. IV, § 7 prohibits the board of pardons from remitting any fine or forfeiture, and from making any commutation or pardons except by a majority decision of the board. Thus it is clear that when the legislature provided for the commission of pardons and parole to succeed to the rights, powers, and authority of the board of pardons established by the constitution, it intended that a majority vote would be required in order to exercise the discretionary power to grant parole, for this responsibility — like the power to remit fines and forfeitures or to commute a sentence or to grant a pardon — is its most important function and constitutes the board’s very *raison d’être*.

Talbot v. Board of Education, supra at 343, 344.

In promulgating its rules and regulations, the parole commission has given a literal construction to the constitution's directive: "The commission for pardons and parole will hold regular parole hearings each month. These hearings will normally be conducted by a quorum of three commissioners." POLICIES AND PROCEDURE MANUAL, § II A 1. A following provision is more germane:

A decision to grant or to deny a parole must be made by a majority of the five members of the commission. If, at a regular hearing, the vote of the three commissioners is not unanimous, the case will be continued to a time when a sufficient number of commissioners are present to obtain a majority vote for the full commission.

POLICIES AND PROCEDURE MANUAL, § II D 4.

The interpretation of the constitutional provision by the commission must be accorded some authority.

Such a contemporary construction by a co-ordinate branch of the government, charged with the duty of enforcing the statute, is when called upon by the courts to construe the statute, entitled to consideration and carries great weight for two reasons: First, it is a practical and administrative construction of the act; and second, where extended over a period of time leads to the conclusion that such construction being known to the legislature has received its tacit approval as being correct.

United Pacific Insurance Company v. Bakes, 57 Idaho 537, 545, 67 P.2d 1024 (1937)

It is clear, then, that a quorum of the commission for pardons and parole, "that number of members of the body which when legally assembled in their proper places will enable the body to transact its proper business," consists of three members. 4 McQuillin, MUNICIPAL CORPORATIONS, supra, § 13.27. Unlike other public commissions which may legally transact business with a bare majority vote of a quorum, and despite common law principles to the same effect, the commission for pardons and parole must have the unanimous vote of its quorum in order to fulfill the statutory and constitutional provisions which require that a majority of the board agree on its actions; nothing less will suffice, cf. *People v. Kinney*, 30 Ill 2d 201, 195 N.E. 2d 651 (1964); *Ornitz v. Robuck*, 366 F. Supp. 183 (ED Ky. 1973); *Newbold v. City of Stuttgart*, 224 S.W. 993 (1920) *Wood v. Gordon*, 52 S.E. 261 (W. Va 1905). "The authority which creates a body has the power to fix its quorum." P. Mason, MANUAL OF LEGISLATIVE PROCEDURE FOR LEGISLATIVE AND OTHER GOVERNMENTAL BODIES, § 501(2) (1962). See also 2 Am. Jur. 2d Administrative Law § 196.

No one will gainsay the fact that the *McGuire* case presents unusual circumstances in which coincidentally two members of the commission, for whatever reasons, feel that their conflicts prevent them from rendering an impartial determination. This, however, does not mean that there is not extant a validly constituted quorum of the commission capable of acting. The Kansas Supreme Court faced a similar issue in a case where a parolee objected to a revocation by two of the three members of the state board of probation and parole where the third chair was vacant. The court, in *Murray v. State of Kansas*, 394 P.2d 88, 91 (1964) quoted one of its previous decisions and cited abundant other authorities for the principle that:

If there are sufficient members of the council remaining in office who vote for and sanction the work to be done . . . to constitute a majority of the entire constituent membership, and not merely a majority of a quorum, it seems that their official action is valid. Tending to support this view are *Saterlee v. San Francisco*, 23 Cal. 314; *State ex rel. Harty v. Kirk*, 46 Conn 395; *Knoxville v. Knoxville Water Company*, 107 Tenn 647, 64 S.W. 1075; 61 L.R.A. 888; 2 Dillon, MUNICIPAL CORPORATIONS (5th Ed.) § 534; 2 McQuillin, MUNICIPAL CORPORATIONS, §§593, 594; and *Hartzler v. City of Goodland*, 97 Kan. 129, 133, 154 P. 265, 267.

The Kansas Supreme Court then held that:

The authority conferred upon such administrative body may be exercised by two members of the board . . . where both members concur in the action taken, and the position on the board to be held by the third member is vacant.

Murray v. Kansas, supra, at 92.

In the present case three members of the five member commission, "a majority of said board," constituted a quorum capable of acting. The disqualification of two members has not altered the power of the commission to act.

Where a number required by statute or other rule to constitute a quorum is fixed at a definite number, the diminution of the members of the body will not change the number necessary for a quorum.

Mason, LEGISLATIVE MANUAL § 502(3).

That the commission is not unanimously in favor of a release for Mr. McGuire cannot alter the legal fact that there is a majority of the commission able to make binding decisions.

A zealous advocate for another point of view might point to the "Forward" of the POLICIES AND PROCEDURES MANUAL which states that:

The commission reserves the right to deviate from these normal procedures whenever it determines that extraordinary circumstances so warrant. The commission additionally reserves the right to act at its discretion in circumstances not specifically outlined by its policy.

There being a majority of the commission able to act, no emergency exists which would warrant abrogating the rules and regulations of the commission even if it had the power to diverge from its grant of authority. Moreover, "Where the statute or charter prescribes the number that shall constitute a quorum, it cannot be changed by the body." McQuillin, *MUNICIPAL CORPORATIONS*, *supra*, § 13.27a.; cf. *York v. Board of County Commissioners of Walla Walla County*, 28 Wash. 2d 891, 184 P.2d 577; *Flint v. Horsley*, 25 Wash. 648, 66 P.59; and *Klass v. County Commissioners*, 140 Wash. 43, 248 P. 77. *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 156 Cal. Rptr. 240 (1979). The commission, through its rules and regulations, does not have the power to prescribe any procedure different than that which is set up in the statute and the constitution of our state for "No rule that conflicts with a rule of a higher order is of any authority . . ." Mason, *LEGISLATIVE MANUAL*, *supra*, § 518(2). When the constitutional and statutory provisions prescribe that a majority of the commission must make any decisions regarding parole, it does not lie within the power of the commission to follow a procedure in derogation thereof.

II.

Of what effect was the July 7th meeting and the unanimous vote for a tentative parole date?

By law the commission must meet at least quarterly after notice is given in a newspaper of general circulation listing the names of all prisoners making application for pardon, Idaho Code § 20-213. The July 7th meeting was a regularly scheduled quarterly meeting of the five-member commission as prescribed by the statute and in section II. A.1 of the *POLICIES AND PROCEDURES MANUAL*. The first notation on the minutes of the hearing states that Commissioners Tway and Skoro disqualified themselves from hearing the case because both commissioners, for reasons not appearing, believed that they had conflicts of interest regarding McGuire's case. It has been said that disqualification:

may be warranted whenever a public official, by reason of his personal interest in a matter, is placed in a situation of temptation to serve his own purpose, to the prejudice of those for whom the law authorizes him to act.

McQuillin, *MUNICIPAL CORPORATIONS*, *supra*, § 13.35.

The recusal by the two commissioners left a quorum of three members which then heard evidence regarding Mr. McGuire's eligibility for parole.

The minutes end with a statement that "The three Commissioners hearing the case, this date, did elect to grant a tentative parole date on or after December 8, 1983." See Minutes of July 7 meeting, Exhibit "A". It would appear from the minutes that this was a final action and that the commission did not reserve any motions to reconsider the case at a later time nor did the commission fix the following day for further proceedings; consequently, one must conclude that on July 7, 1983, there was a binding and legal vote to extend parole.

III.

Did the commission at its July 8 meeting take valid action to void the tentative parole date extended on July 7, 1983?

The minutes of the July 8, 1983, meeting are denominated "review of tentative parole date," Exhibit "B". Because the narrative of the minutes of this meeting consists of only four sentences it is difficult to understand by what authority and by what procedures this meeting was conducted. Substantial doubt as to its validity arises because the meeting was not properly noticed nor was there a quorum present for conducting any business relating to the *McGuire* case, two members having disqualified themselves. "A less number than that required for a quorum cannot convene and transact business. Their acts will be considered void." McQuillin, *MUNICIPAL CORPORATIONS*, *supra*, § 13.27a. No legal significance can, therefore, be attached to the conclusions reflected in the minutes that the "commission voted" or that the "Commission does elect to schedule a re-hearing in October, 1983," or, "the Commission will void the previously granted tentative parole date of 7/7/83 based on the dissent vote cast on 7/8/83."

The lack of notice of its intention to again consider the *McGuire* matter as required by Idaho Code § 20-213 left the commission on July 8, 1983, in a posture reminiscent of that of the three member board of pardons on January 4, 1937, when, without compliance with its notice requirements, it proceeded to vote two-to-one in favor of a commutation in Blackie Miller's case. The Idaho Supreme Court held that:

The action of the board of pardons taken on December 5, 1936, in the matter of the application of this petitioner in denying said application for pardon ended the function of the notice theretofore given and the said meeting of the board of pardons on January 4, 1937, was therefore without notice and the commutation therein granted was void.

Miller v. Meredith, 59 Idaho 385, 389, 83 P.2d 206 (1938).

After the July 7 meeting adjourned *sine die*, the next valid action by the commission took place on the 11th of October, 1983. Any action taken on July 8, 1983, was void.

IV.

Of what effect was the vote on October 11, where two of the three members of the commission for pardons and parole affirmed the previously granted parole date?

The minutes of the parole commission meeting on the 11th of October show that a quorum was again present consisting of the same three members who unanimously voted on the *McGuire* case on the 7th of July, 1983. Regardless of the invalidity of any actions taken on the 8th of July, Chairman Kiser's decision to dissent was treated as a motion to rescind the previous grant of parole. Under the accepted rules of parliamentary procedure, the motion would have failed for lack of majority support. Mason, LEGISLATIVE MANUAL, *supra*, § 473. Were the commission without rules or regulations to guide its procedures, then resort to and reliance upon such standard authorities on administrative law and parliamentary procedure would be indicated.

While its rules do not with specificity address the motion-by-motion procedures for transacting its business, the rules do, clearly, speak to the question of reconsideration of parole once granted.²

The commission's rules and regulations contain a clear and specific provision which allows the commission to reconsider a previous decision to grant parole without going through complex formalities of motions and votes to rescind.

If, after a parole or final release date has been granted but before the inmate is released, the commission receives additional information concerning the inmate which might reasonably have resulted in a parole or release date not being granted at a prior hearing, the commission may cancel the date granted and reschedule a new parole hearing.

POLICIES AND PROCEDURE MANUAL. II. D 8.

A review of the minutes from July 7 and October 11, 1983, shows that on the latter date the commission received additional information concerning the inmate. At the July 7th meeting the minutes reflect a presentation almost unilaterally weighted in favor of the prisoner's release. There is no indication that anyone represented the interests of the State of Idaho — no one spoke from the prosecution or law enforcement point of view. Judging by the minutes, on October 11th the commission was presented with more balanced evidence of McGuire's suitability for parole; witnesses appeared on behalf of

²The right of the commission for pardons and parole to rescind parole eligibility is not violative of federal due process rights guaranteed by the Fourth and Fourteenth Amendments. *Jago v. Van Curen*, 454 U.S. 14, 70 L. Ed. 2d 13, 102 S. Ct. 31 (1981).

the defendant as well as for the state. It is reasonable to conclude that had the commission been presented with the information of the 11th of October at the hearing on the 7th of July the original vote to release would not have been unanimous and the tentative parole date would not have been granted.

Reconsideration under § II D 8 of the commission's POLICIES AND PROCEDURE MANUAL is not actuated by any formalistic rules of parliamentary procedure. It is a very pragmatic rule which allows this commission of such serious stewardship and broad discretion to reconsider its actions before they become irrevocable.

After the rehearing, the three members of the parole commission again voted two-to-one in favor of release. As discussed above, a non-unanimous vote of three commissioners was insufficient to set a release date for the inmate.

Until such time as there is a change in the composition of the board or a change in McGuire's circumstances which would make him fit for a parole release, the status quo will undoubtedly continue. The conclusion offered to you at this time in answer to your question is that the commission does not have the power on a two-to-one vote to extend a valid parole date to the inmate.

AUTHORITIES CONSIDERED:

1. Constitutions:

Idaho Constitution: art. IV, § 7.

2. Statutes:

Idaho Code § 20-210

Idaho Code § 20-223

Idaho Code § 20-213

3. Rules and Regulations:

The Policies and Procedures Manual of the Idaho Commission for Pardons and Parole, Forward, § II A 1; § II D7; § II D8

4. Idaho Cases:

Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975)

State v. David Zynn Wilson, Idaho Ct. App. Case # 14466, filed November 7, 1983.

Florek v. Sparks Flying Service, Inc., 83 Idaho 160, 359 P.2d 511 (1961)

State v. Jonasson, 78 Idaho 205, 299 P.2d 755 (1956)

United Pacific Insurance Company v. Baker, 57 Idaho 537, 67 P.2d 1024 (1937)

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

5. Cases Cited From Other Jurisdictions:

Talbot v. Board of Education, 171 Wis. 974, 14 NYS 2d 340 (1939)

People v. Kinney, 30 Ill. 2d 201, 195 N.E. 2d 651 (1964)

Ornitz v. Robuck, 366 F. Supp. 183 (ED Ky. 1973)

Newbold v. City of Stuttgart, 224 S.W. 993 (1920)

Wood v. Gordon, 52 S.E. 261 (W. Va. 1905)

Murray v. Kansas, 394 P.2d 88 (1964)

York v. Board of County Commissioners of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577 (1947)

Flint v. Horsley, 25 Wash. 648, 66 P.59 (1901)

Klass v. County Commissioners, 140 Wash. 43, 248 P. 77 (1926)

Grimm v. City of San Diego, 94 Cal. App. 3d 33, 156 Cal. Rptr. 240 (1979)

6. Other Authorities:

4 McQuillin, Municipal Corporations (3d Ed. 1979) § 13.31b; § 13.27, § 13.27a; 13.35

Mason, Manual of Legislative Procedure for Legislative and Other Governmental Bodies, § 501 (2) (3); § 518 (2)

2 Am. Jur. 2d Administrative Law § 196

DATED this 2nd day of December, 1983.

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

ANALYSIS BY:

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice Division

Exhibits not included. May be viewed on demand at the office of the Attorney General.

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January 19, 1983

The Honorable David Little
Idaho State Senator
Joint Finance-Appropriations Committee
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Re: State Range Land Fire Protection District

Dear Senator Little:

In response to your committee's letter of December 13, 1982, concerning the state's liability for fires originating on state land, the following is my analysis of the four questions posed by your committee.

ISSUE NO. 1:

Where no statutory provision exists, what is the state's liability for fires originating on state-owned range land?

CONCLUSION:

The state must exercise reasonable care in preventing the spread of fires of accidental or unknown origin which occur on state-owned lands.

ANALYSIS:

Under the Idaho Tort Claims Act (Idaho Code §§ 6-901 et seq.), the state has waived its governmental immunity from tort claims: "[E]very governmental entity is subject to liability . . . where the governmental entity if a private person or entity would be liable for money damages under the laws of Idaho." Thus, absent any statutory provision, the state's liabilities are controlled by Idaho's common law.

There is little recent legal authority concerning a private landowner's liabilities for fires not started by an act of the owner or his employee but which originate from his lands and spread to other adjoining lands and thereby cause damage. Most legal precedent concerns fires started by railroad cars on railroad company land which spread to other lands. The general rule developed from these cases is that the owner of property is not liable for the spread of a fire which is accidentally started thereon by the act of a stranger or by some other cause with which he has no connection, unless he is guilty of some negligence in respect to the condition of the premises or in failing to prevent the spread of the fire. See 18 A.L.R.2d 1081, § 12, "Fire — Liability for Spread."

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

However, a person on whose premises an accidental fire starts must exercise reasonable care to prevent it from spreading after he has notice of the fact, although he has no connection with its origin. This rule was applied in *Spence v. Price*, 48 Idaho 121, 279 P. 1092 (1929) and *Goodwin v. Price*, 48 Idaho 129, 279 P. 1094 (1929). There, the defendant permitted fires of unknown origin to burn on his meadows for over fifty days without availing himself of the opportunity to put out the fire which he could have easily done. The fire spread to adjoining property which contained valuable timber stands. The owners of the timber successfully sued to recover damages caused by the fire. Whether there is negligence depends on each particular set of facts. However, failure to respond quickly to notice of a fire on the owner's land (*Arnhold v. United States*, 285 F.2d 326 (C.A. 9th Cir. 1960), failure to determine if the fire has been extinguished (*Arnhold v. United States, supra*), and inadequate methods used in suppressing a fire (*Criscola v. Guglielmelli*, 308 P.2d 239 (Wash. 1957)), have been held to be grounds for finding negligence in suppressing a fire which spread to another's land.

There is a significant possibility, under the authority cited above, that the state would be liable for fires which originate on state lands and which spread to other land thereby causing damage where the state failed to exercise reasonable care to prevent its spreading.

ISSUE NO. 2:

What is the responsibility of the Department of Lands, when funds are appropriated to extinguish fires on state lands, but it receives no appropriations to engage in contractual arrangements with the Bureau of Land Management for fire protection activities?

CONCLUSION:

The legislature's decision not to appropriate money to engage in reciprocal contractual agreements with the BLM for fire protection is a discretionary decision which will not subject the state to liability for failure to adequately fund the state's fire protection services.

ANALYSIS:

It is initially noted that the Department of Lands does have the statutory authority under Idaho Code § 38-104(1)(a) to enter into contractual agreements with the Bureau of Land Management for fire protection services.¹ This statute further provides that the expense of such an agreement is payable from appropriations and funds available for protection of forest lands. The "operating expenditure" class provides for expenses for "services." Contractual agreements with the BLM would be reimbursed through the operating expenditure class as a service expense.

¹ The duty of an occupier of land to take reasonable steps to prevent the spread of a fire is non-delegable in nature. *Arnhold v. United States*, 284 F.2d 326 (C.A. 9th Cir. 1960). Thus, any negligence on the part of the BLM in controlling fires on state land would be imputed to the state.

However, even if the legislature were to pass a bill which prohibited the Department of Lands from expending money on BLM fire protection services, the state is still obligated to make all reasonable efforts to extinguish fires on state lands of which it has notice. Thus, the question again is whether the state has taken reasonable care to prevent the fire from spreading.

However, in determining whether reasonable care was taken to prevent the spread of a range fire, the question of whether the legislature should have appropriated money for the Department of Lands to enter into contractual arrangements with the BLM for fire protection would probably not be addressed by the courts because such decisions are legislative in nature and are still protected by governmental immunity. Thus, in *Hines v. Charlotte*, 72 Mich. 278, 40 N.W. 333 (1888) the plaintiff's suit, which alleged the legislature's failure to enact certain fire protection measures, was dismissed based upon the legislature's absolute immunity concerning what laws should and should not be enacted. See also *Forsyth v. Atlanta*, 45 Ga. 152 (1871); c.f. *J.S.K. Enterprises, Inc. v. Lacey*, 6 Wash. App. 433, 493 P.2d 1015 (1972); 57 Am. Jur.2d, *Municipal, etc., Tort Liability*, § 114.

The Idaho Tort Claims Act provides a governmental entity and its employees immunity from any claim which is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity. See Idaho Code § 6-904(a). "Discretionary" acts are those which involve planning or policy making and include those decisions which require the exercise of reason in the adaption of means to end, discretion as to how, when, and where the act shall be done, and the courses to be pursued in the attainment of the objective. *Miller v. U.S.*, 410 F. Supp. 425 (6th Cir. 1976). Thus, for example, the government's decision in *McGillic v. U.S.*, 153 F. Supp. 565 (8th Cir. 1957) to construct dikes to protect a federal nursery from floods may have been negligent, but the decision was discretionary and thus immune from liability.

The legislature's decision not to appropriate funds for BLM contracts would be clearly legislative and discretionary in nature and not subject to second-guessing by the courts. c.f. *Loger v. Washington Timber Products*, 8 Wash. App. 921, 509 P.2d 1009 (1973); *Collins v. Martin*, 139 A. 122, 290 Pa. 388 (1934).

ISSUE NO. 3:

Who has the responsibility for fire suppression on so called "no-man's" land?

CONCLUSION AND ANALYSIS:

Our understanding is that "no-man's" land refers to state-owned lands located outside any fire protection district. The state's liability for fires originating on these state lands is as discussed in Issue No. 1.

ISSUE NO. 4:

Is there any obligation on the part of the state to pay the BLM, where no contractual arrangement exists for controlling fires on state-owned range land?

CONCLUSION:

The state is not obligated to pay for BLM fire protection services where no express or implied contractual arrangement exists. The state is liable to reimburse the BLM if the state does not take reasonable steps to prevent a fire on state-owned land which spreads or threatens to spread to BLM land.

ANALYSIS:

Absent any express agreement between the state and the BLM, any obligation of the state to reimburse the BLM must arise as promise implied from the surrounding circumstances. If an agreement to reimburse the BLM cannot be implied from the surrounding circumstances, the BLM services will be viewed as volunteered and no obligation to reimburse would be imposed.

Any conclusion of whether liability exists depends upon the facts and circumstances of each case. There must exist some objective manifestations of promise by the state to pay for services. In general, when a service is performed prior to reaching any agreement to pay for such service, the service is deemed to be volunteer and any promise thereafter to pay is gratuitous. See, e.g., *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535 (1978). However, if the state has reimbursed the BLM in the past for services rendered, this may create a basis for implying a promise to pay for future fire protection services. See, e.g., *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 428 P.2d 524 (1967). The state may avoid this ambiguity by a clear expression of the state's intent not to reimburse communicated to the BLM.

Finally, if a fire originated on state land and spread or threatened to spread to neighboring BLM land through the state's lack of reasonable care to prevent its spreading, the state would likely be obligated to reimburse the BLM for services it provided in suppressing the fire. *Spence v. Price, supra*.

Neil Tillquist
Deputy Attorney General
Division of Natural Resources

NT/tl

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

February 9, 1983

The Honorable Warren H. Gilmore
Ada County Courthouse
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: District Court Fund — Permitted Uses

Dear Judge Gilmore:

You have presented three questions about the district court fund for our consideration: (1) Is it proper to utilize the fund balance in any current year to satisfy expenditures or liabilities incurred in excess of the budget appropriation for that year? (2) Can surplus money in the district court fund be diverted to other departments? and (3) If the fund balance of the district court fund cannot be utilized to fund expenditures or liabilities in excess of appropriations, what specific remedies are available to insure that the courts are sufficiently funded in the current year?

(1) Title 31, chapter 16 sets forth the county budget law. It provides in part that the counties, including the district court, are to operate upon a cash basis and that *annual expenditures shall not exceed appropriations* except in certain specified emergency situations. Idaho Code §§ 31-1605, 31-1606, 31-1607. Section 31-1605 states in part that:

Said budget as finally adopted for the ensuing fiscal year shall specify the fund or funds against which warrants shall be issued for the expenditures so authorized, respectively, and the aggregate of expenditures authorized against any fund shall not exceed the estimated revenues to accrue to such fund during the ensuing fiscal year from sources other than taxation together with any balances and plus revenues to be derived from taxation for such ensuing fiscal year, . . .

While the foregoing in conjunction with Idaho Code § 31-867 authorizes expenditures from the district court fund, those expenditures must not exceed the appropriation for the given fiscal year.

Thus, it *would* be proper to use fund balances to satisfy expenditures or liabilities incurred which are *within* the budget appropriations for that year. It *would not* be proper to use fund balances for expenditures in excess of the budget appropriations for any year.

Any expenditure in excess of appropriation that did not come within one of the exceptions listed below would probably be unlawful. The county commissioners, the auditor, and the treasurer could be personally liable and recovery could be had from them and upon their bonds if they exceeded the

appropriations established in the budget. Idaho Code §§ 31-1606, 31-1607, 31-2017. *Garrity v. Board of County Commissioners*, 54 Idaho 342, 34 P.2d 949. There are certain exceptions which allow expenditures in excess of appropriations. They are:

(a) For judgments or orders of court against the county. (Idaho Code §§ 31-1502, 31-1607, 31-606; *H.J. McNeel Inc. v. Canyon County*, 76 Idaho 14, 277 P.2d 554);

(b) Pursuant to orders of court adjusting or changing the budget appropriations, (Idaho Code §§ 31-1502, 31-1607; *Bonneville County v. Hopkins*, 94 Idaho 536, 493 P.2d 395);

(c) Pursuant to changes in budget appropriations authorized by law and appropriated by the county commissioners such as receipt of unexpected funds from federal or state government (Idaho Code § 31-1605);

(d) In extra-ordinary situations if the commissioners were to fail to provide for the operation of some county function such as the jail, the courts, etc., the district court could order payment to maintain such functions, (See Attorney General's Opinion 79-2);

(e) For expenditures to meet emergencies as provided for in Idaho Code § 31-1608.

(2) The question of whether the surplus money in the district court fund can be diverted to other departments has been answered in the affirmative in Attorney General's Opinion 78-36. That opinion states that if the commissioners so desire, they may use any monies over and above appropriations from the district court fund for other purposes.

It should be noted that Idaho Code § 31-867 states that balances in the district court fund may be accumulated sufficient to operate the district court fund on a cash basis but that such balances shall not exceed 60% of the total budget for court functions for the current year. This would appear to mean that any balances above 60% (or a lesser figure as determined by the county commissioners) may be used for other functions determined at the time of the setting of the budget under Idaho Code §§ 31-1601 through 31-1605.

(3) The remedies available are to some extent set forth in Attorney General's Opinion 79-2. For instance, an action might be maintained in the district court to compel the commissioners to maintain the jail, the courts, or other functions of government if they have failed to do so. Other remedies such as a declaratory judgment action or some form of writ may also be used.

The budget procedure as provided for in chapter 16 of title 31 would also appear to present a method of obtaining proper funding. *Williams v. Board of County Commissioners of Benewah County*, 48 Idaho 462, 282 P. 367 in-

dicates that where the county commissioners failed to provide a sufficient salary for the clerk of the probate court in the county budget, the proper action to obtain such salary was by appeal to the district court from the lack of action by the county commissioners. If the appeal failed or if no appeal was taken, no larger payment could be made for that salary; only the amount appropriated could be paid.

In *Planting v. Board of County Commissioners of Ada County*, 95 Idaho 474, 511 P.2d 301, a county clerk was successful in obtaining additional salary by suit against the county commissioners. That case was an appeal under Idaho Code §§ 31-1509, et seq., from the county commissioners' order reducing the salary of the county clerk.

In summary, it is our opinion that it would be improper to use the district court fund to finance expenditures in excess of appropriations unless those expenditures came within one of the listed exceptions to the county budget laws. While the district court fund has been established to finance district court activities, monies in excess of the courts' budget may be diverted to other lawful uses at the commissioners' discretion during the budget setting process. Finally, the normal remedies to compel action on the part of public officials are available to assure adequate funding for the district court.

If you have additional questions, please call or write.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

RGR/tl

February 14, 1983

Honorable Ron Bieteispacher
Senator, State of Idaho
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Bieteispacher:

You have requested my opinion concerning events surrounding the senate consideration of House Concurrent Resolution 10. Specifically, you have asked when a concurrent resolution is effective; whether it is effective upon filing with the secretary of state's office, upon receiving the signature of the presiding officers of each house, or upon final action of the second body to

consider the resolution. Second, you have inquired, if the concurrent resolution is effective upon final action of the second house, whether it is final upon completion of the yeas and nays or upon disposition of a motion to reconsider.

Before answering the questions posed, it should be noted that although you have requested a formal opinion of the Attorney General, due to the urgency of your request and the necessarily brief amount of time to respond to your concerns, the following is provided informally for your guidance. Second, this opinion is advisory only. This is especially so to the extent it relies upon an interpretation of senate rules, as art. 3, § 9 of the Idaho Constitution states: "Each house when assembled shall . . . determine its own rules of proceeding . . ." Accordingly, so long as the rules do not conflict with any provision of the Idaho or federal Constitutions, they are valid and subject to ultimate interpretation by the senate. See *Keenan v. Price*, 68 Idaho 423, 437, 195 P.2d 662 (1948).

In order to illustrate the conclusions of law contained in this informal guideline, a brief statement of the facts is appropriate. Idaho Constitution, art. 3, § 23, provides a mechanism for establishing a rate of compensation for members of the legislature. It creates the Citizens' Committee on Legislative Compensation with the duty to establish the rates of compensation and expenses for a two-year legislative period. The section, however, allows the legislature to reject or reduce the levels of compensation established by the commission:

The rates thus established shall be the rates applicable for the two year period specified unless prior to the twenty-fifth legislative day of the next regular session, by concurrent resolution, the senate and house of representatives shall reject or reduce such rates of compensation and expenses.

This language is repeated in Idaho Code § 67-4066, which implements art. 3, § 23.

The questions you have posed concern whether House Concurrent Resolution 10 was effective in rejecting the rates of compensation prior to the twenty-fifth legislative day. The Journal of the Idaho House of Representatives and the "blueback" accompanying HCR 10 indicate that by a vote of 54-14-2 it passed the house on January 27, 1983, the eighteenth legislative day. The Senate Journal and the "blueback" indicate that HCR 10, after having been referred to committee and reported to the floor without recommendation, was read for a third time and by a vote of 29-6 passed on February 2, 1983, the twenty-fourth legislative day. The documents indicate that the resolution was held for reconsideration after notice was served according to Senate Rule 38(A). Further, the documents show that the motion to reconsider was voted upon on February 3rd and failed by a vote of 13-22. Finally, the records show that HCR 10 was signed by the speaker of the house and president of the senate on February 7th and filed that day in the

office of the secretary of state. The signature of the President of the Senate indicates the resolution passed the senate on February 2, the twenty-fourth legislative day. Accordingly, if the resolution effectively can reduce or reject legislative pay only after it is filed with the secretary of state or signed by the president of the senate and speaker of the house, or upon failure of the motion to reconsider in the senate, it is not effective to reduce legislative compensation as the action was not completed prior to the twenty-fifth legislative day.

The first question you have asked is whether a concurrent resolution must be filed in the office of the secretary of state before it is effective. It is my conclusion that such filing is not a condition precedent to the effectiveness of the concurrent resolution. First, it should be noted that concurrent resolutions do not derive their validity from the Constitution or the statutes. In fact, there is no constitutional section or statute authorizing the legislature to pass concurrent resolutions nor controlling their consideration or disposition. Rather, they are a creature of history and legislative rules. Joint Rule 6 states: “. . . concurrent resolutions . . . shall, after being passed, be filed with the secretary of state, rather than being submitted to the governor for consideration.” It is possible to argue that this provision creates a mandatory duty that all resolutions be filed with the secretary of state and not be effective until such filing takes place. In the context of the rule, however, such interpretation probably is not appropriate. The rule simply states what is to happen to the resolution “*after being passed*.” It is most likely that the rule was intended to facilitate the duty of the secretary of state set forth in Idaho Code § 67-901 to take custody of “all acts and resolutions passed by the legislature.” Idaho Code § 67-902 further provides that all “printed bills and all amendments thereto introduced in their respective houses” shall be filed with the secretary of state “and the same shall constitute official records of the State of Idaho.” This provision includes, obviously, legislative acts and resolutions which were not approved. Further, submission of concurrent resolutions which have been approved by the legislature to the secretary of state will facilitate the secretary of state’s duties to publish such resolutions in the session laws, as required by Idaho Code § 67-904. It should be seen that the secretary of state’s function in this regard is merely that of archivist for the legislature.

Support for this position can be garnered from the few cases which have discussed the nature of legislative resolutions. Distinguishing “resolutions” from “laws,” most courts have relied upon Webster’s which defines a resolution as “a formal expression of opinion, will, or intent by an official body or assembled group.” See, *McGinley v. Scott*, 401 Pa. 310, 164 A.2d 424, 430 (1960), and *Kalamazoo Municipal Utilities Assn. v. City of Kalamazoo*, 345 Mich. 318, 76 NW2d 1 (1956). Other courts have arrived at similar definitions. The Court of Appeals of Illinois, defined a resolution as “a form by which the legislative body expresses an opinion.” *The Village of Gulfport v. Buettner*, 114 Ill. App. 2d 1, 251 NE2d 905, 909 (1969). These definitions indicate that it is the expression of a resolution which is important. It is difficult to understand, in the absence of a compelling justification,

why the effect of an expression of a legislative will ought to be delayed until it is filed with the legislature's archivist. This is especially so when the legislature must act in accordance with art. 3, § 23 of the Idaho Constitution prior to the twenty-fifth legislative day. As a concurrent resolution takes considerable time to be approved by both houses, if all rules are followed, it would be unreasonable to infer an intent on the part of the framers, that the resolution must be filed in the office of the secretary of state prior to the twenty-fifth day. The twenty-five day limit undoubtedly was placed in art. 3, § 23 to make it difficult to reduce or reject the recommendations made by the citizens' committee unless there is substantial concurrence in both legislative bodies in support of such a rejection or reduction.

The only cases of which we are aware which provide that an action shall not be effective prior to its filing with the secretary of state deal with gubernatorial vetoes which are required by various state constitutions to be filed with the secretary of state's office by a date certain or be invalid. See, Idaho Constitution, art. 4, § 10, and *Cenarrusa v. Andrus*, 99 Idaho 404, 582 P.2d 1082 (1978). See also, *In re Interrogatories of the Governor Regarding Certain Bills of the Fifty-first General Assembly*, 195 Colo. 198, 578 P.2d 200 (1978), construing Colorado Constitution, art. 4, § 11, which provisions are similar to the Idaho Constitution. We are aware of no case which has held a legislative act to be invalid because it was not filed with the secretary of state.

From the foregoing it is my impression that a court would probably conclude that the requirement that concurrent resolutions be filed with the secretary of state is directory rather than mandatory, so such filing would not be viewed as a condition precedent to the effectiveness of the resolution. See, *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948), and *Smith v. Cenarrusa*, 95 Idaho 818, 475 P.2d 11 (1970), where the Idaho Supreme Court applied similar requirements in a directory rather than mandatory fashion.

The second question you have asked is whether a concurrent resolution is valid prior to being signed by the presiding officer of each house and the chief clerk or secretary of the originating house. Again, as before, there are no statutory or constitutional provisions requiring concurrent resolutions to be signed in such a manner. Art. 3, § 21, Idaho Constitution states: "All bills or joint resolutions passed shall be signed by the presiding officers of the respective houses." This provision specifically does not require concurrent resolutions to be so signed. Again, the only requirements for signature can be found in the legislative rules. See Joint Rules 2 and 5, House Rules 30 and 61, and Senate Rules 17(B) and 15.

It is difficult to see why an expression of legislative will or opinion ought to be effective only after signature of the presiding officers of either house and the chief clerk of the originating house. In these circumstances the signatures ought to be viewed as simply a method of proving the accuracy of the contents of the resolution and the fact that the resolution duly passed. Other state courts uniformly have announced this to be the purpose of such signatures.

See, e.g., *Thompson v. Saunders*, 52 NM 1, 189 P.2d 87 (1948); *Citizens' Council Against Crime v. Bjork*, 84 Wash. 2d 891, 529 P.2d 1072 (1975); *Harris v. Shanahan*, 1982 Kan. 183, 387 P.2d 771 (1963); *Childers v. Couey*, 348 So. 2d 1349 (1977) and Annotation, Effect of Failure of Officers of Legislature to Sign Bills as Required by Constitutional Provisions, 95 A.L.R. 278.

The only real controversy concerning the requirement that legislative acts be signed by the presiding officers concerns whether constitutional provisions which require such signature are to be construed as mandatory or directory. As evidenced by the annotation at 95 A.L.R. 278, the majority of states conclude that such constitutional provisions are mandatory and therefore if an act is not signed by the presiding officers it cannot be given effect. Some states, such as Montana, have formulated this rule based upon provisions such as Montana Constitution, art. 3, § 29, which says that all legislative acts are to be construed as "mandatory and prohibitory, unless by express words they are declared to be otherwise." See, *Vaughn & Ragsdale Co. Inc. v. State Board of Equalization*, 96 P.2d 420 (Mont. 1939).

Other states, however, have adopted a different approach. Kansas and Nebraska appear to construe such constitutional provisions as directory rather than mandatory. See, Annotation, 95 A.L.R. 278 at 284-87. Recently, the Utah Supreme Court has chosen to follow the minority position, in *Dean v. Rampton*, 538 P.2d 169 (Utah 1975). Therein, the court construed the Utah Constitution to be directory only, concluding that if the signature of the presiding officers of each house were to be required before a legislative act could become effective, the failure or refusal of the presiding officer to sign an act would give that person a veto power over the legislation. Noting that the purpose for requiring the presiding officers' signatures was evidentiary in nature, the court stated at 538 P.2d 171:

We hold that the requirement of the constitutional provision in question is simply to give evidence of the accuracy and authenticity of the bill, and if the officer fails or refuses to sign within the five day period, the court can determine from the journals of each house whether the proceedings related to the enactment were accurate and authentic.

The latter line of cases expresses the better reasoned approach and one which the Idaho courts would likely follow. Keeping in mind that the requirement of signature serves merely evidentiary purposes, the Idaho Supreme Court has stated that the journals of the house and senate are the preferred sources of evidence concerning enactment and content of legislation. See, *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974), and *State ex rel. Brassey v. Hansen*, 81 Idaho 403, 342 P.2d 706 (1959). Citing *Burkhart v. Reed*, 2 Idaho 503, 22 P.2d 1 (1889), and *State v. Eagleson*, 32 Idaho 280, 181 P. 934 (1919), the court stated in *Keenan v. Price*, 68 Idaho 423, 435, 195 P.2d 662 (1948): "We take judicial notice of . . . the journals of the legislative bodies to determine whether an act of the legislature was constitutionally passed and for the purpose of ascertaining what was done by

the legislature.” Because Idaho has adopted the “journal entry rule,” although the question has not been addressed directly by the Idaho Supreme Court, it would probably determine that the signature required by legislative rules, being merely an evidentiary matter and subservient to the evidence provided by the journal, is merely directory. Therefore, the failure of a resolution to contain the signature of the presiding officers and chief clerk or secretary of the originating house would not be fatal to its effectiveness. Accordingly, I conclude that the signature of the presiding officers and chief clerk or secretary of the originating house are not required before a concurrent resolution is effective.

The final question which you have asked is, if a concurrent resolution is effective upon final action in the second house, whether such action is final upon the yeas and the nays approving it, or upon the consideration of a motion to reconsider the yeas and nays. Again, it should be underscored that this portion of my legal analysis rests entirely upon senate rules and joint rules concerning which the senate, and house and senate in concert, respectively are the final arbiters. Our opinion on this matter, of course, is merely advisory.

The analysis of the effect of senate reconsideration HCR 10 must begin with Senate Rule 38(1) which states:

When a question, the decision on which may be reconsidered, has been decided by the senate, any senator voting on the prevailing side may, on the day the vote was taken and at the order of business then prevailing or during the first order of business called thereafter, serve notice that he may move for reconsideration thereof and thereupon, if the subject of the motion to reconsider effects a bill, resolution or memorial, the same shall be held at the Secretary's desk until such motion shall have been disposed of.

Senate Rule 38(B) continues:

The motion to reconsider may be made only during the first call of the tenth order of business on the next succeeding legislative day . . .

There is no question in the present circumstances, that the vote was one subject to reconsideration, that proper notice was served, and that the motion was made properly on the succeeding legislative day. Nor is there any question that the motion to reconsider was defeated the following day. The question presented thus, is whether HCR 10 was effective on the twenty-fourth legislative day, the day it received affirmance by the yeas and nays, or not until the twenty-fifth day, when the motion to reconsider the passage of HCR 10 was defeated. Although Senate Rule 38(A) states that a notice of intent to move for reconsideration shall cause the resolution to be reconsidered to “be held at the Secretary's desk until such motion shall have been disposed of,” that is not the end of the inquiry. The purpose of holding the measure at the secretary's desk is simply to have the resolution within the senate's possession

the subsequent legislative day when the vote of the previous day is to be reconsidered. The Senate Rules do not indicate whether the resolution is to be given effect when it is passed, subject to nullification or repeal should reconsideration result in the reversal of the previous vote, or whether the effectiveness is to be delayed until the reconsideration is voted upon. Senate Rule 48 states:

In all cases not herein provided for, and in which they are not inconsistent with these rules or the joint rules of the senate and house of representatives, the general rules of parliamentary practice and procedure as set forth in *Mason's Manual of Legislative Procedure* shall govern the proceedings of the senate.

Accordingly, analysis of the effect of reconsideration requires reference to *Mason's*.

At first inspection, there appear to be two sections of *Mason's* which address the point directly. Unfortunately, they appear to be contradictory and require differing conclusions. The first provision of *Mason's* is section 468 (4) which states:

A legislative act is effective from the date the action is taken, even though a motion to reconsider would still be in order at an adjourned meeting. *Reconsideration, during the time a motion to reconsider may be made, is only a contingent right and does not postpone the effectiveness of the original action.* Where a city council took an action which carried a penalty and adjourned the meeting to a later date, any person violating the act was subject to the penalty of the act even though the original act was still subject to reconsideration. (emphasis added)

The second relevant provision of *Mason's* is section 7.37(6) which states:

Where a bill has been voted upon favorably by both houses, but a motion to reconsider its action in passing the bill is pending in the house last acting on the bill and the bill is still in its possession, it has not been finally passed by both houses.

In an attempt to interpret these provisions, certain rules of construction are particularly appropriate. First, all sections should be considered and construed together to determine their meaning. See, *Magnuson v. Idaho State Tax Comm.*, 97 Idaho 917, 556 P.2d 1197 (1976), and *Janss Corp. v. Board of Equalization of Blaine Cty.*, 93 Idaho 928, 478 P.2d 878 (1970). Second, the rules must be construed as a whole, without separating one provision from another. See, *Idaho Power Co. v. Idaho Public Utilities Comm.*, 102 Idaho 744, 639 P.2d 442 (1982), and *First American Title Co. of Idaho, Inc. v. Clark*, 99 Idaho 10, 576 P.2d 581 (1978). Finally, the rules must be interpreted to the extent possible, to give effect to all provisions. See, *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 629 P.2d 662 (1981),

Magnuson v. Idaho State Tax Comm., 97 Idaho 917, 556 P.2d 1197 (1976), and *Filer Mutual Telephone Co. v. Idaho State Tax Comm.*, 76 Idaho 256, 281 P.2d 478 (1955).

With these rules of construction in mind, each of the two sections of *Mason's* must be scrutinized closely. An inspection of section 737(6) reveals that it applies to *bills* upon which a *motion* to reconsider is *pending*. There is no senate rule or joint rule nor has any section of *Mason's* been found which requires resolutions to be distinguished from bills for the purpose of section 737(6). Indeed, there is no logical reason why section 737(6) ought to apply to bills and not resolutions. In the absence of authority to the contrary, section 737(6) should not be inapplicable to the question presented simply because it refers to bills and not resolutions. Second, section 737 refers to a motion which is pending. Obviously, in the present circumstances a motion to reconsider was not pending until the twenty-fifth legislative day when it was duly made. Under Senate Rule 38, no motion to reconsider could be made until the subsequent day although the notice of intent to move to reconsider was given properly on the twenty-fourth legislative day. The question becomes then whether the notice contemplated in Rule 38(A) is sufficient to bring the present circumstances within the purview of section 737(6). It is clear *Mason's Manual* contemplates that a notice will serve the same function as a motion for the purpose of section 737(6). Section 463(3), *Mason's Manual*, states:

A notice of one day of the making of a motion to reconsider is required by rule in some bodies. When this is the practice the notice of the motion holds up any further action as a result of the vote *the same as though the motion to reconsider had been made*.

Similarly, section 467(1) states: "The effect of making the motion to reconsider, or of giving notice of the motion where that is the procedure, is to suspend all action on the subject of the motion until the reconsideration is acted upon." It appears, therefore, that section 737(6) *Mason's Manual* applies directly to the question at hand.¹

As it appears that section 737(6) applies to the present circumstances, section 468(4) must be analyzed. That section states that an act is effective "even though a motion to reconsider *would still be in order . . .*" (Emphasis added.) Further, the section applies to the period of time during which "a motion to reconsider *may be made . . .*" (Emphasis added.) By stating the rule in the subjunctive, it appears to be limited in application to circumstances in which a motion to reconsider has not been made but, according to the rules, could be made. This interpretation is supported by citation to *Bigelow*

¹ It should be pointed out that two cases are cited by *Mason's* as authority for section 737(6). The first, *State v. New London Savings Bank*, 79 Conn. 141, 64 A. 5 (1906), directly supports the statement of the rule. The second, however, *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963 (1912), is inapposite, as it deals with a situation in which a motion to reconsider was passed and reconsideration of the previous question subsequently tabled.

v. Hillman, 37 Me. 52 (1854). In that case, a resolution was passed at a town meeting which allowed a public right of way to revert to private ownership. The defendant, thereafter, was charged with trespassing upon the ground in question.

After deciding that the town could allow the land to revert to private ownership, the court continued:

But it is objected that the town meeting at which the vote was passed to discontinue this way, was adjourned to a day subsequent to the time when the plaintiff erected his fences, and subsequent also the day on which the defendant committed the alleged trespass, by removing said fences, and that said vote could only take effect from the day of the final adjournment of the meeting; because, it is contended, it was in the power of the town, at any time during the continuation of the meeting, to reconsider their vote by which the road had been discontinued.

Without considering whether it would be competent for a town to reconsider a vote, after the rights of third parties had intervened, depended upon such vote, which may well be doubted, it is sufficient in this case, that the vote discontinuing this road was absolute in its terms, and at most could be liable only to the contingency of being reconsidered at the adjourned meeting. That contingency never happened. The rights of the plaintiff under that vote, if deemed contingent until final adjournment of the meeting, then became absolute, and related back to the day on which the vote was actually passed.

This language seems to imply that all votes subject to reconsideration are final, and that the effect of a successful reconsideration is to nullify the final vote. A close scrutiny of the case, however, indicates that no motion to reconsider was made. Accordingly, as the ruling applies to situations in which motions have been made, it is mere dicta. It is easy to justify such a proposition, when the rules of legislative practice allow reconsideration to be moved days or weeks after the question was considered. See, *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, (1912), and *State v. New London Savings Bank*, 79 Conn. 141, 64 Atl. 5 (1906). If that is the situation, there must be some certainty concerning the effectiveness of an action taken. The theory is somewhat more difficult to support, however, as applied to legislative rules which allow reconsideration only upon the immediately succeeding day.

One final problem should be discussed; that is that section 468(4) by its terms, limits its application to instances in which a motion to reconsider would be in order "at an adjourned meeting." If, for the purposes of section 737(6) a notice of intent to move for reconsideration is synonymous with a motion to reconsider, so must it be for section 468(4). If that is the case, section 468(4) may not apply to the given circumstances, as the notice of intent to reconsider was made prior to the adjournment of the meeting.

Accordingly, *Mason's* section 468(4) can be read not to apply to the present circumstances. If this is so, then section 737(6) must apply. There is,

however, an unsettling theoretical gap in the logic supporting section 737(6). That is, there will always be a delay between the time a matter will have been passed and the time a notice of reconsideration or motion to reconsider may be made. It would appear, therefore, that during that amount of time, the approval of the body would be effective even under section 737(6). Even if this delay is but a few moments, nevertheless during those moments the matter will be effective. Therefore, to state that a matter is not finally passed if a motion is pending fails to consider that the matter was approved and for at least some period of time effective. This easily could lead a court to determine that the logic of section 458(4) is the sounder and ought to be applied in these circumstances. Moreover, the principle contained in section 737(2) that a bill is duly enacted when voted upon affirmatively by both houses further renders the proffered interpretation of 737(6) less than conclusive.

It is my conclusion that a strict reading of the rules favors the application of section 737(6) as a preferable technical legal argument. Considerable doubt exists whether this question would be resolved merely by reference to technical legal arguments. Rather, it is my prediction that a court would attempt to resolve the narrow issue by looking at the substance of the entire proceeding. It is clear that a vast majority of legislators desired to reject the proposed levels of compensation. It is also clear that they voted to do just that prior to the twenty-fifth legislative day. To rule that the rejection was untimely merely because the reconsideration which was doomed to failure could not be addressed until the following legislative day, is to elevate form over substance and thwart the will of the legislative. A concurrent resolution is merely a means by which a legislative body expresses an opinion temporary in nature and incidental to the normal legislative process. *State v. Atterbury*, 300 S.W.2d 806 (Mo. App. Ct. 1975). See Sutherland, *Statutory Construction* § 29.03. It would seem that the legislature expressed its will as contemplated generally by art. 3, § 23, Idaho Const., and Idaho Code § 67-4066. Unreasonableness of a result produced by one among alternative interpretation in favor of another which produces a reasonable result. Sutherland, *Statutory Construction*, § 45.12. I would certainly prefer to see the senate interpret its rules in such a fashion as to give effect to the unquestioned will of the majority. The senate certainly has that authority. I doubt a court would substitute its own judgment for that of the senate.

I hope this has provided the legal guidance which you have requested. I am sorry that I cannot definitively indicate to you which is the "correct" interpretation of the Senate Rules. I have given you my impressions. I hope they will be useful to you.

Sincerely,

JIM JONES
Attorney General

JJ/bc

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

February 22, 1983

The Honorable James D. Golder
State Representative
Statehouse Mail
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION AND IS PROVIDED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Golder:

This is in response to your questions regarding the validity of the governor's actions in vetoing various portions of House Bill 130. As discussed below, we are concerned that the governor may have exceeded his authority in utilizing the line item veto with respect to certain substantive provisions other than appropriations. Nevertheless, it must also be kept in mind that this guideline is merely advisory. Unless the actions of the governor are judicially determined to be invalid, they are entitled to a presumption of correctness. They should be assumed to be effective unless judicially overturned. With this proviso in mind, we offer the following analysis.

The governor's veto power is derived from Idaho Constitution, article 4, sections 10 and 11. Idaho Constitution, article 4, section 10 provides for the general veto power. That power is available to the governor with respect to all bills and is exercised by either accepting or rejecting the entire bill. Idaho Constitution, article 4, section 11 provides the governor with additional authority with respect to appropriation bills. That section provides:

The governor shall have power to disapprove of any item or items of any bill making appropriations of money embracing district items, and part or parts approved shall become a law and the item or items disapproved shall be void, unless enacted in the following manner: if the legislature be in session, he shall within five (5) days transmit to the house within which the bill originated a copy of the item or items thereof disapproved, together with his objections thereto, and the items objected to shall be separately reconsidered, and each item shall then take the same course as is prescribed for the passage of bills over the executive veto.

The Idaho Supreme Court has considered the extent of the governor's power to disapprove of "any item or items" of any bill making appropriations of money. In *Cenarrusa v. Andrus*, 99 Idaho 404, 582 P.2d 1082 (1978), the court was faced with the question whether the language of the constitutional section requires the item veto to be limited to money items. The court held that the item veto power applies solely to distinct money items in appropriation bills. Therefore, the court found the governor's action in attempting to veto conditions in an appropriation bill to be an invalid exercise of the item veto power.

In the case of *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969) the court defined what the term appropriation means as used in the Idaho Constitution. Therein the court states:

The Idaho definition of the word "appropriation" is basically outlined in several Idaho cases (citations omitted). These cases define appropriation as (1) authority from the legislature, (2) expressly given, (3) in legal form, (4) to proper officers, (5) to pay from public monies, (6) a specified sum and no more, and (7) for a specific purpose, and no other.

These cases define the limits of the governor's power to item veto portions of appropriations bills. The cases hold that the power is strictly limited to the veto of specific money items of appropriations. Reviewing the actions taken on House Bill 130 in light of the rules discussed above, it appears that portions of the veto exceeded the authorization contained in Idaho Constitution, article 4, section 11.

The governor vetoed §§ 2 and 3 of House Bill 130. Section 2 directed the state board of examiners to "reduce the general account appropriations made for fiscal year 1983 by not to exceed twelve percent (12%) of the total general account appropriation . . ." with certain exceptions. The section appears to merely direct the board of examiners to institute the process of investigating the appropriations and to make reductions as may be necessary.

Idaho Code § 67-3512 permits the state board of examiners upon investigation and report of the administrator of the division of financial management to reduce appropriations as necessary after opportunity for hearings by the departments, offices or institutions affected. Presumably, § 2 of House Bill 130 merely sought to have the state board of examiners review the appropriations of the various agencies and to reduce them if necessary by not to exceed twelve percent (12%). The section does not relate to a money item of appropriation as construed by the Idaho Supreme Court. Therefore, a veto of such a section would appear to exceed the authority granted by Idaho Constitution, article 4, section 11.

Section 3 of the act contains several provisions. The most important appears to be an appropriation for public schools contained in subsection 2 of section 3 of the bill. Subsection 2 contains money items of appropriation within the meaning of the Idaho cases. Therefore, the governor's veto of the proposed reduction of the public school appropriations was within the authority granted by Idaho Constitution, article 4, section 11. Subsection 1 of Section 3 merely states legislative intent with regard to the way in which the reductions should be made if they were made. However, since the appropriation itself was not reduced as a result of the governor's action, the legislative intent regarding the proposed reductions is no longer meaningful.

Subsection 3 of section 3 of the bill deals with the deficiency certification to be made by the state board of education. In particular it provides that the

amount of a certified deficiency determination should be reduced by the amount of the balances in the public school income fund and by the cash dividend paid to the school district by the state insurance fund. Those provisions appear to be outside of the definition of money items of appropriation and therefore are not subject to line item veto.

As mentioned above, this discussion is merely advisory. The governor's action is entitled to presumption of correctness unless judicially overturned. For example, in *State v. Hanson*, 81 Idaho 403, 342 P.2d 706 (1959), the Idaho Supreme Court quoted from an Arizona case with approval as follows:

The same presumption which attaches in favor of the constitutionality of a statute with respect to its subject matter, is indulged with respect to its form and enactment, and the burden of proof is on one who claims that a statute is not duly enacted . . .

This statement quoted by the court is merely one variation of the general rule which presumes the constitutionality of acts and the regularity of proceedings and actions. See *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 914, 591 P.2d 1078 (1979) In *Texas Company v. State*, 254 P. 1060 (1927) the Supreme Court of Arizona applied the above general rule to the specific case of a governor's veto. Therein the court stated:

We further think that a veto exercised by the governor is entitled to just as much respect as the act of the legislature in originally passing a law, and it would be proper to say that, as we indulge every intentment in favor of the constitutionality of an act as originally passed by the legislature, we should also have the same presumption in favor of the constitutionality of a veto. The reason for this rule is, of course, the respect due the act of a coordinate branch of the government. 254 P. at 1064

You have also inquired as to whether the veto of portions of the bill without also vetoing the corresponding portions of the title violates Idaho Constitution, article 3, section 16 which provides:

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

This provision requires that all portions of the substance of the bill be covered by the subject matter stated in the title. The veto of portions of the substance of a bill without similarly vetoing the title does not run afoul of this section because after the veto the subject matter of the bill still remains in the title. As stated in *Kerner v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360 (1978):

The purpose of this constitutional provision is to prevent fraud and deception in the enactment of laws and provide reasonable notice to the legislators and to the public of the general intent and subject matter of the act. (citation omitted) As such, the title of the legislative act need not serve as a catalog or index to the subject matter of the act, but need only set forth the general subject. (citation omitted) The title to the act in question here satisfies this standard. The title provides general notice of the subject matter contained in the act. The body of the act is not broader than the title and does not encompass subjects which are not germane to or which are incongruous with the title. 79 Idaho at 452

Thus, a violation only occurs when the subject matter contained in the act is broader than the title. We do not believe this to be the case with respect to House Bill 130.

Sincerely,

DAVID G. HIGH
Deputy Attorney
General

DGH/tg

February 24, 1983

Honorable Roger Fairchild
Senator, State of Idaho
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Fairchild:

You have asked for legal advice concerning Senate Bill 1044, which makes numerous changes to the Employment Security Act, title 72, chapter 13, Idaho Code. Among these changes is the addition of a mechanism to allow collection of an additional tax by the enactment of Idaho Code § 72-1346A. You specifically have asked whether this act is required by Idaho Const., art. III, § 14, to originate in the house of representatives rather than in the senate.

Idaho Const. art. III, § 14, states in relevant portion: "... bills for raising revenue shall originate in the house of representatives." If this is a bill "for raising revenue" it may not originate in the senate but rather must originate in the house. The general rule regarding legislation such as SB 1044 is that if the revenue raising provisions are "incidental" to the main provisions of the act, it may originate in the senate. This argument however specifically was rejected in *Dumas v. Bryan*, 35 Idaho 557, 566, 207 P.2d 720 (1922), in which the court stated:

It will not do to say that this tax represents a mere incident to the main purpose of the bill, for this would be a mere evasion . . . The amount of the tax levy is immaterial, for the Constitution requires that all bills for raising revenue shall originate in the house.

Accordingly, the general rule may not be relied upon to allow this bill to originate in the senate.

There is a line of authority, however, which indicates that this bill may not be "for raising revenue." That line of cases is summarized by Annotation, Application of Constitutional Requirement that Bills for Raising Revenue Originate in Lower House, 4 A.L.R. 2d 973 at 980, as follows:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government, and give to the person from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizens; they give no direct equivalent in return. *U.S. ex rel. Michels v. James*, (1875: CC) 13 Blatchf 207, F. cas. no. 15464; *Com. v. Bailey*, (1881) 3 Ky. LR 110; *Thierman Co. v. Com.* (1906) 123 Ky. 740, 97 SW 366.

See also *In re Opinion of Justices*, 249 Ala. 389, 31 So.2d 558 (1947).

As a complement to the cases cited above, other cases have determined that particular measures were not bills "for raising revenue" in certain circumstances where the money raised was not used to support "general governmental purposes." In *Northern Counties Investment Trust v. Sears*, 30 Or. 388, 481 P. 935 (1895), the court held that a bill which increased court costs was not a bill for raising revenue, and therefore not in contravention of the clause of the Oregon Constitution which is similar to Idaho Const., art. III, § 14. In so holding, the court noted at 41 P. 936:

A law which requires a fee to be paid to an officer, and finally covered into the treasury, of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government which is enjoyed by the whole community, and which the party may pay and obtain benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue.

Accord, *In re Lee*, 64 Okla. 310, 168 P. 53 (1917).

In *Mikell v. Philadelphia School Dist.*, 359 Pa. 113, 58 A.2d 339 (1948), a special property tax was levied to pay for extraordinary school expenses. The court indicated that such a tax was not for raising revenue. A similar con-

clusion was reached in *Opinion of the Justices*, 233 A.2d 59, 62 (Del. 1967), in which the court stated:

. . . to qualify as a revenue-raising bill, within the purview of this constitutional provision, the money derived from the tax imposed must be available for the general governmental uses and purposes of the taxing sovereignty, i.e. for defraying its general governmental expenses and obligations.

233 A.2d at 62. See also, *Evers v. Hudson*, 36 Mont. 135, 92 P. 466 (1907). The holding in this later case was reaffirmed in *Morgan v. Murray*, 134 Mont. 92, 328 P.2d 644 (1958), in which the Montana Supreme Court stated at 328 P.2d 648:

The constitutional requirement that bills for raising revenue originate in the lower house is generally construed as having reference to the raising of money for defraying the expenses of the general government, where the revenue derived from the tax imposed is paid into the treasury of the exacting sovereign for its own general governmental purposes.

In *Dumas v. Bryan*, 35 Idaho 557, 207 P.2d 720 (1922), the Idaho Supreme Court held that a property tax of general applicability which raised money to assist schools could not originate in the senate. Although some of the above cases deal with school funding and appear to conflict with *Dumas* they can be distinguished in that the revenue in each case was paid directly to the school district rather than to the state general fund as in *Dumas*. Accordingly, the revenue in those cases truly was not available for general governmental purposes.

With the exception of *State ex rel. Parsons v. Workmen's Compensation Exchange*, 59 Idaho 256, 81 P.2d 1101 (1938), the only cases which have been decided on this issue by the Idaho Supreme Court have involved taxes of general applicability which are to be paid to the state's general fund. It is my impression that were this issue to come before the Idaho Supreme Court, it would be inclined to follow the authority which holds that SB 1044 is not "for raising revenue." Although such a result is not required by Idaho case law, I believe the court would adopt this conclusion based upon a reading of the above cases in conjunction with *Dumas* and cases cited below. In *Dumas* the court held that the measure in question should have originated in the house, stating:

It provides for levying a direct tax against all property in the state, for government purposes . . . This is truly a tax levied for governmental purposes as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of art. III, § 14 of the constitution.

35 Idaho at 566.

As can be seen, the court was careful to demonstrate that the act in question did fund general governmental purposes. Although the court did not decide specifically that such a requirement must be met before a measure will be considered to be “for raising revenue,” by implication, the conclusion that such a purpose was required would appear to be sound. Accordingly, if SB 1044 can be viewed properly as not in support of general governmental purposes, it may not fall within the prohibition of art. III, § 14 of the Idaho Constitution.

A similar provision to SB 1044 was considered by the New Jersey Superior Court in *Raybestos-Manhattan, Inc. v. Glaser*, 144 N.J. Super. 152, 365 A.2d 1 (1976). There a senate bill which became law levied a tax on any employer who ceased doing business in the state of New Jersey. The amount of tax was to be equal to the total value of non-vested pension benefits for employees who had been employed by the employer ceasing business for fifteen years or more. The statute further provided that employees with at least fifteen years of experience with the employer could file a claim to be paid the equivalent of their non-vested pension benefits. Quoting *Mickell, supra*, the court held that the tax was not “for raising revenue” because it was not used for “general governmental purposes.” Rather, the bill constituted a tax on the employer for the benefit of the employees, just as SB 1044 provides.

It is quite possible that an Idaho court could reach the same conclusion. Reference to Idaho Code § 72-1302 indicates that the purpose of the Employment Security Act is “to [e]ncourage employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment . . .” It should be noted that the money accumulated under the provisions of the Employment Security Act is placed not in the general fund, but in a special employment security fund established by Idaho Code § 72-1346. This fund may not be used for any purpose except as allowed by the Employment Security Act. In this regard, the fund is in the nature of a trust fund which is not available for general governmental purposes but rather may be used only to provide unemployment compensation for the covered workers. See *Totusek v. Department of Employment*, 96 Idaho 699, 535 P.2d 672 (1975).

Indeed, at least one justice of the Idaho Supreme Court has indicated that the unemployment tax is not one “for raising revenue.” In *In re Gem State Academy Bakery*, 70 Idaho 531, 542, 224 P.2d 529 (1950), Justice Givens stated:

The intent and purpose of both the state and national governments in enacting the unemployment compensation statute was not to raise money for revenue purposes, but to raise money to do away with unemployment . . .

Although this statement was made in dissent, the issue was not one contrarily decided by the court nor in fact even addressed by the majority opinion.

Finally, in *State ex rel. Parsons v. Workmen's Compensation Exchange*, 59 Idaho 256, 81 P.2d 1101 (1938), the court faced a challenge to an amendment to the workmen's compensation law which provided that if a worker should be killed in an accident covered by the workmen's compensation act and if that worker had no dependents, the employer should pay \$1,000 to the State Industrial Administration Fund. The bill was challenged on the grounds that it raised revenue yet originated in the senate. Even though the act required taxpayers to pay money to the state, the court indicated that it was not a measure for revenue raising. This demonstrates at least one example in which the court has avoided invalidating an act which does not place revenue into the general fund.

There is some disturbing dicta in *Parsons*, 59 Idaho at 260, to the effect that "the provision in question is neither a license nor an excise tax." Further, the court commented: "It can make no difference with the validity of the law, for what purpose the state uses the fund." 59 Idaho at 262. I assume the court made the latter statement under the rationale that since the payment in question was not revenue its use was immaterial. The first statement, however, is somewhat bothersome because it seems to infer that excise taxes are for raising revenue and the Idaho Supreme Court has stated in another context that the unemployment compensation tax is an excise tax. See *Employment Security Agency v. Joint Class "A" School Dist.*, 88 Idaho 384, 400 P.2d 377 (1965). Because the comment in *Parsons* is of such a passing nature and is clearly dicta in the case, it should not be relied upon to hold that SB 1044 must not originate in the senate. In fact, when the whole issue is considered, it is probably of marginal relevance. Further, it should be pointed out that at least one court has refused to adopt the "general governmental purposes" test, without comment. See *Glasgow v. Aetna Ins. Co.*, 284 Ala. 177, 223 So. 2d 581 (1969).

Just as the workmen's compensation statute was deemed by Justice Givens not to be revenue raising, and as the courts found the taxes in *Parsons* and *Raybestos* not to be revenue raising, the court certainly could conclude that SB 1044 is not "for raising revenue." If not for the concerns stated in the previous paragraph I would be quite confident that SB 1044 could originate in the senate. Given these concerns, however, the conclusion is somewhat less clear. Although the court could decide not to apply the "general governmental purposes" test, or could find in this instance that the tax is an excise tax and, thus, is for raising revenue, in my estimation, it probably would be inclined to characterize the increased levies as not in furtherance of general governmental purposes, not revenue raising, and hence not in violation of art. III, § 14 of the Idaho Constitution although, again, this conclusion cannot be stated with absolute certainty.

I hope this has answered your concerns. If you have further questions or comments, please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief - Legislative/
Administrative Affairs

KRM/bc

February 28, 1983

The Honorable Michael Strasser
Representative, District 12
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Strasser:

You have asked whether House Bill 75 is constitutional. We have examined the bill in its amended version under the contract clause and other provisions of the U.S. and Idaho constitutions.

House Bill 75aa would amend title 41 of the Idaho Code to provide that an individual, group, or blanket disability insurance policy or subscriber's or health maintenance organization contract "delivered, issued for delivery, used, amended or renewed" after July 1, 1983, shall exclude the coverage for elective abortions unless the exclusion is *waived* by endorsement and an additional premium paid. The bill defines an elective abortion as one undertaken "for any reason other than to preserve the life of the female upon whom the abortion is performed."

We will note from the outset that the following discussion is general in nature due to the fact that a determination of whether proposed legislation would impair a particular contract would require a review of that contract. Because we have not been presented with any specific contract, it is impossible for us to offer specific advice in that regard.

The federal and state constitutions provide for the protection of contracts by prohibiting a state from passing any law impairing the obligations of contracts. U.S. Constitution Art. I, § 10. Idaho Const. art. I, § 16. The federal constitution's reference to "contract" refers to all different kinds of valid contracts. *Filipkowski v. Springfield Fire and Marine Insurance Co.*, 206 Wis. 39, 238 N.W. 828 (1931). It includes contracts to which the state is a party. *Hessick v. Moyrihan*, 83 Colo. 43, 262 P. 907 (1927).

The impairment clause has been, in modern times, liberally construed to prohibit only unreasonable impairments. *Re State Employees Pension Plan*, 364 A.2d, 1228 (1976). The question of whether a law impairs the ap-

plication of a particular contract is not always susceptible to any easy solution. The prohibition against impairment of contracts is not absolute and is not to be read with literal exactness like a mathematical formula. *Lyon v. Flournoy*, 271 Cal. App.2d 774, 76 Cal. Rptr. 869 (1969). An obligation of contract is "impaired" when a party is deprived of the benefit of its contract or when the enactment changes the obligations in favor of one party against another, either by enlarging or reducing the obligations. *Northern P.R. Co. v. Minnesota*, 208 U.S. 583 (1908). Generally, the test of impairment is met by showing that the value of the contract has been materially diminished. *Re Fidelity State Bank*, *supra*; *Phillips v. West Palm Beach*, 70 So.2d 345 (1953); *School Bldg. Finance Committee v. Betts*, 216 Cal. App. 685 (1963).

In conformity to the well established rule that the laws in effect at the time and place of making a contract enter into and form a part of it as though they were expressly referred to and incorporated in its terms, the obligation of a contract is measured by the standard of the law in force at the time it was entered. *Fidelity State Bank v. North Fork Highway Dist.*, 35 Idaho 797, 209 P. 449 (1922). The provision of the constitution which declares that no state shall pass any law impairing the obligations of a contract does not apply to a law enacted prior to the making of a contract the obligation of which is claimed to be impaired. Although a statute tending to impair the obligations of a contract is inoperative as to contracts existing at the time of the statute's passage, it may nevertheless be valid and operative to future contracts. *Shelofsky v. Helsby*, 32 N.Y.2d 54, 343 N.Y.S.2d 98, 295 N.E.2d 774 (1973).

Clearly a statute which affects contracts delivered or issued for delivery after the effective date of the statute does not impair the obligations of the contracts as contract rights do not attach until the policy of insurance is delivered or issued for delivery. See *Williston on Contracts*, 3d ed., § 906. Also, clearly, the statute will impair the obligations of contracts which are used or amended after its effective date but under which contract rights have accrued prior to its effective date. See *Williston on Contracts*, 3d ed. § 901. Finally, renewal of a policy of insurance is viewed as a new and separate contract, so to the extent the statute applies to policies renewed after July 1, 1983, it is valid. See *Williston on Contracts*, §§ 901, 906.

In reviewing House Bill 75aa, it attempts to affect contracts rights which accrue both before and after the effective date of the bill. Accordingly, although the statute itself is valid as applied to future contractual obligations, it may not be applied to existing rights. See *Shelofsky*, *supra*. To avoid any ambiguity or constitutional infirmity, it would be advisable to state clearly that this bill applies only to those contracts which are delivered, issued for delivery or renewed after July 1, 1983.

Thus, while the amended bill is acceptable to the extent it affects contractual rights which accrue after the effective date to the extent the amended bill affects contracts which are "used" or "amended" in a manner that is unrelated to the benefits received for elective abortions, the amended bill constitutes an impairment of existing and vested contract rights.

Second, you have asked whether House Bill 75aa violates the equal protection or due process clauses of the Fourteenth Amendment to the United States Constitution. It is a woman's right to obtain an abortion before the fetus obtains viability. See *Roe v. Wade*, 410 U.S. 113 (1973). As stated by the U.S. Supreme Court in *Maher v. Roe*, 432 U.S. 464, 473-4 (1977):

[*Roe v. Wade*] did not declare an unqualified "constitutional right to an abortion," as the district court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion . . .

If the state enacts a statute which places an "undue burden" on a woman's fundamental right to privacy concerning her right to seek an abortion, it must be justified by a compelling state interest. See *Maher v. Roe*, 432 U.S. 464 (1977); *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 65 F.2d 848, 855, (8th Cir. 1981); *Akron Center, etc. v. City of Akron*, 651 F.2d 1198, 1204 (6th Cir. 1981); and *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980). Finally, if the statute places no "undue burden" on the individual's right to seek an abortion, it need only bear a rational relationship to a legitimate state interest. See *Harris v. McCrea*, 448 U.S. 297, 324 (1980).

The only court to consider a statute similar to House Bill 75aa is the United States District Court for the Eastern District of Pennsylvania in *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 552 F. Supp 791 (E.D. Pa. 1982). In that case, the court found that the statute did not impose an undue burden upon a woman's right to privacy in choosing to have an abortion. Discussing the statute, the court commented at 552 F. Supp. 805:

The limitation of insurance coverage does not itself affect the abortion decision or its effectuation. Insurance coverage merely affects the source of payment. Full abortion coverage still may be purchased. Even assuming that increased insurance costs could constitute a legally significant burden, there is no evidence in this record that section 3215 (e) will require purchasers of comprehensive coverage to pay more after the act than they paid before the act. Section 3215 (e) is rationally related to the public policy of the Commonwealth encouraging childbirth over abortion . . . It ensures that opponents of abortion will not be required to purchase coverage which they would not desire to use . . .

Because the court's decision was whether or not to issue a preliminary injunction against the enforcement of the statute, because evidence was not before it that the bill would cause an increase in insurance rates and therefore an undue burden, it is not necessarily dispositive of the question. As the court noted, if evidence may be introduced which shows a significant increase in abortion insurance costs, the statute might well have to be justified

by a compelling state interest. As decided by *Ashcroft*, *Akron Center*, and *Charles v. Carey*, *supra*, a state's interest in encouraging childbirth over abortion is not a compelling interest. We are unaware to what extent, if any, House Bill 75aa will cause abortion insurance to increase in price. It may be that the price of the insurance will be nominal and therefore not an undue burden. It further may be that under the provisions of House Bill 775 insurance carriers may choose not to provide insurance at all for elective abortions. If this should turn out to be the case, the statute at that point in time may well constitute an undue burden, therefore requiring a compelling state interest. Until such evidence is shown, however, the statute is facially valid and must be presumed to be constitutional.

Finally, it has been suggested that the statute may violate the federal constitution's prohibitions against sex discrimination. This objection is not well taken, see *General Electric Co. v. Gilbert*, 29 U.S. 125 (1976). I hope this has answered your questions and concerns. If you need further information, please contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

KRM/bc

March 10, 1983

Mr. Keith Roark
Blaine County Prosecutor
P.O. Box 756
Hailey, ID 83333

Re: Prosecutorial discretion

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Roark:

We have considered the questions you submitted on February 15, 1983, and have concluded they should be answered as follows:

1. *Under Idaho law, including I.C. § 31-2604*, is the prosecuting attorney of each county required to prosecute all criminal actions or does the prosecuting attorney have discretion in deciding what criminal actions to bring and what criminal actions to maintain?

It is a well established principle in this and most other jurisdictions that the county prosecutor has broad discretion in the matter of prosecuting criminal offenses, including the discretion to decide whether to prosecute or not prosecute in particular instances.

Idaho Code § 31-2604(2) provides that the prosecuting attorney shall have the duty to "prosecute all criminal actions for violation of all laws or ordinances," except for certain minor offenses and those resulting from the violation of city ordinances.

It is quite clear that this statute does not circumscribe the prosecutor's discretion. In the first place, it does not purport to do so inasmuch as it speaks to a duty to prosecute "actions," that is, proceedings already commenced as a consequence of a decision to proceed. There is nothing in the statute which states that a county prosecutor is required to prosecute all offenses or allegations of crime which may come to his attention.

Moreover, there is an unambiguous precedential basis for the proposition that the prosecutor¹ is the State's representative for the prosecution of criminal offenses and has sole authority, not generally subject to judicial supervision, to decide which cases shall be prosecuted.

Statements of that principle in the opinions of the Idaho Supreme Court have been brief, but plain enough. In *State v. Wilbanks*, 97 Idaho 346, 509 P.2d 331 (1973), the court said merely that "prosecuting attorneys are vested with discretion in deciding when to prosecute." The discretion conferred is "broad," *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980), and "wide-ranging," *State v. Vetsch*, 101 Idaho 595, 596, 618 P.2d 773 (1980). It includes the discretion to decide "when and what crimes to prosecute," *Id.*, and even includes a *duty* to "be impartial in abstaining from prosecuting as well as in prosecuting," *State v. Harwood*, 94 Idaho 615, 617, 495 P.2d 160 (1972).

See also, *Cairns v. Sheriff of Clark County*, 508 P.2d 1015 (Nev. 1973) (matter of prosecution entirely within the control of the prosecutor); *State v. Kanistanaux*, 414 P.2d 784 (Wash. 1966) (within the discretion of the prosecutor to charge or not charge); *State v. Turner*, 576 P.2d 644 (Kan. 1978) (prosecutor is representative of the state in criminal prosecutions and controls the matter of what charges shall be prosecuted).

In cases where questions of the relationship between judicial and prosecutorial authority have arisen in this context, courts have been consistent in the view that the prosecutor's discretion is not shared with other branches of government. In *State v. Murphy*, 555 P.2d 1110 (Ariz. 1976), the Arizona Supreme Court held that the trial court was not authorized to order

¹ Including elected officials and those authorized to exercise prosecutorial functions. See, e.g., Idaho Code § 31-2603; *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

the prosecutor to introduce evidence of aggravating circumstances in a capital case.

The duty and discretion to conduct prosecutions for public offenses rests with the county attorney. [citations omitted] Generally, the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers. 555 P.2d at 1112.

Similarly, in holding that it was an abuse of discretion for the trial court to refuse to allow the prosecutor to amend an information to charge a misdemeanor instead of a felony, the Kansas Supreme Court held:

[T]hat when the prosecutor exercises his discretion as to the charges to be filed or as to amendments of the information seeking to reduce the charges to lesser offenses, the trial judge has no right to substitute his judgment for that of the prosecutor absent some compelling reason to protect the rights of the defendant . . . *State v. Pruett*, 515 P.2d 1051, 1057 (Kan. 1973).

Convincing reasons for judicial abstinence from supervision of prosecutorial decisions, putting aside the lack of judicial power in that area, were summarized by the United States Court of Appeals for the Second Circuit in *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1973), where the court observed that "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to supervision."² 477 F.2d at 380.

2. Do I.C. §§19-1114 and 19-1115 prevent a prosecuting attorney from agreeing with a person having knowledge of criminal activities not to bring criminal charges against such person in exchange for such information?

Idaho Code § 19-1114 provides for immunized testimony in the case where the prosecuting attorney becomes aware in advance that a witness will refuse to testify or produce evidence on the ground of self-incrimination. The prosecuting attorney is authorized in such event to agree in writing with the witness for immunity from prosecution.

Section 19-1115 provides for compelling testimony under a grant of immunity, upon written request of the prosecutor, if a witness refuses to answer on self-incrimination grounds during a proceeding.

² Among the reasons suggested by the court for keeping out of the charging process were (1) the impracticality of reviewing decisions not to prosecute based on insufficient evidence, (2) the difficulty of establishing standards capable of efficiently controlling prosecutorial decisions, (3) lack of judicial competence to undertake such responsibilities, and (4) the undesirability of inserting judges into the process of prosecutorial decision making.

Each section sets forth a standard for approval of immunity requests in almost identical language. Section 19-1114 provides that “upon written request of such prosecuting attorney being made to the district court . . . , said district court shall approve such written agreement unless the court finds that to do so would be clearly contrary to the public interest.” Section 19-1115 provides that “the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest.”

On its face, the statutory language *requires* the district court to approve an immunity agreement or to grant immunity and order an answer in the course of a proceeding except in the limited circumstance where there is an unmistakable showing that it would not be in the public interest to do so. In effect, the decision to immunize a witness, “. . . is an integral part of the *charging* process, and it is the prosecuting attorneys who are to decide what, if any, crime is to be charged.” *In re Weber*, 523 P.2d 229, 240 (Cal. 1974). Immunity from prosecution is a function of prosecutorial discretion.

The stated conclusion is compelled by a consistent line of cases interpreting like and similar statutes, which is appropriate to review.

At the outset, we note that the Idaho Supreme Court expressed the foregoing view of immunity functions in *State v. Ramsey*, 99 Idaho 1, 576 P.2d 572 (1978). Ramsey had argued on appeal that it was an abuse of the prosecutor’s discretion not to grant immunity to a potential defense witness. As we read *Ramsey*, the court gave two reasons for rejecting the argument: (1) immunity was not requested, resulting in failure to preserve the issue for review, and (2) “. . . the immunity power granted by statute in Idaho is solely for the use of the prosecuting attorney,” 99 Idaho at 4, a factor that implicitly precludes judicial review of immunity decisions, *see, In re Weber, supra; United States v. Herman*, 589 F.2d 1191 (3rd Cir. 1978); *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980), *cert. denied* 447 U.S. 921, and that also precludes resort to the immunity statute by defendants.

With respect to the question of whether the court had some inherent power under the due process clause to require the prosecutor to grant immunity in extraordinary circumstances, the court noted but did not reach the question.

Although there may be some inclination to view the court’s observations about the prosecutor’s immunity authority as *dicta*, on the theory that the issue was disposed of by the procedural holding, the general rule is that where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*, *Woods v. Interstate Realty*, 337 U.S. 535, 93 L. Ed. 1524 (1949), even if one of the independent grounds alone would have disposed of the case. *Daugherty v. Toomey et ux.*, 222 S.W.2d 197 (Tenn. 1949). *See also, City of Detroit v. Public Utilities Comm.*, 286 N.W. 368 (Mich. 1939). In any event, whether the court’s statement was *dictum* or not, it was a unanimous expression of the court’s view of the prosecutor’s role in the immunity function, and we must at least accept it as an important in-

dication of how the question you put would be answered by the court if it were asked to decide.

Although the Idaho Supreme Court's expression in *Ramsey* seems to provide a complete answer to your question, we have also reviewed a substantial body of law from other jurisdictions and have found general agreement among courts that statutes like our own, at a minimum, reserve to the prosecuting attorney the right to decide who shall have immunity with the court exercising only a ministerial role in the process of compelling testimony or approving immunity agreements.

There is particular unanimity about the principle in the federal courts.

The pertinent federal immunity statute, 18 U.S.C.A. § 6003, provides that a United States district court "shall issue" an order compelling testimony at the request of the Attorney General or his designee. Testimony thus compelled and information derived therefrom may not be used against the witness in any criminal case, except one for perjury arising out of the compelled testimony. 18 U.S.C.A. § 6002.

A United States Attorney, with the approval of the Attorney General, may seek an order compelling immunized testimony or other information when, in his judgment, the information sought "may be necessary to the public interest," and the witness has refused or is likely to refuse to testify or give information. 18 U.S.C.A. § 6003(b).

The distinctions between the federal statutes and the Idaho statutes do not require the conclusion that the two statutory schemes differ with respect to the authority conferred on prosecuting officials, for which reason the federal cases have considerable weight on the question of the scope of the prosecutor's authority under the Idaho statutes, especially in light of the general agreement among the federal circuits and the view already expressed by the Idaho Supreme Court in *State v. Ramsey*.

Under both the federal and the Idaho statutes, the court "shall" issue an appropriate order upon the request of the prosecutor and both statutes use language which leave it to the prosecutor to initiate action to secure immunity for a witness.³

The notable differences between the two statutory plans are that the Idaho statute provides transactional immunity while the federal statute provides only use and derivative use immunity, *see, In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973), the Idaho statutes authorize the court to decline to grant immunity if there is a clear showing that it would not be in the public interest

³ Idaho: "If the prosecuting attorney . . . in writing requests . . ." I.C. § 19-1115; "upon written request of such prosecuting attorney being made to the district court . . ." I.C. § 19-1114.

to do so, and there is no specific federal statute covering immunity agreements. In the latter case the federal statutory scheme is probably explained by the fact that there was no need to provide by statute for immunity agreements inasmuch as the government is bound to such agreements as a matter of due process of law, *Santobello v.*

Federal: “. . . upon the request of the United States Attorney . . .” 18 U.S.C.A. § 6003(a).

New York, 404 U.S. 257 (1971); *Matter of Wellins*, 627 F.2d 969 (9th Cir. 1980); *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978); *United States v. Pellon*, 475 F. Supp. 467, *aff'd* 620 F.2d 286, *cert. denied* 446 U.S. 983, and Congress undertook to do only what was necessary to secure testimony from unwilling witnesses. Lack of specific statutory authority to enter into an agreement for immunity does not render the agreement either unlawful or unenforceable. Such transactions are inherently executive functions and the due process clause requires that immunity agreements be honored. *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981).

The other distinguishing factors do not touch on the prosecutor's power to make the initial immunity decision, and one may thus consider the federal cases quite relevant to interpreting the Idaho statutes.

The federal courts have held that the function of the district court in granting the prosecutor's request for an immunity order is largely ministerial and that the district judge has no discretion to deny an immunity request by the United States Attorney as long as the request is in proper form. *United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977); *United States v. Herman*, 589 F.2d 1191 (3rd Cir. 1978); *In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *United States v. Leyva*, 513 F.2d 774 (5th Cir. 1975); *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974); *In re Kilgo*, *supra*; *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980), *cert. denied* 447 U.S. 929; *United States v. Housand*, 550 F.2d 818 (2nd Cir. 1977), *cert. denied* 431 U.S. 970; *United States v. Garcia*, 554 F.2d 681 (3rd Cir. 1976); *Matter of Doe*, 410 F. Supp. 1163 (E.D. Mich., S.D. 1976); *In re Baldinger*, 356 F. Supp. 153 (C.D.Cal. 1973); *In re Corrugated Container Antitrust Litigation*, 644 F.2d 70 (1981).

The California immunity statute is very much like the Idaho statutes. It provides that the “. . . court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest . . .” Calif. Penal Code § 1324. The California courts have held that the decision to grant immunity is solely within the discretion of the district attorney to grant immunity or to grant immunity on the court's own motion. *People v. Sutter*, 184 Cal. Rptr. 829; *People v. Manriquez*, 130 Cal. Rptr. 585 (1976); *In re Weber*, *supra*; *People v. Super. Ct. of Los Angeles Cty.*, 525 P.2d 716 (Cal. 1974).

See also, People v. Gomez, 437 N.E.2d 797 (Ill. 1982).

In a well reasoned decision, the Alaska Supreme Court held that the prosecuting attorney had the authority to make a grant of use and derivative use immunity which would bind the state, even in the absence of statutory authority to do so. *Surina v. Buckalew*, 629 P.2d 969 (Alaska 1981). The Alaska court observed that earlier cases rejecting the view that there could be no immunity grant in the absence of statutory authority were premised on the theory that the prosecuting attorney could not guarantee that his promise would be kept, there being no assurance in the absence of the statute that another prosecutor would respect the immunity agreement. This reason was thought by the court to have been negated by the rule of due process of law in federal and state courts, binding the government to promises of immunity when such promises induced the defendant to testify. *See also, People v. Superior Ct. of Glenn Cty.*, 83 Cal.App.3d 335, 147 Cal.Rptr. 856 (1978).

Even in the case where an immunity statute authorizes the court to review the immunity agreement in light of the public interest, the court's role is limited.

The decision of whether to grant immunity in any given case involves an exercise of discretion based on whether the public interest would be best served by exchanging immunity for testimony. (citation omitted). Such discretion is vested not exclusively in the trial court but on the contrary is traditionally a function of the prosecution. Thus, although it is the court who ultimately makes the formal grant of immunity, it is at the prosecutor's request and is, in the first instance, a matter of prosecutorial discretion to decide when the public interest would be best served by exchanging immunity for testimony. (citation omitted). *State v. Cookus*, 563 P.2d 898, 902 (Ariz. 1977).

While it is not possible to anticipate all of the circumstances in which a court might properly find that an immunity agreement was "clearly" not in the public interest, the statutory language and the history of such statutes in other jurisdictions require the conclusion that judicial review of immunity decisions must be justified by something greater than a discretionary decision on the part of the court that it would be better not to grant immunity than to grant it. For example, if it became clear that the person to be immunized was the principal perpetrator of the offense and to confer immunity on such a witness would result in complete non-prosecution of a crime, the court might properly deny approval of the immunity agreement, but only if such a showing was "clear."

The reason for such limitations on the court's participation in immunity decisions arises out of the basic doctrine of separation of powers. The decision to charge, of which the decision to grant immunity is a component part, is an executive function and immunity statutes are typically construed to give the court only a ministerial role with respect to approving immunity agreements or compelling testimony in order to avoid trenching seriously upon the powers of the executive branch. *United States v. Herman, supra*.

Although the prosecuting attorney is, in Idaho, a “judicial officer,” Idaho Constitution, Art V, § 18; *State v. Wharfield*, 41 Idaho 14, 236 Pac. 862 (1925), there is little doubt that he is charged with exercising executive powers, *State v. Wharfield, supra*, in the process of bringing charges of criminal offense. The separation of powers provision of the state constitution provides that the various components of government shall not intrude on the *powers* assigned to a different branch. Idaho Constitution, Art II, § 1. Accordingly, the presence of the prosecuting attorney in the judicial department of government does not justify the judiciary in taking over the exercise of executive powers. If it were otherwise, the prosecutor’s constitutional place as a judicial officer, “. . . charged with the performance of duties and the exercise of powers properly belonging to the judicial department,” *State v. Wharfield*, 41 Idaho at 17, could as well be construed to authorize the prosecutor to give final approval to his own immunity agreements.

It seems unlikely that such a result was intended, and thus the focus of attention must be on keeping the *powers* of the branches of government separate, irrespective of the branch of government to which the officials charged with exercising those powers belong.

There are, to be sure, decisions holding that the prosecutor has no power to extend immunity, *Apodaca v. Viramontes*, 212 P.2d 425 (N.M. 1949) (no immunity power in the absence of statutory authority); *Higdon v. State*, 367 So.2d 991 (Ala. 1979) (same), or that the prosecutor is not authorized to extend immunity without the approval of the court. *Whitney v. State*, 73 N.W. 696 (Neb. 1898); *Washburn v. State*, 299 S.W.2d 706 (Tex. 1956).

Obviously, cases decided on the basis of a lack of statutory authority are of no value to us inasmuch as there is statutory power to grant immunity in Idaho.

We do not think the Idaho Supreme Court would follow the Nebraska and Texas cases in light of what the court has said of prosecutorial discretion in the charging process and the prosecutor’s power to immunize witnesses.

It might be said in passing that there could be some adverse due process implications were it to be held that a district judge had responsibility for anything other than ministerial inquiry into the question of public interest as a prerequisite to a grant of immunity. If the trial judge were to confer with the prosecuting attorney about what witnesses should be immunized, in anything more than this limited way, he would necessarily become a participant in discretionary decisions, not governed by established rules of evidence, that could affect the quantum of proof available to convict the defendant. The judge, in that circumstance, is placed in a strategy-planning position and the resulting appearance of unfairness is at least undesirable if not an infringement of the defendant’s right to an impartially conducted proceeding against him.

For present purposes, it is not necessary to ascertain whether this is a matter of good policy or constitutional command, and it is offered only as

another reason for concluding that the Supreme Court would not be likely to conclude that the initial decision about who should be immunized in criminal proceedings was, in some way, a function of the judiciary.

That is not to say that the district court is *entirely* without power to deny an immunity request. The Idaho statute authorizes the court to deny an immunity request on the limited ground that it is clearly not in the public interest and the court has the inherent power to protect constitutional rights. It may, in the exercise of that power, intervene in extraordinary circumstances. In *United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976), the court held that the government was not entitled to intimidate a potential defense witness in such a way as to cause the witness to exercise the fifth amendment privilege and that in such event the trial judge would be authorized to compel the government to grant immunity to the witness. The court's power in a case of that character springs from its authority to enforce the principles of due process of law in a criminal trial. The exercise of judicial power in that limited way would not seem to implicate the separation of powers principle inasmuch as the prosecuting attorney has no legal authority to use his immunity power to violate a defendant's right to due process of law. Judicial intervention at that point would not interfere with any proper exercise of executive authority.

Finally, we note that the constitutionality of immunity statutes that give protection coextensive with scope of the privilege relinquished is well established. *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); *Dutton v. Dist. Court, etc.*, 95 Idaho 720, 518 P.2d 1182 (1974).

3. *If a witness in a criminal action testifies to having committed or having participated in criminal activity may the presiding judge order the immediate arrest of such person without an appropriate criminal complaint having been laid before him?*

In the context of your letter, we assume that the question relates to the circumstance where the prosecuting attorney has promised a witness immunity, without prior approval of the district judge, following which the witness testifies and incriminates himself.

As we interpret the governing cases, a promise of immunity which induces a witness to relinquish his privilege against self-incrimination, in the belief that he is immunized from prosecution, is enforceable whether authorized by statute or not. The due process clause assures that a witness will not be deceived in the matter of relinquishing guaranteed rights.

In *Santobello v. New York*, 404 U.S. 257 (1971), the defendant entered a plea of guilty as a result of a plea bargain promise made by the prosecuting attorney that the state would make no sentencing recommendation. The promise was broken by the prosecuting attorney's successor in office. The United States Supreme Court held that the original promise was binding on

the government as a matter of due process of law, and vacated the conviction.

This phase of the process of criminal justice, and the adjudicative elements inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 404 U.S. at 262.

The governing principle of *Santobello*, is that due process requires that if one is induced by the state to waive a right, the state is bound to honor the terms of the inducement. That principle, of course, is not limited to the factual circumstances of *Santobello*, but extends to all cases of waiver, as the Alaska court held in *Surina v. Buckalew*, *supra*. See also, *Matter of Doe*, *supra*.

In the same vein, the federal government is precluded from making any use of testimony required under a state immunity statute. *Murphy v. Waterfront Commission*, 378 U.S. 521, 12 L. Ed. 2d 678 (1964). See also, *Stevens v. Marks*, 383 U.S. 234, 15 L. Ed. 2d 724 (1966).

Sincerely,

Lynn E. Thomas
Solicitor General

LET:lb

March 14, 1983

Ms. Debora May George
Executive Director
Sun Valley/Ketchum Chamber of Commerce, Inc.
P.O. Box 2420
Sun Valley, ID 83353

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: City Promotions/Chamber of Commerce

Dear Ms. George:

You have asked us several questions concerning public funding of information and community promotional services which are provided by cham-

bers of commerce. Your questions may be summarized as follows: (1) May a city engage in promotional activities, i.e. advertising community attributes including those of private businesses to the general public and responding to inquiries about the community and its economic base? (2) If a city may so act, can it contract with a private entity to carry out those tasks? (3) May a city pay membership dues from public funds to a chamber of commerce?

City Advertising

The first question that must be answered is whether a city has any power to promote itself or to offer information about itself to the public at large. Without such a power the question of whether the city may contract with someone else to perform the service is moot. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).

A municipal corporation is a body politic created by organizing the inhabitants of a prescribed area under the authority of the legislature into a corporation with all the usual attributes of a corporate entity but endowed with a public character by virtue of having been invested by the legislature with subordinate legislative powers to administer local and internal affairs of the community . . .

56 Am. Jur.2d *Municipal Corporations*, § 4.

The legislative authority for the creation of cities and towns springs from art. 12 of the Idaho Constitution. In art. 12, § 1 the constitution provides that:

The legislature shall provide by general powers for the incorporation organization and classification of the cities and towns . . .

Art. 12, § 2 gives the direct grant of police power to cities who thus may make and enforce "all such local police, sanitary, and other regulations as are not in conflict with its charter or with the general laws."

The general authority granted to cities by the legislature is found in Idaho Code § 50-301. Therein it is stated that:

Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; . . . and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Idaho Code § 50-302 provides that:

Cities shall make all such ordinances, by-laws, rules, regulations, and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to

maintain the peace, good government and welfare of the corporation and its trade, commerce and industry . . .

While the preceding section does not specifically state that cities may advertise their virtues, it can be argued that in order to maintain the “welfare of the corporation and its trade, commerce and industry” at some point the city might have to advertise. Therefore such power to advertise or promote itself must necessarily be implied in the statutory requirement to maintain the welfare of the corporation and its trade. This line of reasoning follows along with the statements of the Idaho Supreme Court in such cases as *Veatch v. Gibson*, 29 Idaho 609, 617, 160 P. 1112 (1916) where it was stated that:

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.

If cities are required to maintain the welfare of their citizens and industry such a requirement carries with it the necessary implication that cities may take whatever reasonable steps are necessary to carry the requirement out. Those steps may include the promotion or advertising of the community to outsiders.

Another way to approach the question of whether a city may promote itself is to ascertain whether a city may expend public funds for the purposes of advertising or promoting economic and other benefits of the community.

All appropriations or expenditures of public money by municipalities and indebtedness created by them, must be for a public and corporate purpose as distinguished from a private purpose . . .

15 *McQuillin on Muni. Corp.* § 39.19. The same rule prevails in Idaho:

It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state, funded by tax revenues, must have primarily a public rather than a private purpose. A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Idaho Water Resources Bd. v. Kramer, 97 Idaho 535, 559, 548 P.2d 35 (1976). See also *Gem Irrigation Dist. v. Van Deusen*, 31 Idaho 779, 176 P. 887 (1918).

Also of note is the corollary proposition that while public funds must be expended for public purposes a public program will not be invalidated where incidental benefits may be realized by private enterprises. *Board of Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, 96

Idaho 498, 531 P.2d 588 (1974); *Engleking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969).

Public funds must be expended for public purposes but it is immaterial that some of the benefits from the expenditure of public funds may fall to private entities so long as the overriding purpose of the expenditure is public in nature.

While a thorough review of Idaho law finds no specific statutory authorization or supreme court case concerning the expenditure of city funds to advertise and promote the advantages of a municipality, the question has been considered in other contexts and other jurisdictions. Cases have held that expenditures for advertising or promoting a city, its resources, and other attributes are expenditures for a public purpose. *City of Tucson v. Sunshine Climate Club*, 64 Ariz. 1, 164 P.2d 598 (1946); *Sacramento Chamber of Commerce v. Stephens*, 299 P. 728 (Cal. 1931); *San Antonio v. Paul Anderson Co.*, 41 S.W.2d 108 (Texas 1931); see *Jarvill v. City of Eugene*, 40 Ore. App. 185, 594 P.2d 1261 (1979); 15 *McQuillin on Muni. Corp.* § 39.21.

Although the Idaho Supreme Court has not directly considered this exact question it has had occasion to consider closely related issues. In the case of *State v. Enking*, 59 Idaho 321, 82 P.2d 649 (1938) the Supreme Court had to decide whether a tax on produce levied for the purpose of providing a fund for advertising was lawful. In upholding the tax the court stated that:

[T]he tax having been levied for the purpose of providing an advertising fund for advertising such fruits and vegetables is valid and for a public purpose in that the protection of the apple, prune, potato, and onion industry is as much a matter of public concern to Idaho as the citrus fruit industry is to Florida . . .

An earlier case, *Bevis v. Wright*, 31 Idaho 676, 125 P. 815 (1918) held the levying of a tax to provide a fund for exhibition of the products and industries of the county at domestic and foreign expositions for the purpose of encouraging immigrants and increasing trade in the products of the State of Idaho was for a public purpose and therefore constitutional.

Advertising and promotion have also been found to be public purposes by the Idaho legislature. The Idaho Code is replete with authorizations for various state and local entities to promote themselves and their commodities. For example, Idaho Code § 22-2918 authorizes the Idaho Bean Commission to advertise commodities; Idaho Code § 67-4912(m) authorizes auditorium districts to promote themselves and their functions; Idaho Code § 67-4703 authorizes the state Division of Economic and Community Affairs:

To engage in advertising the State of Idaho, its resources, both developed and undeveloped, its tourist resources and attractions, its agricultural, mining, lumbering, and manufacturing resources, its health conditions and advantages, its scenic beauty and its other at-

tractions and advantages; and in general either directly, indirectly or by contract do anything and take any action which will promote and advertise the resources and products of the State of Idaho, develop its resources and industries, promote tourist travel to and within the State of Idaho, and further the welfare and prosperity of its citizens.

Many other examples can also be found within the code.

Based upon the foregoing it is our opinion that local governments may lawfully expend public funds for the purposes of advertising and promoting themselves, their citizens and their industry since such advertising and promotion has been found to be a public purpose both by the courts and by the legislature. Furthermore, the courts have found such practices to be in harmony with constitutional prohibitions against public aid in support of private endeavors.

Contracts to Perform Services

Once we have decided that the city may advertise and promote itself and its citizens and industry we must next answer the question of whether the city may contract with a private entity to carry out those same functions.

As previously discussed, Idaho Code § 50-301 authorizes cities to enter into contracts. Furthermore, "whatever public service a municipality may perform it may hire others to perform for it, in the absence of prohibitive legislation." 56 Am. Jur.2d *Municipal Corporations*, § 226. Therefore, since the city probably has the authority to promote and advertise itself it may enter into a contract with some other person or entity to provide those same services.

Some concern has been expressed as to whether Idaho Constitution art. 8, § 4 and art. 12, § 4 which prohibit the loaning or giving of public credit in aid of private endeavors would somehow be violated by a public entity contracting with a private entity to provide services to the public entity. Such concerns are without basis. As previously stated, cities are authorized to contract and be contracted with and furthermore are authorized to provide services to their inhabitants. Although the payment of public moneys to a private entity to provide services may indirectly benefit the private entity by enhancing its economic well being, such expenditures are nonetheless lawful so long as they are for a public purpose. *Board of Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, supra; *Engleking v. Investment Board*, supra; *Gem Irrigation Dist. v. Van Deusen*, supra. Thus, although public moneys may be paid to a private entity, such payment is lawful so long as the purpose to be achieved is public in nature. It is therefore our opinion that the city could contract with a private entity to provide advertising and promotional services to the city.

Membership Dues to Chambers of Commerce.

Your final question is whether a city may pay membership dues from

public funds to a chamber of commerce. In this regard the city would be making a donation to the chamber for no specific service to the city. Additionally no contract would be entered into to provide such service. In light of the prohibition of the extension of public credit or the donation of public funds to private interests contained in art. 8, § 4 and art. 12, § 4 of the Idaho Constitution it is our opinion that membership dues paid to a chamber of commerce would be unlawful.

Summary.

The city may expend public funds for public purposes. Advertising and promoting the city, its natural and economic features probably is a public purpose and therefore lawful expenditures may be made in the pursuit thereof. Cities may provide services which are public in nature and are authorized to contract with private entities to provide those same public services. Finally, although cities may contract for private performance of public services they may not make donations to private organizations. Such donations are violative of constitutional prohibitions.

If we may be of further assistance to you on this or any other matter please call upon us.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

RGR/tl

March 16, 1983

The Honorable Walter E. Little
Representative, District 10
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 249

Dear Representative Little:

Your letter of March 8, 1983, asks us two questions about House Bill 249, First Regular Session, Forty-Seventh Idaho Legislature, to-wit:

1. Whether the Bill is unconstitutional as it pertains to existing water rights; and

2. At what point in the Department of Water Resources Administrative Process does an application for a water permit vest so as to require compensation for a taking?

CONCLUSION:

1. House Bill 249 as proposed is probably constitutional under the authority of art. 15, § 3 of the Idaho Constitution and as a valid point in the regulatory process compensation may have to be paid pursuant to the requirements of art. 15, § 3 and art. 1, § 14 of the Idaho Constitution as they pertain to the taking of private property.

2. Water rights under the permit system provided for in title 42, chapter 17, Idaho Code, probably vest at the time a permit is issued although a priority date for purposes of allocation dates back to the time of the original application.

DISCUSSION:

At the outset it should be noted that due to the urgency of the request and the short time available, our responses must necessarily be brief and in legal guideline form. A more thorough analysis would require substantially more time.

House Bill 249 (and the same language in House Bill 277) proposes to amend Idaho Code § 42-405 by the addition of a new subsection 4 which reads as follows:

It is the intent of the legislature to subordinate the use of water for power purposes under the police power of the state for the optimum use of water resources in the public interest. All existing and future rights to the use of water for power purposes, however appropriated or evidenced, are and shall be subject to the condition that such uses will not conflict with depletions in the flow of the waters of the natural stream and its tributary sources from which such water is or may be used for power purposes, and will not prevent or interfere with the subsequent upstream diversion and use of such water for other beneficial purposes.

Although not specifically stated, the proposed enactment apparently relies in part on the powers granted by art. 15, § 3, Idaho Constitution. The pertinent part of that section provides that:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes . . .* but the usage by such subsequent appropriator shall be subject to such provision of law regulating the taking of private property for public and private use, as referred to in § 14 of art. 1 of this constitution.

The underlined language, which was added by an amendment in 1928, was apparently intended to give the state power to make choices between the allocation of water for power and its allocation for other beneficial uses including rights already vested. Support for this interpretation is correspondence and accounts contemporaneous to its passage. See, for example, *The Idaho Statesman*, October 20, 1928 p. 9, col. 1; letter of W. G. Swendsen, Idaho Commissioner of Reclamation to Governor C. C. Moore dated August 16 and August 18, 1924, Idaho State Historical Archives. We feel that, without further discussion, it is reasonable to conclude that it is within the power of the legislature to regulate the uses of water for power purposes, including present vested rights.

Also of importance is art. 1, § 14 of the Idaho Constitution relating to eminent domain. It is specifically referred to in art. 15, § 3 in connection with the taking of vested water rights for other uses. The section provides in part that:

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore.

It should also be noted that art. 11, § 8 provides that:

The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property in franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

It is reasonable to say then that while the state may take private property for the public good, compensation must be paid.

Water Rights as Property Rights

The state of Idaho follows the doctrine of prior appropriation in the determination of rights to the use of water within the state. Art. 15, § 3, Idaho Constitution; Idaho Code § 42-103. Fully vested water rights constitute an interest in real property under Idaho laws. Idaho Code § 55-101. This principal has been frequently acknowledged by the Idaho Supreme Court. See, Hutchins, "Idaho Law of Water Rights," 5 Idaho L. Rev. 1, 30 and cases cited therein. Furthermore, Idaho law does not provide that water rights for power purposes are less of a property interest than water rights used for other beneficial uses. While art. 15, § 3 of the Idaho Constitution grants the state the right to regulate and limit the use of water for power purposes it does not alter the characterization of water rights for power purposes as real property.

The Police Power

The police power of the state has been described as the power inherent in a government to enact laws within constitutional limits to promote the order, safety, health, morals, and the general welfare of society. C.J.S. Constitutional Law § 174. See *Rowe v. City of Pocatello*, 70 Idaho 343, 349 (1950); *In re Hinkle*, 33 Idaho 605 (1921). The police power is said to be a necessary attribute of every civilized government. However, the concept is not described with precision because no description can foresee the ever changing conditions which may require its exercise. 15A Am. Jur.2d Constitutional Law §§ 360, 362 (1979).

While the police power is not capable of precise definition it can be said that it is the inherent power of the state to make public policy decisions about the allocations of resources between competing interests for the good of society. Thus, it may be exercised by the legislature in determining how to allocate scarce water resources for the public good.

The police power is different from the power of eminent domain. The exercise of the power of eminent domain results in the taking of private property for public use and requires compensation to be paid for the value of the property. Art. 1, § 14 Idaho Constitution; 30 C.J.S. Eminent Domain § 399. On the other hand, the exercise of the police power generally is not a taking of property but rather a regulation of its use. While this exercise may restrict the uses to which property may be put or lessen its enjoyment by the owner, it is not a taking of all use of the property and therefore not an exercise of eminent domain requiring compensation. See, *Dawson Enterprise v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977). However, when the exercise of the police power does so severely limit the use of a person's property so as to amount to a taking it becomes an exercise of inverse condemnation of eminent domain and requires that compensation be paid. The distinction between the two powers is at times somewhat clouded and results in much litigation when the government exercises its police power regulatory function.

Two conclusions can clearly be drawn from the foregoing constitutional provisions: (1) The state clearly has the authority to regulate the use of water for power purposes, and (2) at some point that regulation may ripen into a taking of private property for the public good and may require compensation. Thus, the thrust of our consideration must be at what point does regulation of the use of property by the state ripen into a taking.

The Taking Issue

We have been unable to locate any cases which deal with the question of at what point does state regulation of a water right for power purposes rise to the level of a taking. However, there are other areas of the law where the exercise of the police power creates analogous situations. One is the exercise of the police power in the regulation of mineral resource development.

In the area of resource management, the Idaho Supreme Court has addressed the police power/taking issue in the cases of *Andrus v. Click*, 97 Idaho 791, 544 P.2d 969 (1976) and *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981). These cases involved the issues of whether the exercise of the state police power under the Idaho Dredge and Placer Mining Law by the state Department of Lands amounted to a taking of private property. In holding that such police power regulation did not amount to a taking, the Supreme Court stated:

If the statute prohibited respondents entirely from carrying on their business, then clearly this would be a 'taking.' However, we have determined that the statute may not do this. Beyond that, 'it is often a close question whether and if so how far the police power may be applied to regulate the operations of a property owner without making compensation. Two variable factors are to be considered: first the extent of the public interest to be protected, and second the extent of the regulation essential to protect the interest.' (cites omitted). It may be said in a given case that due process permits regulation to such extent as is necessary to protect the essential public interest. *Merced Dredging Co. v. Merced County*, 67 F. Supp. 598, 609 (S.D. California 1946).

97 Idaho at 800.

The court went on to hold that such a regulation did not deprive the miners of any property interest or render it impossible for them to mine the property and thus there was no taking. The Court also noted that a large discretion is vested in the legislature to determine what the welfare of the public requires and what measures are necessary for the promotion of the public welfare. 97 Idaho at 801. It may be deduced then that although a complete taking will require compensation, reasonable regulation is permitted which may proscribe some of the uses of private property or increase the burdens of using it and no taking will be found.

Another line of cases that generally deal with the police power regulation of private property are those in the area of planning and zoning and municipal regulation. Those cases generally deal with situations where the government prohibits certain uses of property but does not prohibit the use of property altogether. *Dawson Enterprises v. Blaine County*, *supra* is an example. In that case plaintiff was denied a request for a zoning change which allegedly would have allowed a higher and better use of the property. In upholding the county's denial of the permit the court said:

Zoning is essentially a political, rather than a judicial matter, for which the legislative authorities have generally speaking complete discretion. (Cites omitted). Since the local governmental bodies are most familiar with the problems of their particular jurisdictions their legislative determinations come before us with a strong presumption of validity. Such presumption can only be overcome by a clear show-

ing that the ordinance as applied is confiscatory, arbitrary, unreasonable, and capricious. (Cites omitted). If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control and the court may not substitute its judgment for that of the zoning authority. It is not the function of this court or the trial court to sit as super zoning commissions.

Thus, every presumption is to be indulged in favor of the constitutionality of a legislative exercise of police power, unless arbitrary action is clearly disclosed. *Idaho Falls v. Grimmitt*, 63 Idaho 90 (1941). If the exercise of legislative police power is reasonable and not arbitrary any injury occasioned thereby must be considered a servitude inherent under our system of government and damages resulting therefrom do not constitute a legal injury. *Johnson v. City of Boise*, 87 Idaho 44 (1965).

The Idaho Supreme Court has stated that if the exercise of the police power goes beyond the bounds of reasonableness or is arbitrary to the point where there is an actual taking of private property for public use or deprivation of property without due process of law, then an action would lie for damages by way of inverse condemnation or for injunctive relief. *Johnson v. Boise City, supra*. To make such a determination:

The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its function for the public good, while at the same time giving due effect to the policy of the eminent domain clause of insuring the individual against an unreasonable loss occasioned by the exercise of governmental power.

87 Idaho at 52.

Finally it must be remembered that a large discretion is necessarily vested in the legislature to determine what the welfare of the public requires and what measures are necessary for the promotion of the public welfare. *Andrus v. Click, supra; Dawson Enterprises, supra*.

House Bill 249 as Police Power Exercise or a Taking

It must next be considered whether the enactment of H.B. 249 would be a proper exercise of the state's police power or instead would amount to a taking.

At the outset, it should be noted that the subordination requirement also applies to water rights acquired in the future for power purposes. Since no vested property interest could presently exist with respect to rights to be acquired in the future it must be presumed that the enactment of H.B. 249 would be a permissible exercise of police power to the extent that future rights to water for power purposes are to be affected.

H.B. 249 could result in the subordination of all existing unsubordinated water rights appropriated for power purposes. As stated earlier, perfected water rights, including those held for power purposes, must be considered real property under Idaho law. Thus, if enacted, H.B. 249 might result in an interference with vested property rights.

We must therefore consider the constitutionality of the restrictions which H.B., 249, if enacted, might place upon those existing unsubordinated water rights for power purposes. The result would probably be to subordinate such rights to allow for subsequent upstream diversion and use of water for other beneficial purposes in the public interest.

The factors which the Idaho Supreme Court has indicated must be considered to determine the appropriateness of an exercise of police power are the extent of the public interest to be protected, and the extent of the regulation essential to protect that interest. These twin factors must be weighed in light of the large discretion vested in the legislature to determine what the welfare of the public requires and what measures are necessary to promote it. *Click* cases, *supra*. As to the answers to these questions, we may only speculate.

In the case of H.B. 249, the public interest sought to be protected is the future availability of water from the State's natural streams and tributary sources for other beneficial purposes in addition to power generation. In an arid state such as Idaho, it is probably within the authority of the State to ensure that the limited water resources available are allocated among the various domestic, municipal, industrial, agricultural and power generation uses required to satisfy the general welfare needs of the people of the State. See generally, title 42, Idaho Code, for legislative expressions as to the importance to the public welfare of allocating available water supplies among the various uses in the public interest.

The second and more crucial factor to be considered is the extent of the regulation required to protect the public welfare and at what point that regulation may become a taking. H.B. 249 appears to be aimed at altering the situation in which downstream non-consumptive water rights for power purposes granted on a year-round basis may result in no water being available during low flow periods for various other additional upstream beneficial uses.

As such, the provisions of H.B. 249 apparently bear a reasonable relationship to the general welfare of the people of the State. See, *Johnston v. Boise City*, *supra* at 52. Further, there is no indication that H.B. 249 if enacted would constitute an arbitrary action by the legislature. See, *Idaho Falls v. Grimmer*, *supra* at 96. Thus, it may be a lawful exercise of the police power. Even if the police power exercise is lawful, it must be determined whether a taking would result. In *Andrus v. Click*, *supra* at 800, the Idaho court indicated that if the police power regulation prohibited the respondents from carrying on their business then clearly there would be a taking.

In applying this test to the subordination requirement envisioned by H.B. 249 there is no reason to believe that such subordination would render existing hydropower generating facilities without benefit. There are several reasons why this is true. First, while hydropower facilities operate throughout the year, demand from consumptive users of water would normally only interfere with senior power rights during the summer months. Second, the establishment of minimum stream flows by the state may guarantee that water is available in the stream for non-consumptive power generation purposes. See for example, Idaho Code § 42-1736A, establishing minimum daily flow at various gaging stations on the Snake River. Also see generally, chapter 15, title 42, Idaho Code, authorizing the Water Resources Board to apply for minimum stream flows. Lastly, before any upstream users may be authorized to divert water to which an existing power right would be otherwise entitled a permit must be obtained pursuant to Idaho Code § 42-203. One of the criterion which must be considered before granting a permit is the local public interest defined as the affairs of the people in the area directly affected by the proposed use. A downstream power facility affected by the proposed use would appear likely to warrant consideration under the local public interest criterion and be entitled to some degree of protection.

However, the foregoing is merely speculation. The analytical difficulty results from the appearance that the impact of subordination of existing rights is greater than that of the regulation approved in the cited police power cases. On the other hand, the impact would seem to be less than the takings for which compensation was provided in the other line of cases. Subordination of an existing water right which amounts to a decrease in the amount of water to which the appropriator has a right possibly would be a taking for which compensation is required. See for example, *Peck v. Sharrow*, 96 Idaho 512, 531 P.2d 1157 (1975).

Water Resources Permit Process

It is understood that the Department of Water Resources routinely places a subordination condition upon new water right permits for power purposes. It may, therefore, be as unnecessary to determine the specific point in the appropriation process at which a taking would require compensation if H.B. 249 is enacted and determined not to be a valid exercise of police power. It may be said, however, that the mere submission of an application establishing a priority date is unlikely to vest in the applicant a property right requiring compensation. *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981) (holding applicant for water rights obtained no vested right prior to permit having been issued).

CONCLUSION:

The Idaho legislature probably has authority to regulate the uses of water, including present vested rights for power production pursuant to both art. 15, § 3, Idaho Constitution, and other state's inherent police power. Whether such regulation amounts to a taking, however, will undoubtedly have to be

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determined by the courts. Although exercise of the police power allows restrictions upon the uses of property which may diminish its value, an outright prohibition of the use of all or part of the property may require compensation.

The taking issue only applies to present vested rights. Future uses not yet acquired are subject to reasonable regulation. Whether absolute denial is lawful has not been considered, although it would be the logical result if all water has been appropriated.

Finally, we have not considered what effect the federal "Reserved Water Rights" doctrine or the Supremacy Clause may have when dealing with power generation and water allocation. These issues were touched on in *Idaho Power Co. v. State of Idaho*, 82 I.S.C.R. 943 (Nov. 19, 1982) but not dealt with here. That case is also important for the potential impact its remand may have on the issues at hand. The district court must still determine whether an abandonment or forfeiture has occurred for part of the water right at Swan Falls.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government Division

RGR/tl

March 18, 1983

The Honorable J. Vard Chatburn
Representative, District 26
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION.
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

RE: Witness' Privilege Before the Water Resources Board

Dear Representative Chatburn:

In response to your inquiry concerning whether a witness before the Department of Water Resources is protected from prosecution for libel for statements made as a witness, I am of the opinion that such testimony is probably privileged and not subject to a civil suit.

The rule is well established in the United States that defamatory testimony is protected by an absolute privilege if the testimony is relevant to the inquiry, even if the testimony was given maliciously and with knowledge of its falsity. See 50 *Am. Jur.2d*, Libel and Slander, § 249, p. 766; *Restatement*

of *Torts 2d*, § 588; *Lofland v. Meyers*, 442 F. Supp. 955 (N.Y. 1977); *William L. Prosser, Law of Torts*, § 114, pp. 777-78, fn. 77-78. This rule applies not only before courts but also legislative committees or councils and quasi-judicial administrative officers and bodies. *Engelmohr v. Bache*, 66 Wash.2d 103, 401 P.2d 346 (1965).

To qualify as a quasi-judicial administration, the administrative body must have certain characteristics e.g., fact finding hearings which are necessary for it to properly perform its function and the powers of discretion in applying the law to the facts. Thus, for example, administrative hearings before licensing boardings and workmen compensation commissions have been held to be quasi-judicial administrations. *Independent Life Insurance Co. v. Rogers*, 165 Tenn. 447, 55 S.W.2d 767 (1933); *Bleecker v. Drury*, 149 F.2d 770 (2d Cir. 1945). However, the statements must be relevant to the investigation. *Magelo v. Roundup Coal Mining Co.*, 109 Mont. 293, 96 P.2d 932 (1939).

Where the administration has been found not to be quasi-judicial, the courts generally refuse to apply absolute immunity, but grant a qualifying immunity which only protects an honest assertion of a right or one made in the course of a duty. *Andrew v. Gardiner*, 224 N.Y. 440, 121 N.E. 341 (1918); 50 *Am. Jur.2d*, Libel and Slander, §§ 234-237.

A hearing before the Idaho Department of Water Resources has many attributes of a judicial proceeding. For example, in an application for a change in the point of diversion, the director is authorized to investigate the application and conduct a hearing thereon. I.C. § 42-222. Testimony adduced at such hearings would likely be protected by an absolute privilege.

However, there are no Idaho statutes or case law which are dispositive of the witness' privilege question. In *Gardner v. Hollifield*, 96 Idaho 609, 533 P.2d 730 remanded and appealed 97 Idaho 607, 549 P.2d 266 (1976), the court held that statements made by a superintendent of schools to a school board regarding plaintiff's incompetence as a teacher are conditionally, not absolutely, privileged. Unfortunately, the court did not explain under what circumstances these statements were made — i.e., whether the statements were made at a hearing and whether the school board was conducting hearings to gather information on whether to re-employ the school teacher. Nevertheless, the court placed much reliance in its analysis upon the *Restatement of Torts 2d*, which recognizes an absolute privilege for witnesses before a quasi-judicial proceeding. Moreover, the case also recognizes at least a conditional or qualified privilege where the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

In a perusal of case law from the surrounding states, I was unable to find any jurisdiction which has enacted a statute recognizing or defining the parameters of a witness privilege. I don't believe legislation which would recognize this privilege is necessary because Idaho courts will likely recognize

the privilege if ever confronted with the issue. Second, the number of different circumstances under which a person is a witness is great and a statute which attempts to define these circumstances would be so broad that the focus of attention in litigation would then shift to whether the proceeding was covered by the statute.

I hope this guideline will answer your needs and questions. If there is anything further I can do, please feel free to contact me.

Sincerely,

Neil Tillquist
Deputy Attorney General
Division of Natural Resources

NT/tl

April 4, 1983

Honorable Walter E. Little
Idaho House of Representatives
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Little:

You have asked for legal guidance concerning the ability of the Department of Employment to borrow funds from the federal government to pay claims for unemployment compensation. Specifically, you are concerned whether state law will permit the department to borrow money. As your request does not seek advice concerning the ability of the federal government to loan the money to the state, we will not address the point. However, it should be noted that so long as the state is empowered to borrow, 42 U.S.C. § 1321 appears to allow the federal government to lend.

There does not appear to be any provision of the Idaho Constitution which prohibits the Department of Employment from borrowing money to pay unemployment compensation claims. Art. VIII, § 1 of the Idaho Constitution generally limits the state's ability to incur debt. That section however applies only to the legislature, as it states, "The legislature shall not in any manner create any debt or debts . . ." Further, the section has been construed to apply only to obligations which are to be paid from the general account. See *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976), and *Lyons v. Bottolfson*, 61 Idaho 281, 101 P.2d 1 (1940). As the proceeds of the loan to be entered into by the Department of Employment presumably would be placed in the Employment Security Fund established by Idaho Code § 72-1346 and would subsequently be repaid from that fund, there

would be no indebtedness placed upon the general fund of the State of Idaho by the loan. Therefore, such a transaction apparently would not violate art. VIII, § 1 of the Idaho Constitution.

In our opinion, however, current statutes do not permit the Department of Employment to incur such a debt. Pursuant to general rules of administrative law, the authority of administrative officers is determined by statute, and they have only such power and authority as is clearly conferred or necessarily implied from the powers granted. *Douglass v. Kelton*, 610 P.2d 1067, 1068 (Colo. 1980). Similarly, in *Oracle School Dist. No. 2 v. Mammoth High School Dist. No. 88*, 633 P.2d 450 (Ariz. 1981), the court pointed out that a board or commission which is a creature of statute created for a special purpose has only limited powers and it can exercise no powers which are not expressly or impliedly granted. Similarly, see *Colorado-Ute Electric Assn. Inc. v. Air Pollution Control Commission of Colorado Dept. of Health*, 648 P.2d 150 (Colo. 1981); *Woods v. Midwest Conveyor Co. Inc.*, 648 P.2d 234 (Kan. 1982); *State ex rel. State Tax Appeals Board v. Montana Board of Personnel Appeals*, 593 P.2d 747 (Mont. 1979); and *Ochoco Construction inc. v. Dept. of Land Conservation and Development*, 641 P.2d 49 (Or. 1982).

Similarly, in a somewhat different circumstance, the Idaho Supreme Court stated in *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122 (1979):

As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it.

Thus it is clear from a general examination of administrative principles that the Department of Employment lacks authority to borrow funds to pay the expenses of its programs unless such authority is conferred upon it by statute or is necessarily implied from the powers conferred. Idaho Code § 72-1333 sets forth the general provisions regarding the authority of the director of the Department of Employment. That section grants to him the implied power to take such actions as he deems necessary or suitable to administrate the employment security law. However, nowhere in the act is there any indication that the legislature contemplated the borrowing of funds to fund the payment of unemployment benefits. In fact, the legislature set forth a comprehensive scheme to provide the necessary funding for payment of benefits. As stated in Idaho Code § 72-1302, the legislature intended the department to be funded by "the systematic accumulation of funds during periods of employment." Further, Idaho Code § 72-1346 grants the department the authority to invest the principal of the fund and use the proceeds to carry out its purposes. While the department certainly has the implied authority to implement the legislative scheme, it does not have the authority to substitute a scheme of its own for the payment of unemployment compensation benefits. Furthermore, we have been unable to find any decision in which a court has found an administrative agency to have an implied power to borrow funds to support public programs.

We believe it is extremely unlikely that an Idaho court would hold that the Department of Employment has implied powers to borrow money to fund its programs. In fact, a review of Idaho's constitutional provisions reflects a strong public policy aimed at protecting the citizens of the state from the incurring of debt by state and local governments. See, e.g., Idaho Const. art. VII, §§ 13 and 14, art. VIII, §§ 1 and 3. In view of the apparent strong policy against incurring debt without appropriate approval, we think it is extremely unlikely that a court would hold that Idaho statutes grant the Department of Employment an implied power to incur indebtedness.

Further, there is some concern that the loan contemplated may violate Idaho Code § 59-1015 which states in relevant portion:

No officer, employee or state board of the state of Idaho . . . shall enter, or attempt to offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred . . .

Idaho Code § 59-1016 makes such contracts void while Idaho Code § 59-1017 states:

Any person violating the provisions of the two preceding sections shall be deemed guilty of a misdemeanor, and shall be disqualified from holding any state office or from being employed by the state of Idaho . . . for a period of four (4) years from and after the commission of the offense.

Accordingly, any contract which violates the terms of Idaho Code § 59-1015 will both be void and subject the maker of the contract to criminal misdemeanor penalties and ineligibility for public office. Given the severity of the results, extreme caution should be exercised for entering into any such contract.

The loan arrangement contemplated may violate Idaho Code § 59-1015. Idaho Code § 72-1346 perpetually appropriates "all monies coming into said fund." Accordingly, if the money from the loan "comes into the fund" as contemplated by this section it is continually appropriated and therefore, by definition, its expenditure will not violate Idaho Code § 59-1015, as the liability will not exceed the appropriation. Although this may be an acceptable interpretation we urge caution in relying upon it as the penalties of Idaho Code § 59-1017 are substantial. In any event, as we have determined that the Department of Employment lacks authority to enter into the contemplated loan transaction the answer to the question raised by Idaho Code § 59-1015 is not critical.

Given the foregoing, we conclude that the Department of Employment may not borrow funds as contemplated without enactment of additional

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legislation. We hope this has answered your concerns satisfactorily. If we may provide further information, please contact us.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief - Legislative/
Administrative Affairs

DAVID HIGH
Deputy Attorney General
Division Chief - Business Affairs/
State Finance

KRM/DH/bc

April 6, 1983

Mr. Gordon C. Trombley
Director
Department of Lands
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Forest Protection Fund

Dear Director Trombley:

You have asked whether the state may lawfully pay the costs of range fire suppression with monies from the forest protection fund. Our conclusion is that:

1. The state may lawfully do so, provided that:

- a. the costs are incurred for fire suppression on state or private lands located within a designated forest protection district; and
- b. the monies drawn from the forest protection fund do not exceed that portion of funds paid by members of the forest protective district in which the suppression costs are incurred.

2. If the costs are incurred on lands not located within a forest protective district, the state may not lawfully pay suppression costs with monies from the forest protection fund.

ANALYSIS:

The Idaho Forestry Act, Chapter 1, Title 38, Idaho Code (Act), applies to state and privately owned forest and range land within the state. I.C. § 38-105. The Act establishes the forest protection fund. I.C. § 38-129. The principal source of the fund is assessments levied on owners of forest lands. I.C. § 38-129. Assessments on private owners of forest lands are collected per forest protective district designated by the Director of the Department of Lands. I.C. §§ 38-110, 38-111. A forest protective district may include range land, I.C. § 38-110, provided that the range land is "adjacent to or intermingled with forest land." I.C. § 38-101(b).

The state is also considered an owner under the Act, I.C. § 38-114, and pays assessments into the forest protection fund based upon its share of state-owned lands located in the forest protective district. I.C. § 38-114. The state's assessment is paid out of the general fund. I.C. § 38-114.

Monies from the forest protection fund are dedicated to appropriation for the purposes of the Act. I.C. § 38-129. The purposes of the Act include "forest protection," I.C. § 38-102; "protection against the starting, existence or spread of fires," I.C. § 38-111; and the "detection, prevention and suppression of forest or range fires in forest protective districts." I.C. § 38-104(c). Disbursements from the forest protection fund are clearly authorized for suppression costs as well as prevention costs. Further, Section 38-111 provides that additional assessments may be levied when an "actual loss" occurs which exceeds the amount for which assessments have been made. Thus, monies from the forest protection fund may be disbursed retroactively for suppression costs.

There are two important restrictions placed on such payments. First, assessments levied on private forest land owners, including any additional assessments, are based solely on costs assignable within each forest protective district and may not exceed the statutory maximum set forth in Section 38-111. If actual suppression costs exceed the fund money available for the district, the state may authorize the issuance of deficiency warrants to defray the excess costs. Those warrants are drawn from the general fund. I.C. § 38-131.

Second, assessments paid by a forest landowner may not be disbursed for suppression costs incurred outside that owner's particular forest protective district. This restriction is found in Section 38-104(a), which states:

Funds collected from owners of forest lands shall be used only for the benefit of forest lands within the forest protective district from which collected.

While this provision is set forth in a subsection addressing specifically federal-state agreements, it probably has general application throughout the Act when read in conjunction with the provisions of Section 38-111 and the

overall scheme of the Act. Thus, the state may not appropriate forest protection fund monies for fire suppression costs incurred on lands for which no assessments have been levied — that is, lands outside a forest protective district.

This is not to say that the state may not pay for suppression costs via a contractual arrangement or, possibly, common law liability. Indeed the Act allows the state to enter into agreements with the federal government, counties, and municipalities for fire prevention and suppression on private lands. I.C. § 38-104(a)(b). But any payments made pursuant to such agreements would be subject to the restrictions of the Act. Payments from the state must be drawn from the general fund. I.C. § 38-114, 38-131. Payments from assessments levied on private forest protective district members must be restricted to costs from their district. I.C. §§ 38-104(a), 38-111.

Finally, it again should be noted that the Idaho Forestry Act provides for payment through the forest protection fund for suppression costs on state and private lands. The Act does not address fire suppression on federal lands. The question of whether the state is liable for suppression costs on federal lands depends on principles of contract or tort and has not been analyzed in this guideline. It nonetheless can be concluded, based on the explicitly restricted spending authorization in the Idaho Forestry Act, that the monies of the forest protection fund derived from assessments on private forest protective district members cannot be used in payment of any state obligation for fire suppression on federal lands.

Sincerely,

Kurt Burkholder
Deputy Attorney General
Division of Natural Resources

KB/tl

April 8, 1983

Mr. Gordon C. Trombley
Director
Department of Lands
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Application of Forest Protection Fund to Range Land Fire Suppression

Dear Director Trombley:

By an informal guideline addressed to you and dated April 6, 1983, we concluded that the state may lawfully pay costs incurred for fire suppression

on state or private lands located within a forest protective district with monies from the forest protection fund. By your letter of April 7, 1983, you more specifically have asked whether it is lawful to pay suppression costs from the forest protection fund when (1) the costs are incurred on state, federal, and private lands, (2) the lands are located within a forest protective district but have not been charged annual assessments for fire protection, and (3) the lands are range lands located at least fifteen miles from forest lands.

It is our conclusion that monies from the forest protection fund may not be appropriated to pay suppression costs incurred on federal land or on state or private range land which are not adjacent to or intermingled with forest land.

ANALYSIS:

As a preliminary matter, there is no authority to pay suppression costs incurred on federal land with monies from the forest protection fund, whether or not the federal land is located within a forest protective district. As noted in the informal guideline of April 6, 1983, at page 3, the Idaho Forestry Act, Chapter 1, Title 38, Idaho Code (Act), does not provide spending authority for fire suppression on federal land. The Act does allow the state to contract with the federal government for fire suppression, but only as to "*privately* owned forest or range land." I.C. § 38-104 (emphasis added). Otherwise, the assessments which go into the forest protection fund and pay suppression costs under the Act are levied only upon private and state lands. I.C. §§ 38-111, 38-114.

Turning to private and state lands located within a forest protective district, there is nothing in the Act which requires those lands to be assessed before forest protection fund monies may be spent for suppression costs incurred on those lands. Rather, the state may apply fund monies available per forest protective district to suppress fires within that district, and then collect those costs from the owners of the non-assessed lands upon which the costs are incurred. Section 38-111 states:

In the event the owner of any forest land shall neglect or fail to furnish the protection required by this section, the director of the department of lands shall provide such patrol and protection therefor at actual cost to the owner of forest lands.

And, Second 38-107 provides that the state may suppress a fire and then seek to recover the costs from the person responsible for the fire. The expenses incurred by the state prior to reimbursement are paid from the forest protection fund, I.C. § 38-129, provided, of course, the expenses are incurred within a forest protective district which has paid assessments into the fund. See I.C. § 38-104(a); Informal Guideline, April 6, 1983. Once the costs are recovered, they are placed back into the forest protection fund. I.C. § 38-129.

The above conclusion that monies from the forest protection fund may be applied to suppression costs incurred on non-assessed private and state lands

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within a forest protective district does not dispose of the entire question posed here. There remains the issue of whether the fund may be so appropriated if the subject lands are range lands located a considerable distance — here, at least fifteen miles — from forest lands. For the purposes of the Idaho Forestry Act, range land is defined as:

[A]ny land which is not cultivated and which has upon it native grasses or other forage plants making it best suited for grazing of domestic and wild animals and which land *is adjacent to or intermingled with forest land*.

I.C. § 38-101(b) (emphasis added). By this definition, the Idaho Legislature patently excluded from the provisions of the Act those range lands not in close physical proximity to forest lands. This does not mean that the Director of the Department of Lands, in dividing the state into forest protective districts under Section 38-110, must avoid including within those districts range lands which are removed from forest lands. Rather, the statutory definition limits the type of range lands upon which forest protection fund monies may be spent. The Act provides no spending authority for suppression costs incurred on state or private range lands not “adjacent to or intermingled with forest lands.”

As discussed in the informal guideline of April 6, 1983, the lack of authority to spend monies from the forest protection fund in this particular situation does not mean that the state might not be liable for costs of suppressing fires originating on state land or that monies from the general fund might not be appropriated to pay such costs. See Informal Guideline to Hon. D. Little (January 19, 1983). This guideline’s conclusion applies only to the lawful uses of the forest protection fund.

Sincerely,

Kurt Burkholder
Deputy Attorney General
Division of Natural Resources

KB/tl

April 13, 1983

The Honorable Walter Little
Idaho House of Representatives
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL’S OPINION
AND IS PROVIDED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Little:

This is in response to your questions regarding the doubling of assessments

upon personal property for failure to file personal property tax declarations. In particular you have asked the following questions:

1. Under what conditions can an assessor double the assessment upon personal property when a personal property declaration form has not been filed with the assessor's office?

County assessors are entitled to double assessments upon personal property under the conditions stated in Idaho Code § 63-207. That section provides:

Any property wilfully concealed, removed, transferred, misrepresented, or not listed or declared by the owner, or the agent or representative of the owner, to evade taxation for the current year, or in any preceding year or years, must upon discovery be assessed at two (2) times its value for each year such property has escaped assessment. The county board of equalization may excuse the liability for such penalty upon a proper showing that by reason of good and sufficient cause, the requirement to file pursuant to this title not be complied with. The assessor or his representative shall attend such hearing.

Thus, double assessments are permitted where there is a wilful failure to list or declare personal property to evade taxation.

2. What effect does it have on the assessor's right to double the assessments when the assessor has not furnished personal property declaration forms to the taxpayer?

Idaho Code § 63-203 provides in pertinent part:

Every county assessor may require any property owner, if he is a resident of the county, to furnish a list of all taxable personal property owned by or in the possession of said owner and situate in the possession of said owner and situate in the county on forms supplied by the assessor . . . The failure of the assessor to provide the taxpayer's declaration shall not impair or invalidate the assessment, nor will such failure relieve the property owner or his agent of the responsibility to obtain such declaration and to comply with the requirements of this act. In the event the assessor fails to receive a taxpayers declaration as required, the assessor shall list and value such property according to his best judgment and information.

It appears from this section that although the taxpayer who does not receive forms has a duty to obtain and file a declaration, the assessor also has a duty to furnish forms to the taxpayer. Therefore, if forms were not sent to the taxpayer, the taxpayer could probably successfully argue to the county board of equalization that his failure to list or declare property was not done to evade taxation.

3. If a taxpayer has declared his personal property in a prior year, but fails to file a declaration in the current year, should an assessor double the

assessment upon all of the taxpayer's personal property or should he double the assessment only upon additions of personal property during the year which are not declared?

Again, the fact that the taxpayer had previously declared his property would be an indication that the taxpayer was not intending to evade taxation as to property previously declared. The taxpayer could argue to the county board of equalization that there was no intention to evade taxation in that he assumed the assessor would continue to assess normally the property previously declared.

This argument is strengthened by the language of Idaho Code § 63-207 that property not listed or declared to evade taxation "must *upon discovery* be assessed at two (2) times its value for each year such property has escaped assessment." Since the property was previously declared, it could be argued that such property was not currently "discovered".

This question seems to have been partially answered by the Idaho Supreme Court in the case of *V-1 Oil Company v. Lacy*, 97 Idaho 468, 545 P.2d 1176 (1976). In that case, the taxpayer filed an inadequate personal property declaration in 1973 stating on the form only the following: "Existing personal property depreciated 10%. No increase." The taxpayer subsequently denied the assessor access to the taxpayer's property. The assessor then tripled the 1972 assessment. (i.e. not merely additions to the 1972 property). Idaho Code § 63-207 previously provided for the triple assessments. As the Court explained the situation:

Appellant did not list any property on its 1973 taxpayer declaration form, and when respondent "discovered" property owned by appellant in addition to that assessed in 1972, respondent made the 1973 assessment at three times the value fixed for the 1972 assessment. With adjustments for depreciation of the property assessed in 1972, the 1973 figure (representing the 1972 property plus the newly discovered property) approximates an assessment of all of appellant's personal property at three times its value for 1973. Idaho at 470.

The Court, based upon the above, held that the above situation raised issues of fact. As the Court held:

The district court erred, however, in granting summary judgment on the ground there were no genuine issues of material fact. As we have indicated, the record leaves open questions as to the fair market values at which specific items of appellant's personal property were assessed, and as to the statutory authorization for respondent's procedure in assessing appellant's personal property. These material issues of fact remain to be determined. Idaho at 470.

Thus, the court refrained from holding that tripling the assessment upon property which was on the rolls the prior year was erroneous as a matter of

law. Rather, the Court treated this as an issue of fact. This would imply that whether such tripling was justified depended upon the factual circumstances under which the assessor tripled values on the prior year's rolls.

The Court did not indicate what circumstances would or would not justify the triple assessment. Consequently, it is not possible to definitively answer the question. However, it appears that the fact that property was on the rolls in the prior year is one factual circumstance relevant in answering the general question whether the failure to file a declaration was done to evade taxation.

In summary, the fact that the taxpayer had previously declared his property appears to be a significant indication that the taxpayer was not intending to evade taxation as to such previously declared property.

4. In the event that an assessment was doubled, what recourse does a taxpayer have?

A taxpayer who has been double assessed and who believes he has good cause for failure to file should appeal to the County Board of Equalization pursuant to Idaho Code § 63-207 which is quoted above. Upon a good cause showing, the County Board of Equalization may then excuse the liability for the penalty. As a practical matter, the taxpayer would need to submit his property declaration list to the County Board of Equalization in order for the Board to be able to make a determination as to the amount of reduction in assessment that should be permitted.

If the taxpayer failed to appeal to the County Board of Equalization, his appeal remedies are thereafter severely limited. At this point, the taxpayer basically has two potential avenues of appeal. First, the taxpayer could pay his taxes under protest and sue for refund pursuant to Idaho Code §§ 63-2212 and 63-2213. However, those sections have been interpreted by the Idaho Supreme Court to be limited to cases in which the tax is "void ab initio". In other words, that remedy is limited to cases in which there is no jurisdiction to tax, for example, where the property is exempted from taxation. The remedy cannot be used to challenge merely excessive taxation. *Washburn-Wilson Feed Company v. Jerome County*, 65 Idaho 1, 138 P.2d 978 (1943).

A second limited option is provided by Idaho Code § 63-2202. That section provides in pertinent part that:

The Board of County Commissioners may, at any time when in session, cancel taxes which for any lawful reason should not be collected, and may refund to any taxpayer any money to which he may be entitled by reason of a double payment of taxes on any property for the same year, or the double assessment or erroneous assessment of property through error, . . .

The focus of this section is upon a double assessment through error of the assessor. Therefore, this section would probably not provide a remedy where

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the assessor had properly performed his duties, but for some reason the taxpayer had good cause for his own failure to file a property tax declaration. As discussed above, where the taxpayer can show good cause on his own part, he is required to appeal to the County Board of Equalization at its equalization hearings on the personal property role.

I hope this information is helpful in clarifying the situation regarding rights and responsibilities involving double assessment of taxes. If you have any questions regarding this letter, please contact me.

Sincerely,

DAVID G. HIGH
Deputy Attorney General
Chief, Business Affairs
and State Finance Division

DGH/tg

cc State Tax Commission

May 12, 1983

Honorable John V. Evans
Governor of the State of Idaho
Office of the Governor
STATEHOUSE MAIL

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Governor Evans:

You have asked whether House Bill No. 7 of the First Extraordinary Session of the Forty-seventh Legislature was an appropriate subject for legislation during the extraordinary session. Art. IV, § 9 of the Idaho Constitution limits the legislature's ability to legislate during special sessions. In relevant portion, that section states that when the legislature is convened in special session, "it shall have no power to legislate on any subjects other than those specified in the proclamation . . ." Accordingly, if the subject of House Bill No. 7 cannot be found in the proclamation calling the legislature into extraordinary session, it was an inappropriate subject for legislation.

House Bill No. 7, sometimes called the "surplus eliminator bill," appropriates any surplus of FY 1984 general fund money to specific accounts in the state treasury. There are only two items in your proclamation convening the special session, issued on April 22 and amended on May 9, 1983, which even remotely would include an appropriation bill such as House Bill No. 7. The proclamation of April 22 calls the legislature into session:

1. To consider and enact appropriation bills for the following entities:

PUBLIC SCHOOL SUPPORT
VOCATIONAL EDUCATION
COLLEGE AND UNIVERSITIES
AGRICULTURAL RESEARCH/EXTENSION
SERVICES

2. To consider and enact revenue and taxation legislation.

The proclamation of May 9 deletes item two of the above proclamation and thereby removes the subjects contained therein from the permissible scope of legislation during the session. In addition the amendment to the proclamation enables the legislature to "reconsider revenue projections for fiscal years 1983 and 1984." Because the legislature's ability to appropriate during the special session specifically is limited to appropriations for education purposes, and because the appropriation embodied in House Bill No. 7 is not for those purposes, it is not authorized under item one of the April 22 proclamation.

Nor is House Bill No. 7 authorized by item one of the May 9 proclamation as a revenue projection. It is an appropriation bill. It does not predict the amount of revenue to be received by the general fund from particular sources. House Concurrent Resolution Nos. 4 and 5 of the First Regular Session of the Forty-seventh Legislature embody revenue projections. Upon comparison it can be seen clearly that House Bill No. 7 is not a revenue projection. Rather, it appropriates surplus money in the general fund on June 30, 1984, to particular purposes.

A court would construe House Bill No. 7 to be within the subjects specified in the proclamations if such an interpretation is reasonable. See *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938). Further, courts are very reluctant generally to intrude into the reasonable determinations made by constitutional officers and bodies of the state when such determinations appear reasonable. See *Moon v. Investment Board*, 96 Idaho 145, 25 P.2d 335 (1974), and *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932). Even though the above rules of statutory construction would require a court to attempt, if possible, to construe House Bill No. 7 as within the proclamation convening the extraordinary session, it is my conclusion that such an interpretation is improper and unlikely. House Bill No. 7 is not a revenue projection. It is an appropriation bill the subject of which cannot be found in the proclamations convening the legislature into extraordinary session.

Accordingly, it was not an appropriate subject for legislation during the special session. I hope this has answered your concerns. If I can provide fur-

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ther assistance please call upon me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief - Legislative/
Administrative Affairs

KRM/bc

June 3, 1983

Mr. David Bivens
Executive Director
Idaho Cattlemen's Association
2120 Airport Way
Boise, ID 83705

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Ownership and Taxation of Range Improvements

Dear Mr. Bivens:

This guideline addresses two questions you have posed concerning ownership and taxation of range improvements on public land. For the sake of providing you a timely response, a more thorough analysis has not been undertaken. It is our opinion, however, that the conclusions below are correct as a matter of law.

QUESTION NO. 1

Whether, under the Taylor Grazing Act, the United States has an ownership interest in range improvements constructed pursuant to and financed in part with 12½ % fund monies.

CONCLUSION

No.

QUESTION NO. 2

Whether the purchase of materials by a grazing permittee for the construction of United States-owned range improvements is subject to state sales tax.

CONCLUSION

Yes.

ANALYSIS

Question No. 1

Under the Taylor Grazing Act, (Act), range improvements may be constructed by cooperative agreement or by range improvement permit, the latter of which is commonly known as a § 4 Permit. 43 U.S.C. § 315c. By cooperative agreement, costs and labor for the improvements are divided between the grazing permittee and the United States and title to the improvements goes to the United States. 43 C.F.R. § 4120.6-2. By a § 4 permit, the permittee pays for the improvements and receives title to "removable" improvements. 43 C.F.R. § 4120.6-3(a) (b). Removable improvements are not defined in the act or its regulations. However, the comment to the final rulemaking for the regulations states that "removable" improvements are to mean improvements "such as corrals, fences, or loading chutes [which] could reasonably be removed if range improvement permits were terminated." 46 F.R. 5786 (Jan. 19, 1981).

Thus, as a general matter, title to removable improvements constructed under a § 4 permit resides in the permittee. This preliminary conclusion is buttressed by provisions in the act and regulations requiring purchase of a prior occupant's improvements, 43 U.S.C. § 315c, and fair market value compensation for permittee-owned improvements upon termination. 43 C.F.R. § 4120.6-6.

The specific issue here is whether title to the improvements is affected by the improvements being partly financed by state-allocated portions of grazing fees. Under the Taylor Grazing Act, 12½% of the grazing fees collected by the United States from permittees is returned to the state;

[T]o be expended as the State legislature . . . may prescribe for the benefit of the county or counties in which the grazing districts producing such monies are situated.

43 U.S.C. § 3151. The Idaho Legislature has prescribed that its share of 12½% fund monies is to be deposited with the state treasurer, then distributed to the counties generating the funds. Idaho Code § 57-1201. The county treasurer then pays the funds to a grazing district treasurer appointed by the local grazing district advisory board. Idaho Code § 57-1202. The fund is then expended within the county;

[A]s may be directed by the board of district advisers of such grazing district for *range improvements* and maintenance, predatory animal control, rodent control, poisonous or noxious weed extermination, or for any similar purpose.

Idaho Code § 57-1203 (emphasis added).

Arguably, once the 12½% of grazing fees is paid to the state treasurer those monies become state monies over which the United States has no con-

trol or possessory interest. (C.f. Pittman-Robertson Act, 16 U.S.C. § 669, where prohibited application of federal wildlife restoration funds suspends further grants). The Taylor Grazing Act does not impose any condition on the state's use of the monies other than that expenditures be made as the state legislature "may prescribe" and for the benefit of the county or counties generating the monies. See Memorandum, Assoc. Solicitor, Energy and Resources, Dept. of Interior (Dec. 13, 1982). The funding of range improvements with the monies is authorized by the Idaho Legislature. Idaho Code § 57-1203. Nothing in the Taylor Grazing Act provides that such funding vests title in the United States contrary to the permittee title expressly recognized in the act's promulgating regulations. 43 C.F.R. § 4120.6-3(b).

It should be noted that the regulations do state that a permittee shall provide "full funding" for construction and maintenance of range improvements under a § 4 permit. 43 C.F.R. § 4120.6-3(a). It could be argued that the adjective "full" requires the permittee to pay all costs without other financial assistance. This would seem an extreme implication, since it logically also would preclude assistance in the form of agricultural grants and bank loans. The regulations do not specify the source of the permittee's funding, only that the permittee is responsible for providing the funding. The use of the term "full funding" is probably intended only to distinguish permittee liability for improvements under a § 4 permit from joint federal-permittee liability for improvements under cooperative agreements.

In conclusion, grazing permittees have title to range improvements constructed under § 4 permits and such title is probably not affected by the use of 12½ % fund monies to finance the improvements. Whether a state, county, or grazing district advisory board would have an interest in improvements partly financed by 12½ % fund monies has not been examined in this analysis.

Question No. 2

If range improvements are constructed by a cooperative agreement, title to the improvements is in the United States. 43 C.F.R. § 4120.6-2. The grazing permittee may be responsible for purchase of the materials used in the improvements. See 43 C.F.R. § 4120.6-2.

The constitutional principle underlying the question whether such purchases are taxable is that a state may not, consistent with the Supremacy clause, levy a tax directly upon the United States. *Mayo v. United States*, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943); *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819). The Supreme Court decisions evolving from this principle have been, until recently, confusing and often contradictory. See 44 L.E.2d 719-737 (annot.). However, in the recent decision of *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), a unanimous court conclusively ruled on the applicability of federal tax immunity, particularly as to a factual setting similar to the one posed here.

The *New Mexico* decision held that goods purchased by contractors doing business with the federal government are subject to state sales tax even though title to the goods passed directly to the United States. The court stated that tax immunity is appropriate only:

[W]hen the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

455 U.S. at 735.

[A] finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes.'

455 U.S. at 736 (citations omitted). The fact that title passes directly from the vendor to the government,

[C]annot make the transaction a purchase by the United States, so long as the purchasing entity, in its role as a purchaser, is sufficiently distinct from the Government.

455 U.S. at 743 (citations omitted). The court also cited *United States v. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964), for the proposition that a private party's use of the property "in connection with commercial activities carried on for profit" is "a separate and distinct taxable activity." 455 U.S. at 734, 735. The court applied this reasoning to find the contractors' purchase of goods to be taxable even where the expenditures were, in effect, paid by the federal government under an advanced funding arrangement. 455 U.S. at 735. Earlier cases upholding state taxation on materials purchased by private parties for federal projects include *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) and *Detroit v. Murray Corp. of America*, 355 U.S. 489, 78 S.Ct. 458, 2 L.Ed.2d 441 (1958).

These holdings seem directly applicable to the purchase of materials by grazing permittees for United States-owned range improvements. Permittees probably would be considered separate entities from the federal government whose use of purchased materials for range improvements is for a commercial activity. Under *New Mexico*, their purchases thus would be subject to state sales tax whether the purchases were made with their own funds or, apparently, even with federal funds.

Sincerely,

Kurt Burkholder
Deputy Attorney General
Division of Natural Resources

KB/tl

cc: Stan Boyd
Tom Blessinger

June 28, 1983

Pat Barrell
Chief
Bureau of Child Support Enforcement
Department of Health and Welfare
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Ms. Barrell:

You have asked whether extension of a contract for legal services with an attorney would violate Idaho Code § 67-5726(1) given the recent election of his spouse to the Idaho State Senate. Of particular concern, the community property law of Idaho makes all property acquired after marriage including earnings, community property. Idaho Code § 32-906. It is my understanding that the attorney has been under contract with the Bureau of Child Support Enforcement continuously since September 1979 — i.e., the contractual relationship initially began before the election of the spouse. It is also my understanding that the spouse is not a member of the Senate Health, Education and Welfare Committee or the Joint Appropriations Committee.

Idaho Code § 67-5726(1) in pertinent part provides:

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

(emphasis added)

The primary goal in construing this statute is to ascertain and give effect to legislative intent. *Gavica v. Hansen*, 101 Idaho 58, 608 P. 2d 861 (1980). To do so, the courts and thus this analysis will look first to the literal or plain wording of the statute. *Local 1494 of International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 568 P.2d 1346 (1978). If the wording is unambiguous, there is no occasion for further interpretation and the statute will be given effect as expressly stated. *Worley Highway Dist. v. Kootenai City*, 98 Idaho 925, 536 P.2d 206 (1978). However, if the statute is ambiguous, it should be construed so as to give it effect rather than to nullify it. *Maguire v. York*, 99 Idaho 829, 590 P.2d 85 (1978). A construction which would produce harsh or absurd results should be avoided. *Gavica, supra*.

At the outset, it is clear that, if the extension is prohibited by the underscored prohibition of Idaho Code § 67-5726(1), the exception or alternative of competitive bidding is unavailable. The Administrator of the Division of Purchasing, pursuant to Idaho Code §§ 67-5716(5) and 67-5718, has classified legal services as non-biddable. This classification comports with the viewpoint that statutes requiring competitive bidding for public works contracts are not intended to apply to professional services. *Mongiovi v. Doerner*, 24 Or. App. 639, 546 P.2d 1110 (1976); *Capasso v. Pucillo and Sons Inc.*, 132 N.J. Super. 542, 334 A. 2d 370, *aff'd*, 132 N.J. Super. 473, 34 A.2d 334 (1974). In *Capasso*, the courts explained that professional services are not to be secured by competitive bidding because the inherent nature of the bidding process would nullify or detract from the professional qualities sought. With reference to legal services specifically, see *Herd v. Erie County*, 34 AD. 2d 289, 310 N.Y. 2d 953 (1970); *Phillips v. Seely*, 43 Cal. App. 3d 104, 117 Cal. Rptr. 863 (1974); Idaho State Bar DR2-103A. See also 15 A.L.R. 3d 733; *Neal v. Board of Education*, 40 N.M. 13, 52 P.2d 614 (1935); *Commissioners ex. rel. Roberto v. Tice*, 276 A.D. 447, 116 A. 316 (1922); *Caldwell v. Crosser*, 20 S.W. 2d 822 (Tex. Civ. App. 1928).

My analysis thus must focus on this central issue: Did the legislature intend to include within the prohibition such a contract as you envision in which a state legislator has only an incidental pecuniary benefit based upon Idaho community property law? I think not for the following reasons.

Resort to case decisions is of little assistance. The Idaho courts have not construed Idaho Code § 67-5726(1) with your problem in mind. Moreover, the language of the section appears to be peculiar to the State of Idaho. Consequently, resolution of your problem depends almost entirely upon a first effort interpretation of the statutory language.

The clear, literal thrust of the code section prohibits a legislator from entering into a contract (at least one governed by Idaho Code, chapter 57, title 67) unless made by or on behalf of a department or state entity other than the legislature *and* by competitive bid. The additional pertinent language appears to have been chosen to preclude a legislator from circumventing this prohibition by enlisting an agent, intermediary or "strawman" to contract in his or her stead. Attorney General Opinion 78-8, at p. 27. That this is so, is demonstrated by dissecting the sentence structure and words of the statute. A legislator is further-prohibited from undertaking, executing, holding or enjoying such a contract "*by any other person in trust for him or for his use or benefit or on his account.*" (*emphasis added*) Obviously, the conduct covered by the prohibition is that of the legislator. The word "*by*" is defined as "*through the means, act, or instrumentality of*". *Balentine's Law Dictionary* (3d ed. 1969). Similarly, the word "*for*" is defined: "*purpose or intended goal.*" *Webster's New Collegiate Dictionary* (1973). The prepositional phrases "*in trust for him*" and "*on his account*" even more clearly indicate that Idaho Code § 67-5726(1) was intended to preclude the situation in which the legislator remains the real contracting party albeit in disguised fashion. The facts you have given me do not fall within the plain meaning of this statute.

The legislator is not an attorney, and is not attempting by or through another person to provide the desired legal services. Conversely, the intended goal of the attorney spouse is that of furthering his career rather than entering into a contract for the use of the legislator.

Although this is an issue of first impression, I wish to elaborate by comparing the proffered interpretation with court interpretations of other provisions which prohibit related abuses but are worded significantly different. In *Nuckols v. Lyle*, 8 Idaho 589, 70 P. 401 (1902), the Idaho Supreme Court construed the following statutory language:

. . . no [school] trustee shall be pecuniarily interested in any contract made by the board of trustees of which he is a member . . .

The court, relying in significant part upon the long repealed community property law principle that the husband had the exclusive management and control of the community property including the earnings of the wife, concluded that a teaching contract made with the wife of a member of a board of school trustees was prohibited by the above terms of the statute. Not only has the law changed as to the management of community property but the statute construed in *Nuckols* is distinguishable. Idaho Code § 67-5726(1) does not read: "no legislator shall receive any benefit from a contract made on behalf of the State of Idaho." To construe the statute to include such a prohibition and preclude the extension would produce an overly-broad, harsh result — particularly so because the legislator, unlike the school trustee, does not sit on the board making the contract. *Gavica*, supra.

The correctness of the interpretation proffered for Idaho Code § 67-5726(1) is demonstrated by but not dependent upon the holdings of the Utah Supreme Court in *Brockbank v. Rampton*, 22 Utah 2d 19, 447 P.2d 376 (1968) and *Raymond v. Larsen*, 11 Utah 2d 371, 359 P.2d 1048 (1961). These decisions involved application of Utah Const. art. XIII, § 8 which prohibits "the making of profit out of public moneys or using the same for any purpose not authorized by law, by any public officer . . ."

The Utah Supreme Court construed this constitutional provision as being limited to those situations in which the public official was a fiduciary having the power to deal with the relevant property or funds. Consequently, a state senator was permitted in *Brockbank* to submit a bid for a janitorial service contract. The state senator in this case has no fiduciary relationship with the Department of Health and Welfare, and no direct control over the hiring of legal services.

In summary, my advice is based upon the proffered interpretation of Idaho Code § 67-5726(1) and the facts of this case. It is my conclusion that the envisioned extension would not violate Idaho Code § 67-5726(1). Apart from the dictates of this code section, it is important in state government to avoid conduct which might reasonably be interpreted as self-dealing or similarly improper. The precise facts also seem to preclude the possibility of a

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reasonably-based appearance of self-dealing. If you have any questions concerning this informal guideline, please contact me.

Sincerely,

LARRY K. HARVEY
Chief Deputy Attorney General

LKH/tl

cc: Mike Johnson
Steve Parry

July 6, 1983

Ms. Ellie Kiser, Chairman
Idaho Commission for Pardons and Parole
P.O. Box 14
Boise, Idaho 83707

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION.
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Ms. Kiser:

Attorney General Jim Jones has asked us to respond to your letter asking whether a person convicted of a crime and sentenced to a life sentence between July 1, 1971, and July 1, 1980, would have to serve ten years or five years of the sentence before becoming eligible for parole. From your letter, it appears that there is no specific set of facts underlying this question; you simply desire an interpretation of what appears to be an inconsistency in Idaho Code § 20-223 as it existed between the years 1971 and 1980.

Based upon an analysis of the section and the rules of statutory construction, it is most likely that persons sentenced to a life term between July 1, 1971, and July 1, 1980, become eligible for parole under Idaho Code § 20-223 after serving five (5) years. This conclusion is also based upon the interpretation given § 20-223 by the Idaho Commission for Pardons and Parole communicated to various judges around the state and the fact that the commission proposed both the 1971 amendment to Idaho Code § 20-223 and the 1980 revision, which revision clearly established a ten year minimum time to be served before parole eligibility arises for persons under life sentences.

No case has been found interpreting the language of Idaho Code § 20-223. The meaning of the statute, therefore, must be drawn from the language of the statute, rules of statutory construction and administrative interpretations of the statute. A primary rule of statutory construction is that a statute should be construed so that effect is given to all of its provisions, so that no one part of it will be inoperative or superfluous, void or insignificant and so

that one section will not destroy another. *Norton v. Department of Employment*, 94 Idaho 924, 500 P.2d 825 (1972). The language of the statute must be construed, if possible, to give force and effect to every part thereof. *Stucki v. Loveland*, 94 Idaho 621 (1972). Lastly, to give full force and effect to all parts of the statute, all sections of applicable statutes should be considered and construed together to determine the intension of the legislature. *Jauss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478.2d 838 (1970).

The first paragraph of Idaho Code § 20-223 provided that "no person serving a life sentence shall be eligible for release on parole until he has served at least ten (10) years." In 1971 a second paragraph was added and read as follows:

The board shall not accept an application for parole and shall not interview any prisoner for parole who was committed for any of the following crimes: any crime for which the prisoner received a life sentence, any crime of violence, to-wit: homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, assault with intent to kill, or murder in the second degree, a crime of rape, incest, crime against nature, or committing a lewd act upon a child, or with an attempt or assault with intent to commit any of said crimes, or any prisoner serving a sentence as a habitual offender until said prisoner has served either a period of five (5) years or one-third (1/3) of the original sentence, whichever is the least. The above limitation on parole eligibility shall affect only those prisoners who are sentenced on and after the first day of July, 1971.

1971 Idaho Sess. Laws, Regular Session, chap. 93, pp. 204, 205.

Reading the two paragraphs together, two very different interpretations are plausible. The first follows the basic rule that if possible, it is incumbent to give the statutory interpretation which will not have the effect of nullifying any part of the statute. *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). Considering the original statute along with the 1971 amendment, it is possible to say that the legislature meant that a prisoner serving a life sentence could not be eligible for release on parole until he had served at least ten years of his sentence. However, the prisoner could make an application for parole and the parole commission could interview a prisoner for parole after he had served five years of his life sentence.

Under this construction the parole commission could interview the life prisoner after five years to see what progress and rehabilitation he has made while in prison. It is likely that the first few years of such a lengthy sentence would have a purely retributive effect. Allowing a prisoner to make application for parole, though a parole date would be at least five years in the future, would have the salutary effect of promoting the prisoner's rehabilitation by turning his eyes to the future and by lifting him from depression, while continuing to impress upon him the seriousness of his crime. Additionally, the inmate would then have a full five years to prepare

an adequate parole plan of residence, maintenance, employment and emotional support.

Alternatively, Idaho Code § 20-223 with its 1971 amendment may be read to reduce to five years the minimum time a prisoner serving a life sentence must remain incarcerated. The last sentence of the amendment states, "the above limitation on *parole eligibility* shall affect only those prisoners who are sentenced on and after the first day of July, 1971." (Emphasis added). The words "parole eligibility", occurring as they do at the end of the paragraph, probably mean that the legislature intended to change the minimum period of incarceration from ten years to five years before the inmate could be eligible for release on parole.

Webster's Third New International Dictionary (1971) defines "eligible" as (1) fitted or qualified to be chosen or used. Entitled to something. (2) Worthy to be chosen or selected. Eligibility, thus, would mean fitted or qualified to be chosen for release on parole. The first clause of the amendment which speaks of applications and interviews for parole seems to be conditions for eligibility referred to in the last sentence of the paragraph.

It is not to be presumed that the legislature performed an idle act by ordaining a superfluous statute. *Walker v. Nationwide Financial Corporation of Idaho*, 102 Idaho 266, 629 P.2d 662 (1981). However, it appears that the language of the 1971 amendment to the statute which speaks of a five year minimum conflicts with the statute's first part which speaks of a ten year minimum for parole eligibility. As noted above, conflicting provisions of a statute should be read together and given effect if possible. Thus, if the second paragraph speaks of parole eligibility as does the first paragraph, then these conflicting provisions cannot be read together and be given effect. When two governmental promulgations are in irreconcilable conflict, the one enacted later in time governs. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 612 P.2d 542 (1980). *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979). Giving effect to the provision dated in 1971, it should be concluded that from July 1, 1971, until July 1, 1980, prisoners sentenced to life imprisonment would be parole eligible after serving five years.

Moreover, from 1971 until 1980, both the Department of Corrections and the Parole Commission have interpreted § 20-223 as requiring a five year minimum for those prisoners under life sentences. Administrative interpretation is an important construction aid to determine the intent of the Idaho legislature. *Faulkner v. Watt*, 661 F. 2d 809 (9th Cir. 1981) and *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979). The fact that the commission and the agency which are charged with giving effect to § 20-223 have chosen to interpret the statute as requiring a five year minimum between 1971 and 1980 should be given great weight. It should also be noted that members of the parole commission drafted the 1971 amendment. The agency and commission have adhered to the five year interpretation since 1971.

In retrospect, the most telling argument for the five year minimum is the 1980 revision of § 20-223 because the revision is a recognition by the legislature that a conflict existed in the statute following the 1971 amendment. In 1980 the application and interview language is excised. Those

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prisoners serving life terms clearly are required to serve ten years of their sentence before being considered for parole eligibility. The words "eligible for release on parole" are used exclusively to describe when persons with life sentences and persons with sentences less than life may be paroled.

It is significant that the 1980 change was authored by parole commission members; Samuel Kaufman, Jr., James Reid and J. Patrick Harwell. They clearly made the five year minimum inapplicable to life sentences and rewrote the statute to show clear intention that prisoners under life sentences serve a minimum of ten years.

To summarize, the most likely interpretation of Idaho Code § 20-223 as it existed from July 1, 1971, through July 1, 1980, is that prisoners with life sentences would have to serve a minimum of five years before being considered eligible for release on parole. There was an internal, irreconcilable conflict within the statute as it existed after 1971. Because the amendment introduced the conflict into the statute, its terms must prevail over the language of the earlier version of the statute. Furthermore, the policy of the Department of Corrections and the Parole Commission during the period between 1971 and 1980 uniformly interpreted the statute as requiring only a five year minimum for prisoners serving life terms.

I trust this has answered your question satisfactorily.

Sincerely,

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice
Division

ROBERT R. GATES
Deputy Attorney General
Department of Corrections

DMH and RRG/tg

July 21, 1983

Rose Bowman, Director
Idaho Department of Health and Welfare
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: The New Idaho DUI Statute

Dear Director Bowman:

The question presented concerns the legal status of the alcohol evaluation

requirement of Idaho's new DUI statute, Idaho Code §§ 49-1102 et seq., Title 49, Chapter 11 (1983).

This statute has a number of new features which distinguish it from the previous law. Two of the more controversial elements are (1) the mandatory alcohol evaluation statement requirement and (2) the use of the evaluation statement for sentencing purposes. It is my conclusion the statute is valid for reasons which I have outlined below. I do have concerns about the potential unconstitutional application to indigent defendants of the sentencing feature of the new statute, but conclude that even an unconstitutional application would not invalidate the statute as written.

Any person found guilty of or who pleads guilty to a violation of this statute must undergo an alcohol evaluation conducted at his own expense. Idaho Code § 49-1102A(4). It was clearly the legislative intent that the guilty defendant bear the costs of evaluation and treatment. H.B. No. 1 enacted by the Idaho Legislature in the First Extraordinary Session (1983) reads, in part: "it is the intent of the Idaho State Legislature to provide . . . that the mandatory evaluations provided for in this act be used by the sentencing judge to require those who have been identified as abusers to receive counseling and treatment at their own expense." 1983 Idaho Session Law, First E.S., Ch. 3. This statement of intent, combined with the codified section, Idaho Code § 49-1102A(4), unequivocally requires guilty defendants to pay for evaluation and treatment. This means that funds available pursuant to the Alcoholism and Intoxication Treatment Act, Idaho Code §§ 39-301, et seq. (1975), are not to be used to evaluate and treat individuals guilty of violating Idaho Code § 49-1102.

Although guilty individuals must pay for evaluation and treatment the new law apparently does not preclude an individual charged with violating the statute from seeking treatment prior to a conviction under the statute. Hence, a person charged with violating Idaho Code § 49-1102 should be able to voluntarily seek evaluation and treatment prior to trial. Money authorized under the Alcoholism and Intoxication Treatment Act, *supra*, may be available for this individual in accordance with the provisions set forth in the statute. However, once a determination of guilt is made, the guilty individual is precluded by Idaho Code § 49-1102A(4) from receiving funds under the Alcoholism and Intoxication Treatment Act, *supra*.

Concern has been expressed regarding the mandatory nature of the alcohol evaluation as it relates to individuals unable to pay for the alcohol evaluation statement. The two uncertain aspects of this problem are (1) whether failure to provide an evaluation statement can be considered an aggravating circumstance resulting in an enhanced penalty, and (2) if the court orders an evaluation and the defendant is unable to pay, who will bear the financial burden of evaluation and treatment. The legal implications of each of these questions are discussed below.

Although the legislative intent indicates a preference for sentencing based on consideration of an alcohol evaluation statement, see Idaho Code § 49-

1102A(5)(a), it is possible to sentence a guilty individual without the evaluation: "The court shall take the evaluation into consideration in determining an appropriate sentence, except that if a copy of the completed evaluation has not been provided to the court, then the court may proceed to sentence the defendant, . . ." Idaho Code § 49-1102(A)(4). The evaluation is not a condition precedent to sentencing and is not a barrier to the judicial process. Because it is not an absolute barrier it does not have the constitutional infirmities of statutes which do preclude indigents from access to the judicial process. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state required divorce filing fee struck down as unconstitutional because the fee precluded indigents from access to the courts).

However, the statute does permit the court to consider failure to provide an alcohol evaluation an aggravating circumstance for sentencing purposes: "if the defendant has not made a good faith effort to provide the completed copy of the evaluation report to the court, then the court may consider the failure of the defendant to provide the report as an aggravating circumstance in determining an appropriate sentence." Idaho Code § 49-1102(A)(4). This provision allows the court to enhance the penalty of those who cannot afford the fee for the evaluation. An enhanced sentence, either through an increased fine or increased imprisonment, may violate the fourteenth amendment of the United States Constitution as a deprivation of property or liberty without due process of law. *Boddie v. Connecticut*, supra; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

This is not to say the statute is invalid. Rather, it is my conclusion the statute is valid, but susceptible to an unconstitutional application. Although application of the statute to enhance a penalty might result in invalidation of this application of the statute, it would not invalidate the statute itself. Because application of the statute to enhance penalties has questionable constitutional overtones, the preferred construction of Idaho Code § 49-1102A(4) should preclude enhanced penalties for indigents. Sands, *Sutherland Statutory Construction*, § 57.24 (4th ed. 1973).

The new legislation as codified in Idaho Code §§ 49-1102, et seq., does not provide a source of funding for those guilty individuals who are indigent and unable to pay the cost of evaluation and treatment. This legislatively created problem has not been submitted for our consideration. It remains uncertain whether the state or the counties will have to bear the financial burden of indigents convicted under Idaho Code § 49-1102A who are ordered to obtain an alcohol evaluation and subsequent treatment.

In summary, I conclude that the mandatory alcohol evaluation provision of Idaho Code §§ 49-1102, et seq. is valid on its face. Although potential exists for an unconstitutional application of the aggravated circumstances portion of the statute, an application in that fashion would not invalidate the statute as written. Only the application as such would be unconstitutional. Regarding the funding concerns it is clear the legislature intended for guilty defendants to pay for the alcohol evaluation and treatment. However, this

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

does not preclude individuals charged with violating Idaho Code § 49-1102 from voluntarily seeking assistance and treatment pursuant to the Alcohol and Intoxication Act, *supra*, prior to a determination of guilt. Payment for treatment should be according to the provisions set forth in this act. Payment for evaluations and treatment for indigent individuals convicted and ordered to seek assistance apparently may not be made using the provisions of the Alcohol and Intoxication Act.

Very truly yours,

Terry K. Eller
Legal Intern

Kenneth R. McClure
Deputy Attorney General
Chief, Legislative/
Administrative Affairs

August 2, 1983

Rose Bowman
Director
Dept. of Health & Welfare
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Director Bowman:

You have asked this office for legal advice concerning the effect of recent United States Supreme Court decisions regarding abortion on Idaho Statutes which regulate abortion. Specifically you have asked whether the decisions issued by the United States Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4767 (June 15, 1983), *Planned Parenthood Association of Kansas City Missouri, Inc. v. Ashcroft*, 51 U.S.L.W. (June 15, 1983) and *Simopoulos v. Virginia*, 51, U.S.L.W. (June 15, 1983), have affected Idaho Code Title 18, Chapter 6 and particularly that portion which constitutes the "informed consent" statute enacted this past legislative session, 1983 Idaho Sess. Laws Ch. 149, p. 403, Idaho Code § 18-609.

The case of *City of Akron v. Akron Center for Reproductive Health, Inc.*, *supra*., hereinafter referred to as "Akron", appears to have an effect on section 18-609, Idaho Code, as well as on section 18-608, Idaho Code. After reaffirming its earlier decision of *Roe v. Wade*, 410 U.S. 113 (1973), in which the Court held that the 14th Amendment's right of privacy is broad enough to encompass a woman's decision whether to terminate her pregnancy (sub-

ject to certain limitation), the Court held that a number of the provisions of an Akron City ordinance relating to informed consent constituted an impermissible interference with such right of privacy. Based upon the Court's holding, it appears that two provisions in the Idaho informed consent statute are constitutionally questionable, as is a subsection of § 18-608, Idaho Code.

Section 18-609(2) requires the director of the Department of Health and Welfare to publish certain information regarding abortion, pregnancy, and child services available to abortion patients, along with detailed descriptions of fetal development during pregnancy. Under section 18-609(3), this printed material is required to be furnished to persons seeking an abortion. Pursuant to the holding in *Akron*, it appears that it is permissible to require the printing and dissemination of the information described in subsections (a) and (c) of subsection (2). This information pertains to a description of services available to assist a woman through a pregnancy and a description of abortion procedures and reasonable foreseeable complications and risks to the mother. However, there appears to be a question as to the permissibility of requiring the printing for dissemination of the material described in subsection (b) of section (2). This information relates to a description of the physical characteristics of a normal fetus at two week intervals, beginning with the fourth week and ending with the twenty-fourth week of development. § 1870.06(b) of the *Akron* ordinance, which required the provision of similar information to an abortion patient, was struck down by the Supreme Court. Although there are some differences in the type of information required to be provided to the abortion patient and in the matter of dissemination, the constitutionality of subsection (b) of section (2) of the Idaho Statute is certainly called into question by the *Akron* decision.

Under the terms of subsection (b), the abortion patient must be provided a description of the following characteristics of a normal fetus at eleven separate two-week intervals of development: Information about physiological and anatomical characteristics, brain and heart function, and the existence of external members and internal organs. The *Akron* ordinance required that a detailed description of "the anatomical and physiological characteristics of the particular unborn child" be provided to the patient by the physician. While the Court indicated that certain types of information could properly be required to be furnished to a patient, the "recitation of a lengthy and inflexible list of information" was found to be unreasonable. In addition, the Court commented that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." 51 U.S.L.W. at 4774.

The Idaho statute was more carefully drafted than the *Akron* ordinance and, therefore, it is not a complete certainty that it would be found objectionable under the *Akron* decision. The Idaho statute calls for the information to be printed and furnished to the patient, while the *Akron* ordinance required the doctor to furnish the information orally — something which the Supreme Court found to be quite objectionable. The Idaho statute does not call for the physician to speculate as to the development of the particular fetus of the particular patient, as did the *Akron* ordinance, but the Idaho

statute does require fairly detailed information pertaining to a number of time frames during the development of the fetus to be furnished to the patient. It is because of the fairly large amount of detailed information which the Idaho statute requires that the provisions of subsection (b) are constitutionally questionable. If the information required to be provided pursuant to subsection (b) were to be compressed into a summary form, such as a description of the characteristics of the fetus at the end of each trimester or some other formula calling for less detailed information at less frequent intervals, the ability of the provision to pass constitutional muster would be greatly improved. In its present state, however, it is more likely than not that the provisions of subsection (b) would be found to be constitutionally impermissible under the authority of the *Akron* decision and, consequently, there appears to be a question as to the enforceability of subsection (b).

Section 18-609(3) provides that the attending physician or physician's agent inform the patient of a positive pregnancy test. This is substantially the equivalent of § 1870.06B(1) of the *Akron* ordinance, and is without question a valid requirement. The second section of subsection 3, which provides for a 24 hour waiting period after giving the woman the required information but before the performance of an abortion, according to *Akron*, is unconstitutional. Striking § 1870.07 of the *Akron* ordinance which required a 24 hour waiting period, the Court noted "if a woman, after appropriate counseling, is prepared to give her written and informed consent and proceed with the abortion, a state may not demand that she delay the effectuation of that decision." 51 U.S.L.W. at 4776. The 24 hour waiting period requirement of subsection 3 is not permissible.

The next section in question is § 18-609(4) which protects certain "sensitive" individuals from disclosure of the information required by subsection two. There appears to be no reason why subsection four should be invalid as to the information which may properly be furnished to an abortion patient.

Section 18-609(6) requires notice to be given to the parents of any pregnant woman who is both unmarried and either under eighteen years of age or unemancipated. Such notice must be provided at least 24 hours prior to the performance of the abortion. This provision is closely akin to § 1870.05 of the *Akron* ordinance. In review of this provision, the Court noted that so long as an alternative procedure to parental consent is provided (such as judicial consent) the statute is constitutional. Close scrutiny of subsection 6 of § 18-609, however, shows that it requires only *notice* to the parents rather than their consent. According to the Court's ruling in *H.L. v. Matheson*, 450 U.S. 398 (1981), this is clearly permissible as applied to immature minors.

Section 18-609(7) provides a severability clause of significant dimension, which is far different from the normal severability clause employed by the Idaho Legislature. See, e.g., 1983 Idaho Sess. Laws Ch. 102, § (3), p. 222. In § 18-609(7), the legislature has gone out of its way to insure that any valid portion of the statute may remain in effect should others be unconstitutional. As the valid portions of the statute outnumber the invalid portions of the statute, and because the legislature has evidenced a strong intention that the statute be severable, a court most likely would find the valid portions to be

effective. See *Lynn v. Kootenai County Fire Protective District No. 1*, 97 Idaho 623, 550 P.2d 126 (1976).

The only other provision of Idaho law which appears to be affected by the *Akron* decision is § 18-608(2), Idaho Code. That subsection states that second trimester abortions must be performed in a hospital. "Hospital" is defined in § 18-604 as "an acute care, general hospital in this state, licensed as provided in Chapter 13, title 39, Idaho Code." A similar provision can be found in the *Akron* ordinance at § 1870.03. In the portion of the *Akron* decision dealing with hospitalization requirements during the second trimester of a woman's pregnancy, the Court has retreated from the "bright line" distinction between first and second trimester abortions which it established in *Roe v. Wade*. The court concluded that medical science has advanced so that some second trimester abortions may now be done safely without hospitalization during the first portion of the second trimester, holding as follows:

[At] least during the early weeks of the second trimester D & E abortions may be performed at an outpatient clinic as in a full-service hospital. We conclude, therefore, that "present medical knowledge," *Roe*, 410 U.S. at 163, convincingly undercuts *Akron*'s justification for requiring that all second trimester abortions be performed in a hospital . . . The lines drawn in a state regulation must be reasonable, and this cannot be said of [the second trimester hospitalization requirement].

51 U.S.L.W. at 4773. In light of *Akron*, therefore, it appears that section § 18-608(2), Idaho Code, is unconstitutional to the extent it requires *all* second trimester abortions to be performed in a hospital. Although the state cannot require that all second trimester abortions be performed in a hospital, the statute could be redrafted in accordance with guidelines contained in the *Akron* case so as to require that abortions conducted during the greatest portion of the second trimester be performed in hospitals.

In summary, the Dept. of Health & Welfare must publish printed material in accordance with § 18-609(2) (a) and (c) and provide such material to a woman seeking an abortion. Whether the information required under § 18-609(b) may be printed for dissemination is constitutionally questionable. Similarly, a physician may be required to verify a positive pregnancy test prior to abortion and must provide the printed materials to a woman before the abortion, although the requirement that such materials be submitted at least 24 hours beforehand is not enforceable. Other portions of § 18-609 appear to be unaffected by the abortion decisions. Finally, the requirement of § 18-608(2) that *all* second trimester abortions be performed in a hospital is unconstitutional.

I hope this has been of assistance to you, if you have further need for clarification please feel free to contact me.

Sincerely,

JIM JONES
Attorney General

JJ/tal

August 22, 1983

Mr. Max Hanson, Director
Department of Agriculture
State of Idaho

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE

Dear Max:

Your request for guidance of June 29, 1983, raises a broad and somewhat awkward question of proper statutory interpretation. The recognized principles of construction are readily stated, for the most part embodied in the Idaho Code, and susceptible of relatively straightforward application. However, in this instance, one factor complicates the process.

QUESTION PRESENTED

Your specific inquiry may be framed:

Following the 1983 amendments to section 25-613A of the Idaho Code, must heifers born after July 1, 1980, and before July 2, 1983, be calfhood vaccinated against Brucellosis?

The broader issue raised is a question of effect: What is the impact of statutory amendment on previously proscribed or authorized conduct if the substantive standard of conduct contained in the statute is itself comprised of a "date certain" subsequently amended?

CONCLUSION

The answer to your specific question is yes. Heifers born prior to July 2, 1983, and after July 1, 1980, must be calfhood vaccinated, *as before, if* those animals are to be offered for sale for breeding or dairying purposes. Of course, as a result of the amendments in question, all heifers born after July 1, 1983, must be calfhood vaccinated regardless of their prospective end-uses.

ANALYSIS

I. Background

The original provisions of section 26-613A of the Idaho Code were added to the Bang's Disease Law in 1980, and required that all heifers offered for sale, born after July 1, 1980, and which were to be used in breeding or dairying, be calfhood vaccinated against Brucellosis. The 1983 legislature eliminated the "for sale for breeding or dairying" qualifier and mandated that all female cattle born after July 1, 1983, be calfhood vaccinated.

The question of course is: Did the legislature effect an entirely new standard with a correspondingly new starting date, thereby eliminating the old statutory standard in total? Or do the subsequent legislative changes continue to the old criteria in force and merely enhance them as of 1983?

Little if any case authority directly addresses the specific question raised. In an analogous circumstance, the Idaho Supreme Court has indicated that one must look to both "general principles of statutory construction and a common sense appraisal of what the legislature intended." *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977).

II. General Principles

In amending Idaho Code section 25-613A, the legislature did not, as has been suggested, create a new law:

Provisions of the original act which are reenacted in the amendatory act . . . are considered a continuation of the original law, and rights and liabilities accrued under provisions of the original act are not affected by the amendment.

Sutherland Statutory Construction § 22.36 (C. Sands 4th ed. 1972)

Section 67-511 of the Idaho Code restates this established principle and defines the "[c]ffect of amendment of a statute in a chapter of the Idaho Code entitled "Enactment and Operation of Laws:"

Where a section or a part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form . . .

If, then, an entirely new law was not enacted in place of the old, the inconsistent parts of both must be reconciled and accommodated.

The second half of section 67-511 of the Idaho Code, in language immediately following the general statement of effect, attempts to provide guidance, but contains an unfortunate flaw. It states that, in construing an amendment to a statute:

. . . the portions which are not altered are to be construed as having been the law from the time when they were enacted and new provisions are to be considered as having been enacted at the time of the amendment.

Although unremarkably helpful in telling us what effect to give both the unaltered old and the new provisions of a law, this section is inexplicably silent in explaining the efficacy of original but subsequently altered provisions. This omission is crucial. The distinction between these three aspects is essential to a determination of amendatory effect. As noted in the foremost treatise on the subject of statutory construction:

In determining the effect of an amendatory act on transactions and events completed prior to its enactment, it is necessary to distinguish between provisions added to the original act by the amendment, provisions of the original act repealed by the amendment, and provisions of the original act reenacted thereby.

Sutherland. Supra.

Still, in most instances, the absence of the component omitted from the Idaho Code would not unduly hamper utilizing the language of a statute to assess the effect of an amendment. The fate of the original but subsequently altered provisions can usually be inferred from the effect given the new, and the continuing operation of the unaltered original, provisions. The problem arises when, as in this instance, the amended provision of a statute contains a fixed date as part of a compliance standard, and that date is itself amended in conjunction with changes to the substantive content of the statutory standard. Interpretation of the statute then becomes a question of whether or not the original obligation evaporated with the change in dates.

III. Legislative Intent

That question must be answered in the context of and in relation to the actions and intentions of the legislature. The Idaho Code indicates that an amendment does not repeal and simultaneously reenact an existing statute. However, as you know, there is always some danger in attributing legislative conduct to an awareness of what the code mandates as the outcome or effect of a given action. Assessing legislative intent in this context requires perilous assumptions. Two such assumptions, categorized as "popular misconceptions," are that: (a) the question, "what is the meaning of a statute as enacted?" is a question of law; and (b) the problems of applying statutes in the context of specific controversies are exclusively those of ascertaining legislative meaning. R. Dickerson, *The Interpretation and Application of Statutes* 288-89 (1975).

Nevertheless, we can make a fair assessment of legislative intent or purpose in the present circumstances. Inasmuch as the legislature could not have made a wholly new law by amendment alone, the change in dates can only be viewed as gratuitous assurance by the lawmakers that the enhanced vaccination requirements would not be given retroactive effect to 1980.

This deliberate effort by the legislators is unfortunate. The more burdensome vaccination standard could not have been given retroactive impact to 1980 in any event. Section 73-101 of the Idaho Code clearly states: "No part of these compiled laws is retroactive, unless expressly so declared." Yet, although express words of retroactivity have been held not to be required in order to find retroactive effect, *Peavy v. McCombs*, 25 Idaho 143, 140 P. 965 (1914), there must at least be language clearly referring to the past as well as the future, *id.*, or expressions clearly indicative of the intent that the statute be given retroactive impact. *In re Pahlke*, 56 Idaho 338, 53 P.2d 1177 (1936). Sutherland reiterates this principle as well:

[I]t is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. 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.

Supra.

In a situation somewhat analogous to the present one, the Idaho Supreme Court determined that section 67-511 of the Idaho Code sets forth the "applicable rule of construction" and that therefore amendatory provisions of previously enacted statutes "cannot be accorded a retroactive application." *Employment Security Agency v. Joint Class "A" School District No. 151*, 88 Idaho 384, 390, 400 P.2d 377 (1965). The Supreme Court affirmed this same reasoning last year in *University of Utah Hospital v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982), basing its decision on section 73-101 of the Code rather than section 67-511. However, although citing *Sutherland* in support of its proposition that "Retroactive application . . . would run contrary to general principles of law disfavoring such application," 657 P.2d, at 471, the court rendered a decision in *Pence* that had the practical effect of doing precisely what is disaffirmed.

There is another side to the retroactivity coin. We have assumed that the authors of the amendment intended to avoid the imposition of a stricter vaccination standard after-the-fact to the existing class of unvaccinated non-breeding, non-dairy heifers born prior to 1983. This additional burden would have constituted true retroactive impact. However, a lessening of the pre-existing duty to vaccinate breeding or dairy heifers offered for sale would comprise a retroactive effect of equal, if opposite, dimensions. This the statute plainly precludes.

IV. Summary

Upon amendment, the substantive content of a statute is not repealed and then readopted in amended form. Statutory obligations predating the amendment continue in force as the operative law, unless the legislature clearly states otherwise. Thus, all female cattle born after July 1, 1980, and prior to July 2, 1983, must be calfhood vaccinated against Brucellosis if they are offered for sale for breeding or dairy purposes.

You have also asked whether, following the amendments, the department still has the authority to grant exceptions under the terms of the statute in question.

Yes. The amendments did not change the responsibilities and prerogatives of the department. They did alter the standard of section 25-613A by striking the words "for breeding or dairy purposes," making it illegal to own *any* cattle *contrary to the provisions* of the statute. The granting of exceptions, pursuant to the required hearing, is a part of those statutory provisions, and unquestionably within the realm of permissible departmental conduct.

Respectfully yours,

Andre L.L'Heureux
Deputy Attorney General

ALLH:bjm

cc: Dr. Greg Nelson, Administrator, Division of Animal Industries 5Q1-6

September 19, 1983

Mr. Glen R. Foster, Chairman
Idaho Outfitters and Guides Board
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Re: Application of Outfitters and Guides Act to Therapeutic Programs

Dear Glen:

This informal guideline is in response to your inquiry regarding the application of the Outfitters and Guides Act to the Quaker Hill Conference and the School of Urban and Wilderness Survival Programs. Both organizations contend that a program which is not recreationally oriented is outside of the scope of the Outfitters and Guides Act. After considering this issue and several other related issues in general, the guideline will consider the application of the Act to each program based on the facts that have been presented.

1. Is a person "outfitting" when he advertises or holds himself out to the public for hire in conducting a therapeutic program that includes one or more of the recreation activities enumerated in Idaho Code § 36-2102(b) (Supp. 1983)?

2. Is a person "guiding" when, for compensation, he leads or instructs a therapeutic program that includes one or more of the recreational activities enumerated in Idaho Code § 36-2102(c) (Supp. 1983)?

3. Does the providing of equipment or services for a primitive survival skills course come within the definition of "recreational activities" in Idaho Code § 36-2102(b), (c) (Supp. 1983)?

4. Does the outfitters and Guides Act apply to a therapeutic program conducted by a non-profit organization?

5. Does the Outfitters and Guides Act apply to an organization conducting a therapeutic program if it restricts participation in the program to members of the organization?

CONCLUSIONS:

1. The purpose of the Outfitters and Guides Act is to regulate persons who represent themselves to the public as being qualified to provide equipment or services for activities that the legislature deems to present a substantial risk of harm to the participants; thus, the reason for providing the program is irrelevant to the application of the Act. If a person engages in outfitting, he must be licensed.

2. If a person receives compensation for leading or instructing one or more of the activities enumerated in section 36-2102, then he must be licensed by the board.

3. Assuming that the person conducting the survival skills program otherwise comes within the definition of an outfitter or guide, he will be required to obtain a license if the program includes any hunting of animals or birds, float or powerboating, fishing, or hazardous mountain excursions.

4. The fact that a person is a non-profit organization will not preclude application of the Outfitters and Guides Act if the person otherwise comes within the definition of an outfitter.

5. If an organization is providing a program that includes any of the recreational activities enumerated in Idaho Code § 36-2102, but restricts participation in the program to active members of the organization, it will not be deemed to be an outfitter unless the organization is formed for the purpose of evading the Act. However, if the individuals instructing or leading the activities receive compensation for their services, they will be deemed to be outfitters.

ANALYSIS:

Since many of the issues raised by the questions presented in this legal guidelines are analogous to the issue considered in Att'y. Gen. Op. No. 78-34, which dealt with the application of the Outfitters and Guides Act to programs provided by educational institutions, it should be consulted for further guidance. The opinion is attached as Appendix A.

In order to determine whether a person conducting a therapeutic program must be licensed by the Outfitters and Guides Board, the nature of the course or activity offered must be analyzed within the context of the definition of the terms "outfitter and guide." These terms are defined in Idaho Code § 36-2102 (Supp. 1983) as follows:

(b) 'Outfitter' includes any person who, in any manner, advertises or holds himself out to the public for hire providing facilities and services, for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or powerboating on Idaho rivers and streams; fishing; and hazardous mountain excursions and maintains, leases or otherwise uses equipment or accommodations for such purposes. Any firm, partnership, corporation, or other organization or a combination thereof operating as an outfitter shall designate one (1) or more individuals as agents who shall conduct its operations and who shall meet all of the qualifications of a licensed outfitter.

(c) 'Guide' is any natural person who, for compensation or other gain or promise thereof, furnishes personal services for the conduct of outdoor recreational activities limited to the following: hunting ani-

mals or birds; float or powerboating on Idaho rivers and streams; fishing; and hazardous mountain excursions, except any employee of the state of Idaho or the United States when acting in his official capacity. Any such person must be employed by an outfitter and anyone offering or providing such services who is not so employed shall be deemed to be an outfitter.

As can be seen from the definition, a person, among other things, must engage in one of the enumerated "recreational activities" to be considered an outfitter or guide.

1. The purpose of the Outfitters and Guides Act is to regulate persons who represent themselves to the public as being qualified to provide equipment or services for activities that the legislature deems to present a substantial risk of harm to the participants; thus, the reason for providing the program is irrelevant to the application of the Act. If a person engages in outfitting he must be licensed.

The reference to recreational values in the Outfitters and Guides Act does not indicate a legislative intent to preclude regulation of programs that are not engaged in for pleasure. Instead, when the Act is viewed in terms of its legislative purpose, its context, and its implementation by the board, it is apparent that the principal legislative concern was for establishing some method of reviewing the credentials of commercial outfitters who contract with the public to provide equipment or services for activities that present a substantial risk of harm to the participants. The purpose for engaging in the activity is irrelevant to the legislative concern.

The declaration of legislative purpose is clear and concise. Though section 36-2101 refers to recreational values, the thrust of the legislative intent is the health, safety, and welfare of the public when using the services or equipment of a commercial outfitter engaged in hazardous activities. The use of the term "recreational values" is for the sole purpose of identifying the second objective of the Act, preservation of the natural resources of the state. Thus, when the declaration of legislative purpose is considered in its entirety, it is apparent that it would be illogical to conclude that the legislature intended to exclude an activity merely because it was engaged in for therapeutic or other non-pleasure reasons. The dangers inherent in wilderness travel, hunting, fishing, and whitewater excursions are as real whether the activities are engaged in for education, therapy, or pleasure. *See also*, Idaho Code § 6-1201 (Supp. 1983).

Even though the word "recreation" commonly refers to pursuit of an activity for personal pleasure, it encompasses a broad range of ideas. Thus, the term "recreational activities" in Section 36-2102 must be interpreted in light of the context in which it is used rather than in isolation. *In re Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 665 (1937). In the context of the entire statute, it is apparent that the term is used to limit the scope of the Act; however, the limitation is in terms of specific activities rather than the sub-

jective intent of the participants or organizers for engaging in the activities. Thus, since there is no ambiguity, the statute must be given the interpretation the language clearly implies. *Moon v. Investment Bd.*, 97 Idaho 595, 548 P.2d 861 (1976); *Swenson v. Building, Inc.*, 93 Idaho 466, 463 P.2d 932 (1970). Further, even assuming that the term is ambiguous, under traditional rules of construction, a court strives to adopt a construction of a statute that best effectuates the legislative purpose. *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212 (9th Cir. 1967), cert. den. 389 U.S. 898 (1967); *State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981). If the reference to recreation was construed to as a limitation, the Act would be completely eviscerated — everyone would characterize their operation as nonrecreational. Thus, this construction would not be favored.

Finally, the Outfitters and Guides Board has consistently interpreted the Act as applying to any individual engaging in the enumerated activities for commercial purposes. Over the years, the board has required other therapeutic and educational programs to obtain a license. See, Att'y. Gen. Op. No. 78-34. Since the board's interpretation was contemporaneous with the passage of the Act and is of long-standing, it is entitled to great weight and should not be abandoned unless there are cogent reasons for doing so. *I.P.U.C. v. V-1 Oil Co.*, 90 Idaho 415, 412 P.2d 581 (1966); see also, *Andrus v. Kleppe*, 417 F. Supp. 873 (D.C. Idaho 1976), *aff'd*. 595 F.2d 524 (9th Cir. 1979).

In summary, there appears to be no basis for limiting the Act to purely recreational programs. If the person conducting a therapeutic or educational program engages in activities that fall within the definition of an outfitter, he must be licensed.

2. If a person receives compensation for leading or instructing one or more of the activities enumerated in section 36-2102, then he must be licensed by the board.

The analysis of the first question presented is equally applicable to question no. 2. If the person leading or conducting one of the activities enumerated in Idaho Code § 36-2102 receives any remuneration, he must be licensed.

3. Assuming that a person conducting a survival school otherwise comes within the definition of an outfitter or guide, he will be required to obtain a license if the program includes any hunting of animals or birds, float or powerboating, fishing, or hazardous mountain excursions.

As previously indicated, section 36-2102 limits the scope of the Act to specifically enumerated activities. Thus, in order to determine whether a license is required, each course must be reviewed on a case-by-case basis. If the instructing or leading of a primitive skills program involves one or more of the enumerated activities, then the person conducting the program is required to obtain a license.

Though the scope of the activities encompassed by the Outfitters and

Guides Act appears to be self-explanatory, one aspect of the definition deserves further illumination. As originally enacted in 1951, the Act regulated only fishing and hunting; however, in response to the increasing number of uses of the state's natural resources, the Act was amended to include boating and hazardous mountain excursions. Thus, under the present statute, there are apparently two questions that must be asked to determine whether a person is engaged in outfitting or guiding. First, does the program including hunting, boating, or fishing? Second, does the program include a hazardous mountain excursion? If there is an affirmative answer to either question, then the person must be licensed.

The two part inquiry is required because "hazardous mountain excursion" is not defined solely in terms of activities. Instead, hazardous appears to modify mountain excursions. Thus, a mountain excursion may be hazardous either because of the activities engaged in or because of the type of terrain. There is an inverse relationship between these factors. Any activity in a severe terrain would be a hazardous mountain excursion. On the other hand, as the terrain becomes less severe, the nature of the activity increases in importance. Day hiking in the foothills may not be a hazardous mountain excursion, but rock climbing in the same area would be a hazardous mountain excursion.

The interpretation that hazardous modifies mountain excursions is supported by James Baughman, vice-chairman of the board when the statute was modified in 1976 to include this category. He indicated that the amendment was intended as a housekeeping measure to clarify the board's right to regulate any activities conducted in a mountain terrain that posed a significant risk of harm to the consumer. At the time of the amendment, the board was uncertain as to its power to regulate backpacking, survival schools, cross-country skiing, and helicopter skiing. Since he was a proponent of the change and participated in its implementation, his comments supply reassuring confirmation of the literal meaning of the phrase. *Local 1494 v. City of Coeur d'Alene*, 99 Idaho 630, 641, 586 P.2d 1346 (1978).

4. *The fact that a person is a non-profit organization will not preclude application of the Outfitters and Guides Act if the person otherwise comes within the definition of an outfitter.*

The Outfitters and Guides Act is a consumer protection statute. Idaho Code § 36-2101 (1977). One of the purposes of the Act is to provide a means for the consumer to determine whether the outfitter is qualified to provide equipment or services for one or more of the enumerated activities. Profit seeking is not an element of the definition of an outfitter. This is apparent from the declaration of legislative purpose, the definition of an outfitter, and the legislative history of the Act.

Section 36-2101 declares that the Act is intended to reach only *commercial* outfitters and guides, not acts of accommodation. "Commercial" means to engage in a trade or business, it does not distinguish between profit and non-profit businesses. See, *Mechanical Farm Equipment Dist. v. Porter*, 156 F.2d

296, 298 (9th Cir. 1946). Conversely, "accommodation" connotes an act of friendship or assistance without tangible consideration. *Gaspard v. Lachney*, 92 So.2d 277, 279 (La. App. 1957); *Lambert v. Mandell's of California*, 319 P.2d 469 (Cal. 1952). Clearly, neither of these terms would indicate an attempt to exclude non-profit organizations from the Act. In fact, they suggest non-profit organizations are within the parameters of the Act.

Legislative history also supports the conclusion that the Outfitters and Guides Act was intended to include non-profit organizations that engage in outfitting. As originally enacted in 1951, the Outfitters and Guides Act referred to an outfitter as anyone who offered services or equipment for profit rather than accommodation. The 1951 Act was repealed, however, and when the Act was revived, in 1961, the reference to profit was deleted. 1961 Idaho Sess. Laws, chap. 252, § 3. Then, in 1970, when the scope of the recreational activities encompassed by the Act was enumerated, the legislature inserted the words "for hire." This was a clear departure from prior references of compensation and profit.

Finally, it should be noted that this issue was previously litigated in the Second Judicial District Court of Idaho in *Idaho Wilderness School v. Outfitters and Guides Board*, Case No. 8141 (Opinion filed November 12, 1971). Judge Quinlan stated:

The matter of profit or lack of profit is of no consequence. It is the Court's opinion that the Idaho Legislature did not intend that profit making be relevant under the Act. For that reason, the court does not accept the argument that this Act is vague and ambiguous in its application to alleged 'non-profit' corporations.

Id. at 2 of slip opinion. This decision reflects the long-standing administrative interpretation of the Act; thus, the board's interpretation is entitled to judicial deference. *Andrus v. Kleppe*, 417 F. Supp. 873 (D.C. Idaho 1976) *aff'd*, 595 F.2d 524 (9th Cir. 1979); *I.P.U.C. v. V-1 Oil Company*, 90 Idaho 415, 412 P.2d 581 (1966).

5. *If an organization provides a program that includes any of the recreational activities enumerated in Idaho Code § 36-2102 (1977), but restricts participation in the program to active members of the organization, it will not be deemed an outfitter unless the organization is formed for the purposes of evading this Act. However, if the individuals instructing or leading the activities receive compensation for their services, they will be deemed to be outfitters.*

Section 36-2102 defines an outfitter as someone who holds himself out to the public for hire; thus, as pointed out in Att'y. Gen. Op. No. 78-34, an organization that limits participation in the outfitting activity to active members would not fall within the terms of the Act. However, an organization cannot escape the provisions of this Act by simply requiring membership. The activity must be a benefit of membership, not the sole reason for membership. If membership in the organization is on a one-time

basis for the sole purpose of participating in an activity that otherwise comes within the Outfitters and Guides Act, then it would not be exempt. *See*, Att'y. Gen. Op. No. 78-34.

Even though an organization may be exempt from the Act, the individual conducting the activity may be required to be licensed. This problem was addressed in Att'y. Gen. Op. No. 78-34 as follows:

In light of the definition of 'guide' an educational institution could run afoul of the Act even though it does not hold itself out to the public for hire. If the instructor used for the course is paid, and if one of the covered activities is engaged in, the instructor himself would be violating the provisions of the Act if he did not have a license for his activity. This would not involve the institution directly, but the result would be the same.

Id. at 4. This analysis is equally applicable to this situation. Further, it should be noted that if the individual is not employed by an outfitter he will be deemed to be an outfitter himself.

As discussed previously, the Act is not concerned with the profit motives of the individuals engaged in the activity; thus, if the instructor receives any compensation for leading or instructing any of the activities enumerated in Idaho Code § 36-2102, he will be deemed to be a guide. The individual could avoid the situation by providing his services on a volunteer basis or confining the course to outdoor activities that do not involve hunting, float or power-boating, fishing, or hazardous mountain excursions.

As indicated above, the applicability of the Act to any given person will depend upon a comparison of the factual elements of its program with the requirements of the Act. Therefore, the letters requesting this opinion must be considered independently. In addition, the conclusions reached in this guideline regarding the Quaker Hill Conference and the School of Urban and Wilderness Survival are valid only as to the facts enumerated below.

In the first letter from the Quaker Hill Conference, the following details are provided. The conference advertises and provides a social service to the community and church groups. The trips are not recreationally oriented. The church is a non-profit organization, and generally charges a participation fee equal to the expense of conducting the outing. Instructors are paid a basic salary, which is not determined by the number of trips. Activities included in the program are rockclimbing, rapelling, and backpacking.

Applying these facts to the requirements of the Act, it appears that the Quaker Hill Conference must be licensed by the board. As noted previously, the Act is concerned with the potential risk of harm involved in the enumerated activities. Thus, the fact that the Quaker Hill Conference is a non-profit organization and engages in the activity for other than recreational purposes is irrelevant to the application of the Act. The con-

ference holds itself out to the public for hire in the instruction of backpacking, rapelling, and rockclimbing. Since these are hazardous mountain excursions as defined by the statutes and regulations, the conference becomes an outfitter by charging a fee. If the conference were to dispenre with the fee or limit its activity to church members, it would be exempt from the Act. In addition, the instructors fall within the definition of a guide because they receive compensation for instructing and leading hazardous mountain excursions.

The second letter concerning the School of Urban and Wilderness Survival, Inc. contains the following facts regarding its program. It is therapeutic in nature and is designed for troubled youth who need guidance. The program is advertised and made available to the general public. A significant number of the participants, however, are required to participate in the program as a condition of probation. Parents are expected to pay a fee of \$2,800 which covers the cost of a twenty-one day survival school and six months of follow-up counseling. During the twenty-one day school, the youth are taken on an impact hike through the Bennett Hills area of Idaho. In some instances, the program may be shifted to other sites. While on the hike, the students receive instruction in botany, geology, and other physical sciences. In addition, they learn primitive survival skills such as hunting and trapping of fish, birds, and small animals. The ultimate goal of the instruction is to teach the student how to survive on the resources available in the environment. In furtherance of this goal, the student is only allowed to carry a blanket, a knife, a rope, and a limited amount of food rations. Finally, it appears that each trip is designed to present natural barriers such as rock outcroppings, canyons, mountains, etc.

The School of Urban and Wilderness Survival Program involves intensive therapy; therefore, there is a very low student to instructor ratio. The individuals conducting the program may be classified into five separate groups: instructors lead and instruct the participants in primitive aboriginal life cultures and skills; apprentices assist the instructor in teaching primitive aboriginal life cultures and skills; backup personnel serve an intervention role, (they are not involved on a routine basis in the program); counselors are employed to interact and provide therapy for the participants; finally, runners serve as a communication link between the instructors and the backup personnel.

As with the Quaker Hill Conference, it is apparent that the School of Urban and Wilderness Survival, Inc. holds itself out to the public for hire. Therefore, it will be deemed to be an outfitter if it engages in any of the enumerated activities. It is irrelevant that the program is therapeutic in nature because, as discussed previously, the Act is triggered by engaging in activities that post a substantial risk of harm to the participants.

From the sketchy details, it is difficult to determine the complete scope of activities in which the school engages. However, the very nature of the program could be characterized as hazardous. Requiring the consumer to

survive on limited rations and supplies suggests a significant risk of harm. Additionally, conducting this activity in the Bennett Hills area, which is a rough rocky terrain, increases the potential risk of harm. Thus, the combination of these factors suggests that the school is engaging in a hazardous mountain activity.

In addition to the hazardous nature of the activity, informally obtained information suggests that the program includes fishing and hunting. If this information is verified through further factfinding, the school must be licensed.

An additional aspect of the School of Urban and Wilderness Survival Program must be considered. Specifically, it must be determined whether the individuals conducting the program would be considered guides. Since all of the employees are compensated, the only question is whether any of the individuals provide personal services related to the activities enumerated in section 36-2102. If they do, then they will be deemed to be guides and must be licensed.

Based on the description above, it appears that only the instructors and apprentices would be guides. They are the individuals responsible for conducting the hazardous mountain excursion. The other individuals appear to serve a limited role that is not encompassed within the activities enumerated in section 36-2102. This conclusion, however, is based on informally obtained information; therefore, a final determination must await further factfinding. Specifically, the school should be required to clearly identify the scope of each employees' responsibilities.

In conclusion, it appears that both the Quaker Hill Conference and the School of Urban and Wilderness Survival come within the Act. However, further factfinding is recommended with regard to the School of Urban and Wilderness Survival.

Sincerely,

Clive J. Strong
Deputy Attorney General
Division of Natural Resources

September 20, 1983

Mr. Rodney Frederiksen
Chief of Police
City of Lewiston
1224 F Street
Lewiston, ID 83501

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Chief Frederiksen:

First, I apologize for the delay in answering your inquiry. You ask whether a conviction in a sister jurisdiction for driving while intoxicated can be used as a foundation for enhancing punishment of repeat offenders in the State of Idaho under our DUI law, § 49-1102, et. seq., Idaho Code. Succinctly, the answer is no; only a previous conviction under Idaho's DUI statute, either present or former, will allow an enhanced punishment.

Section 49-1102, Idaho Code, prohibits a person who is intoxicated from driving or being in control of a motor vehicle, and sets the criteria for judging whether a person is intoxicated. Section 49-1102A, Idaho Code, enumerates the penalties for violation of the DUI laws:

(1) Any person who pleads guilty to or is found guilty of a *violation of section 49-1102, Idaho Code*, for the first time is guilty of a misdemeanor; . . .

Section 49-1102A (1). (Emphasis supplied)

(2) Any person who pleads guilty to or is found guilty of a *violation of section 49-1102 or 49-1102(b), Idaho Code* [aggravated driving while under the influence] for the second time within five (5) years, irrespective of when the previous violation occurred with respect to the effective date of this act and notwithstanding the form of the judgment(s) or withheld judgment(s) is guilty of a misdemeanor; . . .

Section 49-1102A (2). (Emphasis supplied)

(3) Any person who pleads to or is found guilty of a *violation of section 49-1102 or 49-1102B, Idaho Code*, for a third time within five (5) years, irrespective of when the previous violations occurred with respect to the effective date of this act, notwithstanding the form of the judgment(s) or withheld judgment(s) shall be guilty of a felony; . . .

Section 49-1102A (3). (Emphasis supplied)

The answer to the question posed turns on the meaning of the words "a violation of Section 49-1102, Idaho Code." Must this language be construed

literally to mean a violation of Idaho's DUI law, section 49-1102, Idaho Code; or does the statute's recitation of section 49-1102, Idaho Code, mean any prior violation of a DUI law whether Idaho's or that of any sister jurisdiction?

The first principle of statutory construction is to ascertain and give effect to the legislative intent that led to the enactment. *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980); *Smith v. Department of Employment*, 100 Idaho 520, 602 P.2d 18 (1979).

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 context, the object in view, the evils to be remedied, the history of the times and the legislation upon the same subject, public policy, contemporaneous construction, and the like." *In Re Gem State Academy Bakery*, 70 Ida. 531, 541, 224 P.2d 529, 535 (1950).

Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963).

The same language was quoted with approval by the court in *Local 1495 of the International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346 (1978).

To begin with, then, the literal wording of the statute must be examined. Idaho Code § 49-1102A does not enhance punishment for a prior DUI offense; by its literal terms it increases punishment for violation of § 49-1102, Idaho Code, where a person has within five years previously, been convicted of "section 49-1102, or 49-1102B, Idaho Code." It is to be assumed that the legislature said what it meant and meant what it said. *Pettis v. Ex. rel. U.S. v. Morrison-Knudsen Company, Inc.*, 577 F. 2d 668. That the legislature meant what it said in the wording of Idaho Code § 49-1102A is strengthened by a reexamination of the other detailed provisions of the enhanced penalty paragraphs. Idaho's law enhances the punishment for DUI when a person is convicted a second or third time "within five (5) years, irrespective of when the previous violation occurred with respect to the effective date of this act and notwithstanding the form of the judgment(s) or withheld judgment(s)." If the legislature had meant that a previous violation for driving while intoxicated in another jurisdiction would support an enhancement of penalties for a § 49-1102 violation, it would have explicitly said so just as it indicated that a conviction for a DUI under § 49-1102 prior to July 1, 1983, would constitute a foundational conviction, or just as it indicated that the form of the prior judgment was immaterial. Having overtly stated what it intended about the time and form of previous judgments, it is to be assumed that the legislature also spoke to the jurisdiction of the prior judgments when it limited them to previous violations of the Idaho DUI law.

It is a universally recognized rule of statutory construction that where a statute specifies certain things, their designation excludes all others. *Peck v.*

State, 63 Idaho 375, 120 P.2d 820; *Local 1494 etc. v. City of Coeur d'Alene*, *supra*.

Looking at the legislative history of this statute confirms the conclusion that in order to be punishable as a felony, the prior DUI offenses must be violations of the Idaho DUI law. Prior to its new form effective in July of 1983, Idaho Code § 49-1102 (e) read:

Every person who is convicted of a violation of *this section* shall be punished by imprisonment in the county or municipal jail for not more than six (6) months or by fine of not more than three hundred dollars (\$300.00) or by both such fines and imprisonment. On a second or subsequent conviction he shall be imprisoned in the state penitentiary for not more than five (5) years. (Emphasis supplied)

The previous statute, thus, undertook to enhance punishment only for cases where there were previous violations of Idaho law prohibiting driving while under the influence. The term "section":

is ordinarily used to denote a separately numbered part of the statute, including all subdivisions or paragraphs comprising such part. However, it is not necessarily used in this sense in all cases. The word has been construed to mean a provision, subsection, or an entire act. [citation omitted]

Groves v. Meyers, 35 Wash. 2d 403, 213 P.2d 483 (Wash. 1950)

No context has been found where the term "section" has been used to describe a type of law or offense as would be necessary for this enhanced penalties statute to be applicable to DUI convictions from other states. The term "this section" does not, therefore, refer to a conviction of any DUI law from some other state, but refers only to convictions under Idaho law, section 49-1102, Idaho Code.

Our court follows the well-established rule that criminal statutes must be strictly construed:

A statute defining a crime must be sufficiently explicit so that all persons subject thereto may know what conduct on their part will subject them to its penalties. A criminal statute must give a clear and unmistakable warning of the acts which will subject one to criminal punishment, and courts are without power to supply what the legislature has left vague. An act cannot be held as criminal under a statute unless it clearly appears from the language used that the legislature so intended.

State v. Hahn, 92 Idaho 265, 267, 441 P.2d 714, 716 (1968).

The same language is requoted by the supreme court in *State v. Thompson*, 101 Ida. 430, 437, 614 P.2d 970 (1980).

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

Comparing Idaho's DUI statutes to the analogous provisions for enhanced punishment of persistent felony violators, Idaho Code § 19-2514, there is an important difference which is illustrative of the principles of statutory construction set out above. Idaho allows imprisonment for a term not less than five (5) years and extending to life of any person who is convicted for the third time of a felony "whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho . . ." Idaho Code § 19-2514.

This statute illustrates that if the legislature intends that drivers shall be subjected to enhanced criminal sanctions based upon out-of-state convictions, then the law must explicitly so provide.

In conclusion, applying principles of statutory construction, it is clear that in enacting Idaho's present DUI law, the legislature intended for the enhancement of sanctions for repeat offenders to be imposed only upon those previously convicted under Idaho's present or former DUI law, section 49-1102, Idaho Code.

I trust that this has answered your question.

Sincerely,

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice
Division

DMH/tg

October 31, 1983

Senator "Chick" Bilyeu
Route 1, Box 48
Pocatello, ID 83201

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY FOR LEGAL GUIDANCE

Dear Senator Bilyeu:

You have sought advice concerning the constitutionality of Idaho Code § 39-264 which requires the registration all persons authorized to perform marriages, including ministers. Specifically you have asked whether this code section violates the separation of church and state provisions (i.e., establishment clauses) contained in United States Const. amend. I and Idaho Const. art. I, §4. Your inquiry also fairly raises the question whether the Idaho Code § 39-264 registration requirement violates the freedom of religion guarantees set forth in the same constitutional provisions.

Idaho Code § 39-264 is a part of the statutory safety net insuring that marriages are entered into by competent parties, performed by responsible persons and timely documented for future reference. The statutory framework also insures tracking of the marital status in the event of divorce or annulment. E.g., Idaho Code § 39-262 through 267; 32-301 through 309; 32-401 through 417. Generally speaking, courts have recognized that a state has a paramount interest in marriage and its ramifications because of the basic importance of marriage to society. *Boddie v. Connecticut*, 401 U.S. 371 (1971); 22 ALR 1101 (1922). It is thus assumed, generally, that a state, through its legislature, may prescribe the qualifications and licensing procedures of persons performing the marriage ceremony. E.g. *Galloway v. Truesdell*, 422 P.2d 237 (nev. 1967). Thus, marriage is of proper concern both to the state and the church.

Although the state requirement for registration of all persons performing marriage ceremonies, including ministers, is common, case authority determining specifically whether such a requirement is constitutional under the first amendment establishment and freedom of religion clauses (or their state constitutional counterparts) is rare. The case most precisely pertinent is *Cramer v. Commonwealth*, 214 Va. 561 (1974) in which the Virginia Supreme Court upheld a statutory requirement that all persons who perform marriages, including ministers, be certified. The court rejected claims that the statute violated the establishment and freedom clauses. The court went further to uphold the denial of registration to a person who claimed to be an "ordained minister" of the Universal Life Church. The *Cramer* court thus went beyond reviewing the constitutionality of the registration requirement and approved a far greater impact upon the exercise of religion. Furthermore, the court concluded that such an impact did not violate the establishment clause.

The Virginia Supreme Court, in reaching its decision, emphasized the state has an interest not only in marriage as an institution, but in the contract between the parties and in the proper memorializing of the marriage contract. *Cramer, supra*, at 564-565. The court noted the importance of knowing the identity of the person who performs each marriage and of insuring that marriages are performed by persons sufficiently responsible to see the timely filing of accurate certificates of marriage. Perhaps it would be useful for me to elaborate upon the legal significance attached to the date and validity of a marriage. In addition to the general interest of the state in the stability of families, the date and especially the validity of a marriage are frequently used to determine legitimacy of children, obligations of support and rights of inheritance.

N.Y. Domestic Relations Law § 11-B (McKinney) contains a similar registration requirement which has been implicitly upheld against first amendment challenges. *Ravenal v. Ravenal*, 72 Misc. 2d 100, 338 N.Y.S.2d 324 (1972); N.Y. Attorney General Opinion 129 (1964).

Because of the paucity of case authority directly on point, I have reviewed first amendment cases in other factual contexts to test my conclusion that

Idaho Code § 39-264 is constitutional. For example, most courts which have faced establishment or freedom clause challenges in the context of compulsory education enforcement cases have followed what might be summarized in an over-simplified manner as a “reasonable regulation” standard *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *State v. Riddle*, 285 S.E. 2d 359 (W. Va. 1981); *State v. Faith Baptist Church*, 301 N.W. 2d 571, 579 (Neb. 1981); Idaho A.G. Opinion No. 83-12. Applying the reasonable regulation standard to Idaho Code § 39-264 would result in upholding the constitutionality of the statute. If it were assumed that the regulation — requirement of registration — has impact upon the exercise of religious freedom, it is minor and reasonably related to the long recognized state interest in marriage. However, the constitutionality of Idaho Code § 39-264 probably does not depend upon adoption of such a standard. The statute regulates only the civil aspects of marriage and leaves the religious realm unfettered. For other contexts in which the state interest prevailed over religious convictions, see *Hill v. State*, 38 Ala. App. 404, 88 So. 2d 880 cert. denied, 264 Ala. 697, 88 So. 2d 887 (1956); *Jehovah’s Witnesses in Wash. v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff’d* 390 U.S. 598 (1968).

In summary, Idaho Code § 39-264 does not violate the guarantees of religious freedom, or establish or give preference to a religion in violation of the establishment clauses. It is also relevant to note that Idaho Code § 39-273 (b) (2) provides that the act of neglecting or refusing to register, if committed with knowledge, constitutes a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000.00) or imprisonment of not more than one (1) year or both. Idaho Const. art. I, §4 specifically provides that the Idaho guarantee of religious liberty is a “liberty of conscience” which should not be construed as permitting a person to commit any crime.

I trust this letter adequately addresses your concerns about the constitutionality of this statute. If you desire further clarification, please do not hesitate to contact me.

Sincerely,

LARRY K. HARVEY
Chief Deputy Attorney General

LKH/tal

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

November 1, 1983

TO: Bud Garrett
Department of Corrections
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Garrett:

You have furnished me with a standard document utilized by the Department of Corrections entitled "Warrant of Arrest of Suspected Probation/Parole Violator." [See Exhibit "A" attached hereto.] The document is directed to chiefs of police, marshals, sheriffs and peace officers and says: "You are hereby authorized to take, retake into actual custody, and hold without bail, John Doe," followed by a description of the probationer or parolee. You have asked whether a document, which purports to be a *no bail* arrest warrant issued by a probation/parole officer, is valid. Succinctly, the answer is affirmative in the case of a parole violator, and negative in the case of a probation violator.

At the outset it should be noted that 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. However, the United States Supreme Court perceives no differences in the level of constitutional guarantees relevant to revocation of parole and revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. 788 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). A brief review of Idaho's sentencing statute may help illustrate the difference between probation and parole which is relevant to the issue under consideration.

Under Idaho's laws, when a defendant is sentenced on a felony charge, the court has several options. Pursuant to Idaho Code § 19-2601 the court can commute the sentence and confine the defendant to county jail; suspend the execution of the judgment and place the defendant on probation; withhold judgment and place the defendant on probation; retain jurisdiction and suspend execution of judgment at any time during the first 120 days of incarceration, or during an additional 60-day extension of that period; or, of course, sentence the defendant to the custody of the Idaho State Board of Corrections to be imprisoned in the state penitentiary. It is important to recognize that when the court chooses the last alternative, it relinquishes jurisdiction to the state board of corrections. Idaho Code § 19-2703, *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980). The determination of who has custody of a defendant after he has been sentenced is important because it has bearing upon the issue of who has authority to deal with the defendant when he violates the conditions of probation or parole, which is the issue presented.

In the case of a prisoner who is in the custody or jurisdiction of the state board of corrections, after the prisoner has been incarcerated for that portion of his sentence which is required by law he may be released on parole. His parole is subject to the conditions set by the commission of pardons and paroles which functions under the jurisdiction of the department of corrections. It is a well established and almost self-evident principle that parole is not a matter of right but is a matter of grace. *In Re Prout*, 12 Idaho 494 (1906); *In Re Rawson*, 100 Idaho 308, 597 P.2d 31 (1979); *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975); *In Re Trucker*, 95 Cal. Rptr. 761, 486 P.2d 657 (1971). Thus, when a prisoner is released from the state penitentiary upon parole his freedom is provisional and he is subject to the supervision of a parole officer and the parolee is to abide by the conditions of his parole in order to continue to "do his time" on the outside. Idaho Code § 20-228.

The procedure for dealing with a parole violation is set forth in Idaho Code §§ 20-227 and 20-228. When a parole officer believes that the parolee has violated the conditions of his parole he may arrest the parolee, or any other peace officer with power of arrest may, upon receipt of the parole officer's written statement setting forth the violation, arrest the parolee. "Such written statement . . . shall be sufficient warrant for the detention of the probationer or parolee." Idaho Code § 20-227. The parole officer must then notify the commission at once of his action.

A parolee may be violated in another fashion: "Whenever the commission finds that a prisoner may have violated the conditions of his parole, the written order of the commission . . . shall be sufficient warrant for any law enforcement officer to take into custody such person . . . *Such warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made after hearing.*" Idaho Code § 20-228 (emphasis supplied).

A parolee does not stand in the shoes of the ordinary citizen vested with state and federal constitutional rights to post bail, for his guilt has been adjudicated and he has the status of a confined offender who has been provisionally released. If a parolee is serving his sentence outside the walls of the penitentiary and a warrant suspends his parole, then he is logically and legally in the position of a lawfully incarcerated person until there is a determination of the merits of the violation. *In Re Prout*, 12 Idaho 494 (1906); *In Re Rawson*, 100 Idaho 308, 597 P.2d 31 (1979). The Idaho Supreme Court has never had occasion to consider this issue; nor are there more than a few cases from other jurisdictions dealing with this issue. Two sister jurisdictions have, however, clearly ruled on this issue. New York says: "We conclude that a parolee is not entitled to bail." *People ex. rel. Calloway v. Skinner*, 22 N.Y. 2d 23, 300 N.E. 2d 716, 720 (1973). "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*, 15 Wash. App. 475, 550 P.2d 36 (1976). The paucity of cases dealing with this principle suggests that it is virtually axiomatic. The violating parolee is not entitled to bail, and the "warrant" filed by the parole officer or by the com-

mission for pardons and parole may properly recite that the parolee is to be held without bail. However, it is not necessary for the warrant to say anything about bail, for, as our sister State of Washington has recognized, absent express statutory authority, courts are without jurisdiction and power to release on bail or bond a parolee arrested and held in custody for violating his parole. *Ogden v. Klumdt, supra*.

Somewhat different is the case of a person whose custody has never been relinquished by the court to the board of corrections. A person who has been placed on probation to the court under a suspended sentence or other arrangement is to be supervised by an officer from the state board of correction. "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." Idaho Code § 20-219. It is, by the same statute, the duty of a probation and parole officer to investigate and report "alleged violations of parole or probation in specific cases to the commission or the courts to aid in determining whether the parole or probation should be continued or revoked." *Id.* As in the case of a parolee, the written statement of the probation officer that a probationer is in violation of the conditions of his release "shall be sufficient warrant for the detention of the probationer . . . (after which the) probation officer shall at once notify . . . the court." Idaho Code § 20-227.

The significant difference between the treatment of probationers and parolees is the fact that the parolee has been previously incarcerated in the custody of the state board of corrections and has been provisionally released, while a probationer is still under an unexecuted sentence and is on probation to the court. Hence, Idaho Code § 20-228 provides that a warrant suspends a person's parole, which obviates any need for discussion of, or right to, bail. But in the case of a probationer, the issue of bail is one for the court. Upon the institution of probation revocation proceedings, "(t)he defendant may be admitted to bail pending such hearing." Idaho Criminal Rule 33(3). See also generally, chapter 29, title 19, Idaho Code and Idaho Code § 19-4219. Research discloses no statutory or case authority for a probation officer to set bail on a warrant. Under the provisions of Idaho Code § 20-227, if a probation officer has given a written statement to law enforcement officers — what the statute loosely calls a "warrant" — and pursuant thereto the probationer is detained, the probationer is to answer to the court. The court would, in its discretion pursuant to Idaho Criminal Rule 33(e) and by its plenary authority over the probationer, be able to leave the defendant in custody until the issue of his probation violation is resolved or it could release the defendant on a bail undertaking.

One other way of dealing with probationers is set forth in Idaho Code § 20-222 which provides that a period of probation and suspended sentence may at any time be extended or terminated by the court. "At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested." Idaho Code § 20-222. It appears to be standard practice in this state for a court issuing a bench warrant to simply

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command the arrest and production of the probationer without prescribing thereon any amount of bail; however, there is nothing to prevent the court from setting out on the face of the warrant an amount of bail or denial of bail.

In summary then, a parole or probation officer may issue a written statement showing a violation of conditions of probation or parole which is sufficient to function as a warrant for the detention of the probationer or parolee. Such a "warrant" in the case of a probationer does not have the authority to specify any bail or forbid the release on bail, for once a probationer is taken into custody he is answerable to the court from which he is on probation. The court must decide the consequences of his violation of probation and the related issue of release on bail.

In the case of a parolee, the practical effect of a parole officer's "warrant" is to return the defendant to his status prior to his release on parole. The warrant functions to suspend his parole. In such an instance the parolee's case is in the hands of the parole commission, which may take appropriate action. The recitation, "no bail," on the warrant in question merely iterates that which is already an established rule and fact.

I trust that this has answered your question. If you need any further clarification, please do not hesitate to contact me.

Sincerely,

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice
Division

DMH/tg

December 6, 1983

The Honorable James F. Stoicheff
Idaho State Representative
615 Lakeview
Sandpoint, ID 83864

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION
AND IS PROVIDED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Stoicheff:

This is in response to your questions regarding a proposed school district consolidation election. As I understand it, school districts in your area are considering the possibility of consolidation. However, they desire consolidation only if the consolidated district assumes the outstanding bonded indebtedness of the currently existing school districts.

You have asked if a two-thirds majority is required for the newly-created consolidated district to assume the bonded indebtedness of the predecessor districts. You have also asked whether the consolidation question will automatically fail if the debt assumption question fails.

A review of chapter 3, title 33, *Idaho Code*, indicates that a two-thirds majority is required for the consolidated district to assume the bonded indebtedness of the predecessor districts. It also appears that failure of the bond assumption question would cause the consolidation question to fail. However, as discussed below, the language of the statutes creates doubt as to legislative intent on this question. Consequently, we would recommend that you consider amendatory legislation to clarify the statutes to avoid a potential court challenge in the event the consolidation question should pass and the debt assumption question fail.

Sections 33-310 and 33-311, *Idaho Code*, govern school district consolidations. Section 33-310, *Idaho Code*, provides the procedure whereby contiguous school districts may petition the state board of education for consolidation. The proposed plan is required to state whether or not outstanding bonds are to become obligations of the proposed consolidated district. Section 33-311, *Idaho Code*, provides for a consolidation election if the state board of education approves the plan submitted to it.

Section 33-311, *Idaho Code*, sets forth a simple majority requirement for approval of the consolidation question. (However, if the electors voting in any one of the predecessor districts constitute a majority of all those voting in the entire consolidated district, a majority vote must also be obtained in the remainder of the area).

With respect to assumption of bonded debt, the section provides:

Whenever any plan of consolidation shall propose that the existing bonded debt of any district or districts proposing to consolidate, shall be assumed by and become the obligation of the proposed consolidated district, at the same time of the election hereinabove prescribed, the question of assuming such debt shall be submitted to the electors having the qualification of electors in school bond elections. *The debt or debts shall not be assumed by the proposed consolidated district unless the question be approved by the qualified electors voting on the question and by the majority thereof now, or hereafter, required by section 3, article VIII, of the Constitution of Idaho; and if the assumption of debt be not approved, the proposed consolidation shall not otherwise be effected.* [Emphasis added]

A two-thirds majority is required by art. VIII, § 3, *Idaho Constitution*, for assumption of bonded indebtedness. Consequently, the statutory language requires a two-thirds majority for approval of the assumption by the consolidated district of debts of the predecessor districts.

The second question you have asked, whether the consolidation question fails if the bond assumption question fails, is more difficult to determine from the language of the statute. For example, the statute provides in part:

. . . if the assumption of debt be not approved, the proposed consolidation shall not otherwise be *effected*.

Read literally, use of the word "effected" leads to the conclusion that if the assumption of debt is not approved, the consolidation vote also fails. (i.e. "effected" in such a context means "accomplished", "fulfilled", or "operative"). However, use of the word "otherwise" in conjunction with "effected" raises the question whether there was a drafting error and whether the word "affected" rather than "effected" was in fact intended. The use of the word "otherwise" is meaningless if "effected" was intended.

What was intended is critical to the interpretation since the outcome is opposite depending upon which word gives effect to legislative intent. In interpreting statutes, courts seek to give effect to legislative intent if possible. *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983); *Webster v. Board of Trustees of School District No. 25*, 104 Idaho 342, 659 P.2d 96 (1983).

Doubt as to whether "effected" was intended also arises from the statute's general requirement of a simple majority on the consolidation question and a two-thirds majority on the bonded debt assumption question. This may indicate an intent that the ballot questions be independent rather than interdependent. While the above factors raise significant doubts as to legislative intent, in my opinion the better interpretation is that the legislature intended the word "effected" in the statute.

First, the word "effected" was in fact used, and words in statutes are normally interpreted to give effect to their usual and ordinary meaning. For example, in *State Department of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), the Court held:

The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said. Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect.

While § 33-311 would probably not be viewed as clear and unambiguous, there is nevertheless an inherent presumption that the legislature meant what it said.

Also, the sentence immediately following the above-quoted sentence using "effected" states in pertinent part:

When a consolidation is *effected*, as hereinabove prescribed, a new school district is thereby created, . . .

This sentence clearly uses the word "effected" as meaning "accomplished", "fulfilled" or "operative". The fact that this sentence immediately follows the word "effected" in the prior sentence would indicate a consistent use of the word. In construing statutes, courts typically look at the whole statute to harmonize provisions to bring about a consistent interpretation. *University of Utah Hospital and Medical Center v. Bethke*, 101 Idaho 245, 611 P.2d 1030 (1980).

Similarly, the same act which adopted § 33-311, Idaho Code, also adopted § 33-308, Idaho Code, involving excision and annexation of territory, which provides in pertinent part:

If a majority of the school district electors in each of the two (2) districts and in the area, voting in the election, shall vote in favor of the proposal to excise and annex the said area, and if in the area the electors voting on the question of the assumption of bonded debt and interest have approved such assumption by the majority of votes cast as is now, or hereafter may be, required by section 3, article VIII, of the Constitution of Idaho, the proposal shall carry and be approved. *Otherwise, it shall fail.* (Emphasis added)

This section clearly provides that excision and annexation elections fail if the corresponding bonded debt assumption question fails. Again, courts typically interpret different sections of the same act in *pari materia*, construing them together. *Chief Industries, Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978). It is sometimes held, however, that use of different language implies a different intent rather than the same intent.

Finally, a review of prior statutes involving consolidation and annexation reveals a consistent legislative policy of making passage of consolidation elections which involve the assumption of bonded indebtedness contingent upon the passage of the question of assumption of bonded indebtedness. Chapter 111, § 10, 1947, S.L.; Ch. 184, § 1, 1933 S.L.; Ch. 215, §§ 27 and 28, 1921 S.L.

In conclusion, while the language of the statute does create doubt on the question, it is my opinion that the better reading of the statute leads to the conclusion that failure of the bond assumption question would cause the consolidation question to fail also. However, to avoid potential litigation in the event the consolidation question should pass but not the bond assumption question, I would recommend that you consider the introduction of clarifying legislation.

If you have any questions regarding this letter, please write or call again.

Sincerely,

DAVID G. HIGH
Deputy Attorney General
Chief, Business Affairs
and State Finance Division

DGH/tg

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