

IDAHO ATTORNEY GENERAL'S REPORT

FOR FISCAL YEAR 1984

BEGINNING JULY 1, 1983

AND ENDING JUNE 30, 1984

AND

OPINIONS

FOR THE YEAR

1984

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

INTRODUCTION

It is one of the annual duties of the Attorney General to compile the written opinions of the office and make them available for public inspection. This volume contains the official opinions rendered by my office in 1984, as well as some of the more significant legal guidelines that have been prepared by my staff.

While this is certainly not our main responsibility, my staff and I consider it an important duty. The opinions and guidelines compiled in this volume are designed to provide legal guidance to all governmental entities and the general public, as well as to the specific addressees. Therefore, we strive to produce the best possible legal product, so that the official opinions and legal guidelines compiled herein can be relied upon, useful and used.

I am hoping that our work can be made more widely available for use by the public and private bar. We expect that our official opinions will be reported in the near future on the Lexis system of automated legal research. In addition, we are exploring the possibilities of having our opinions referenced in future publications of the Idaho Code. The work product published in this volume is of good quality and represents many long hours of research and writing by a dedicated staff. It seems appropriate to recognize here the diligent work of my staff but also to make that work widely available to the bar and public so that it can be generally shared.

JIM JONES
ATTORNEY GENERAL

FISCAL YEAR 1984 ANNUAL REPORT
of the
ATTORNEY GENERAL
of
IDAHO



**For the period beginning July 1, 1983
and ending June 30, 1984**

JIM JONES
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1984

Administrative

Jim Jones — Attorney General
John J. McMahon — Chief Deputy
Eric J. Fieldstad — Business Manager
Lois Hurless — Administrative Assistant
Tresha Griffiths — Executive Secretary

Division Chiefs

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

Deputy Attorneys General

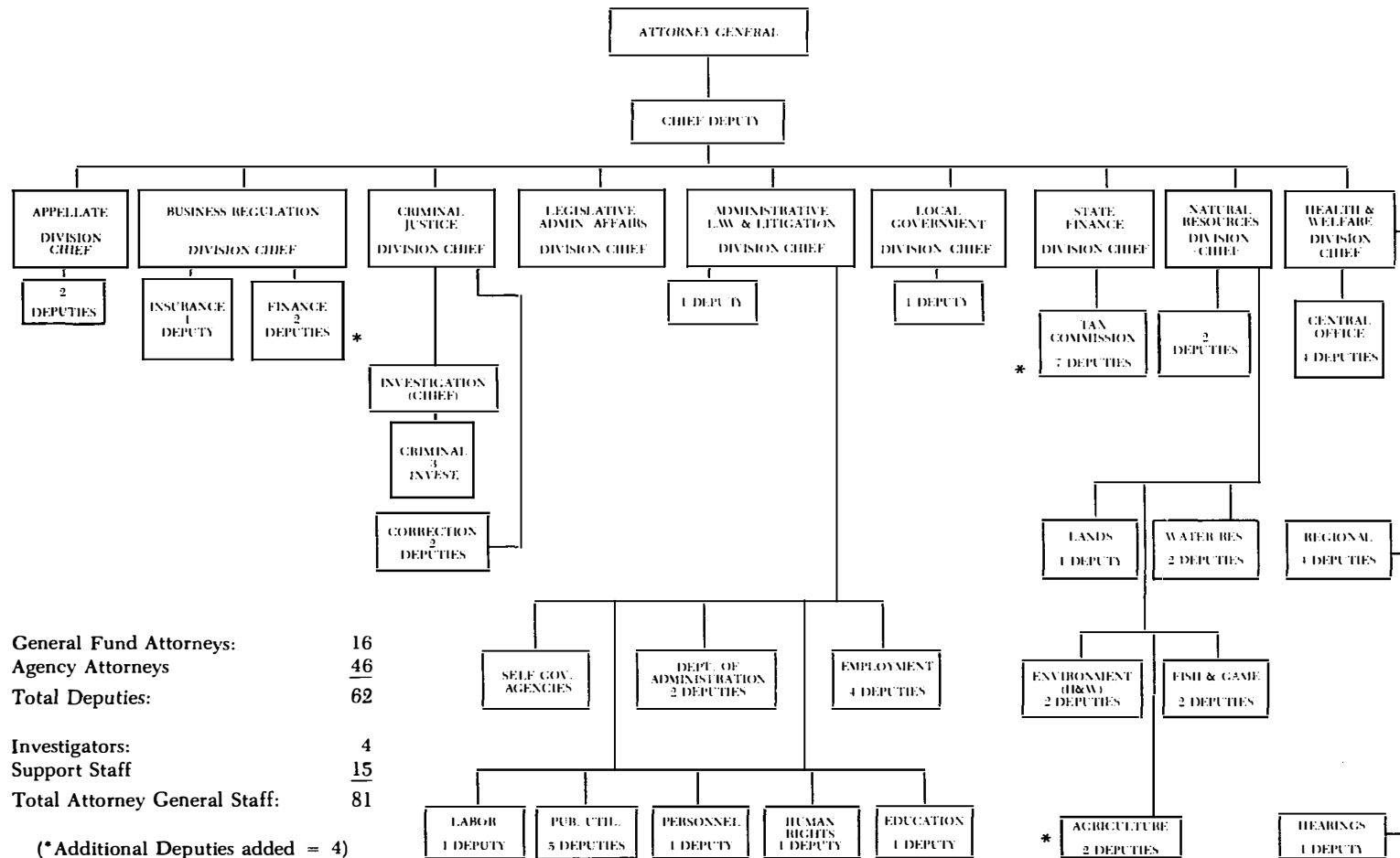
James Baird	Fred Goodenough	James Racon
David Barber	Bradley Hall	Phillip J. Rassier
Robert Becker	John Hockberger	Peter Richardson
Shane Bengochea	Mark Ingram	John Ruebelmann
Carol Brassey	Joseph Jones	Marsha Smith
Sheila Glusco Bush	Rinda Just	Ted Spangler
C.A. Daw	Dean Kaplan	Myrna Stahman
William Dillon	Wayne Klein	Stephen Stoddard
Rene Fitzpatrick	Janice Kroeger	Thomas Swinehart
Warren Felton	Andre L'Heureux	Evelyn Thomas
Curt Fransen	Stephen Lord	William VonTagen
Robert Gates	Mark Martin	Larry Weeks
Michael Gilmore	Roger Martindale	Jim Wickham
Leslie Goddard	Timothy McNeese	Scott Wolfley
Stephan Goddard	Steven Parry	Dave Wynkoop

Investigative Services

Russell T. Reneau, Chief Investigator
Allan J. Ceriale
Richard T. LeGall
Neal B. Custer

Non-Legal Personnel

Jeanne Baldner	Connie Marchwinski	Amber Smith
Kriss Bivens	Elsie O'Leary	Neysa Tuttle
Catherine Chertudi	Sigrid Obenchain	Stephanie Wible
Paula Lund	Sandra Rich	Deborah Williams
	Jacqueline Shelton	



ANNUAL REPORT OF THE ATTORNEY GENERAL

NEW CASES OPENED FOR COURT LITIGATION

The Office of the Attorney General has opened the following cases for Fiscal Year 1984.

CASE NAME	TYPE OF ACTION	STATUS
State vs. Walker, Michael	AP/Other (Misc)	Pending
State vs. Babbitt, Randall	HW/Welfare	Closed
Stevens, Wayne vs. State	CJ/Corrections	Closed
State vs. Campos, Josefina	AL/Employment	Pending
North Pacific Insurance Co. vs. Bochmuehl, et al	SF/Taxation	Pending
State vs. Davis, Hank	HW/Welfare	Pending
Cootz, Anthony vs. State	CJ/Corrections	Pending
Davis, Robert vs. State	CJ/Corrections	Closed
Cootz, Anthony vs. State	CJ/Corrections	Pending
Cootz, Anthony vs. State	CJ/Corrections	Pending
State vs. Edwards, Greg	AL/Employment	Pending
State vs. Hall, Patrick E.	AP/Other (Misc)	Pending
State vs. Jones, Gerald Lee	AP/Other (Misc)	Closed
State vs. Barrera, Ruben	HW/Welfare	Closed
State vs. Faulkner, John	HW/Welfare	Closed
Collins Bros. vs. Dunn, Kenneth	NR/Water Resources	Closed
State vs. Hobbs, Laurie	AL/Employment	Pending
State vs. Shoop, Jim	AL/Employment	Pending
Collins Bros., Inc. vs. Dunn, Ken	NR/Water Resources	Pending
Cunningham, Zane vs. Meehl, Daniel, et al	AL/Judiciary	Pending
McCarthy, William & Susan vs. State	SF/Taxation	Pending
Cregar, Charlene vs. Butler, Vance	HW/Welfare	Closed
SOI/Industrial Comm. vs. Hill, Susan	AL/Other (Misc)	Pending
SOI/Industrial Cmms. vs. Barnes, Mary	AL/Other (Misc)	Pending
SOI/Industrial Cmms. vs. Merrill, Orson	AL/Other (Misc)	Pending
State vs. Peterson, Randolph	HW/Welfare	Closed
State vs. Vasquez, Michael	HW/Welfare	Closed
State vs. Pearson, Doyle	HW/Welfare	Closed
Doremus, Thomas vs. SOI/H&W	HW/Fair Hearing	Pending
State vs. Sivak, Lacey	AP/Other (Misc)	Closed
State vs. Hymas, Richard	HW/Welfare	Closed
State vs. Bremer, Brian	HW/Welfare	Closed
State vs. Sorensen, Susan	AL/Employment	Pending
Nelson, Julianne vs. Salois, Stanley	HW/Welfare	Closed
Pallanes, Daniel vs. State	HW/Fair Hearing	Closed
State vs. Darbin, Floyd/aka Smart, Floyd	AP/Other (Misc)	Closed

ANNUAL REPORT OF THE ATTORNEY GENERAL

State vs. Garrett, Kirk	HW/Welfare	Closed
State vs. Beverly, James	HW/Welfare	Closed
State vs. Boodry, Michael	HW/Welfare	Closed
State vs. Newbold, Lavonne	HW/Welfare	Closed
State vs. Gold Back Mines Corp.	AL/Labor/Wage Claim	Closed
State vs. Haines, Sam & Frank H & H Drywall	AL/Labor/Wage Claim	Pending
State vs. Bradley, Royal	AL/Labor/Wage Claim	Pending
State vs. Palmer, Karl	HW/Welfare	Closed
State vs. Baslee, Dempsey & Helen	AL/Labor/Wage Claim	Pending
Hospitalization of Kemp, Christopher	HW/Mental Health	Pending
Cunningham, Milton vs. Alonzo, Milo et al	AL/Administration Dept.	Pending
State vs. Darbin, Floyd/aka Smart, Floyd	AP/Other (Misc)	Pending
State vs. Rutherford, Norman	AP/Other (Misc)	Pending
State vs. Records, Ann	HW/Welfare	Closed
State vs. Feil, Scott	HW/Welfare	Closed
State vs. Sherwood, Kurtis	HW/Welfare	Closed
State vs. Rademacher, Larry	HW/Welfare	Closed
Hospitalization of Ellis, Steven	HW/Mental Health	Pending
State vs. Garcia, Joaquin	AL/Employment	Closed
SOI/Industrial Cmmsn. vs. Tetherow Lumber Co.	AL/Other (Misc)	Pending
State vs. Durbin, Lewis & Lydia	HW/Welfare	Closed
State vs. Zabriskie, William	HW/Welfare	Closed
State vs. Bronson, Bryce	HW/Welfare	Closed
Pruett, Lillian vs. Pruet, Vance	HW/Welfare	Closed
Anderson, George vs. Gardner, Darrol & SOI	CJ/Corrections	Pending
Stevens, Wayne vs. State	CJ/Corrections	Pending
Burton, Denver vs. State	CJ/Corrections	Pending
State vs. Cantrell, Randy	HW/Welfare	Closed
State vs. Peeke, Craig	HW/Welfare	Closed
Martines, Larry vs. State	CJ/Corrections	Pending
In the matter of Thomas, Daren Eva	HW/Mental Health	Closed
State vs. Yorgensen, John	AL/Employment	Pending
State vs. Wall, Dennis	AL/Employment	Pending
State vs. Brown, Mark	AL/Other (Misc)	Pending
State vs. Canez, Leonardo	HW/Welfare	Closed
State vs. Cline, Gregg	HW/Welfare	Closed
State vs. Shaw, Tomi	HW/Other (Misc)	Closed
State vs. Langworthy, Edwin	HW/Welfare	Closed
State vs. Campbell, Mary	HW/Welfare	Closed
State vs. Crisp, Randall	AL/Employment	Pending
State vs. Fuentes, Eusebio	AL/Employment	Pending

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Amlin, John vs.		
Hamilton, Hon. Kay	AL/Other (Misc)	Pending
State vs. Musgrave, Connie	AL/Labor/Wage Claim	Closed
State vs. Dennis, Denny & Kathryn	HW/Other (Misc)	Pending
State vs. Chapman, John R.	AL/Other (Misc)	Pending
State vs. Stone, Gordon	HW/Welfare	Closed
State vs. Doss, Rick	HW/Welfare	Closed
State vs. Akers, Jack	HW/Welfare	Closed
State vs. Morin, Renaldo	HW/Welfare	Closed
State vs. Baslee, Dempsey & Helen	AL/Labor/Wage Claim	Pending
State vs. Licause, Bob	HW/Welfare	Closed
State vs. Hagen, Everett	AL/Labor/Wage Claim	Pending
Carlson, Charles vs. State	CJ/Corrections	Closed
Palmer, Michael vs. State	CJ/Corrections	Pending
Irwin, Marianne vs.		
Johnson, Clifford	HW/Welfare	Closed
U.S.A. vs. Merrill, Lloyd, SOI et al	AL/Other (Misc)	Pending
State vs. Dorman, James	HW/Welfare	Closed
State vs. Padilla, Javier	HW/Welfare	Closed
State vs. Knutter, Michael	HW/Welfare	Closed
Ramirez, Fred vs. State	CJ/Corrections	Pending
State vs. Humble, Lynn	AL/Other (Misc)	Pending
State vs. Maiden, Chris	AL/Employment	Pending
State vs. Kiser, Kenneth	AL/Employment	Pending
Tisdale, Charles P. vs.		
Gardner, Darroll	AL/Other (Misc)	Pending
State vs. Lambert, Richard	AL/Other (Misc)	Pending
State vs. Murinko, Phillip	AL/Other (Misc)	Pending
Tisdale, Charles vs.		
Gardner, Darroll	AL/Other (Misc)	Closed
State vs. Greene, Kevin	HW/Welfare	Pending
State vs. Jackson, Calvin	HW/Welfare	Closed
Gay, Tony vs. State	CJ/Corrections	Pending
* Month Totals * 106 Listed, 106 Filed, 54 Closed . . . for Jan. — 1984		
State vs. Godinez, Rudolpho	AL/Other (Misc)	Closed
State vs. Wiley, Robert	HW/Welfare	Closed
State vs. Silva, Eliseo	HW/Welfare	Pending
State vs. Kinman, Darrel	AL/Labor/Wage Claim	Closed
Major, Melvin vs. Crowl et al	CJ/Corrections	Pending
State vs. Ritchie, Brenda	AL/Employment	Pending
Peppers, Vaneta (and all others . . .) vs. SOI/H&W	HW/Medicaid	Pending
In the interest of Field, Cheryl/-		
Rhodes, Catherine	HW/Child Protective Act	Pending
State vs. Hamilton, Roland & Pat	HW/Welfare	Closed

ANNUAL REPORT OF THE ATTORNEY GENERAL

State vs. Lombard, Ron	AL/Labor/Wage Claim	Pending
State vs. Nelson, George	AL/Employment	Pending
State vs. Watson, James	AL/Other (Miscl)	Closed
State vs. Webb, Lonny	HW/Welfare	Closed
In the interest of Chlarson, Tracy	HW/Terminations	Closed
State vs. Linstrom, Dennis	HW/Welfare	Closed
Cootz, Anthony et al vs. State	CJ/Corrections	Pending
State vs. Pennell, Jerry	AL/Other (Miscl)	Pending
State vs. Hickman, Ernest	HW/Welfare	Closed
State vs. Orozco, Ruben	HW/Welfare	Closed
State vs. Williams, Lynn	AL/Employment	Pending
State vs. Elam, Tom D	HW/Welfare	Closed
State vs. Wiley, Carin	HW/Welfare	Closed
State vs. Combes, Robert	HW/Welfare	Closed
State vs. Larsen, David	HW/Welfare	Closed
State vs. Marcum, Wilma L.	HW/Welfare	Closed
State vs. Patschull, Timothy	HW/Welfare	Closed
State vs. Hanson, Clifford	HW/Welfare	Closed
State vs. McNutt, Cindy	HW/Welfare	Closed
State vs. Cahuana, Meridith	HW/Welfare	Closed
Laurent, Andre vs. State	CJ/Corrections	Pending
Jones, Larry vs. State	CJ/Corrections	Pending
State vs. Castro, Jessie Ann	HW/Welfare	Closed
State vs. Bohrn, Rosa	HW/Other (Miscl)	Pending
In the interest of Adams, Baby Boy	HW/Terminations	Closed
State vs. Sturdevant, Robert	AL/Labor/Wage Claim	Pending
Hughes, Michael vs.		
SOI/State Hospital South	HW/Mental Health	Closed
Anderson, Joanne vs. Elgethun, Paul	HW/Other (Miscl)	Pending
State vs. Alanis, Linda Mae	AP/Other (Miscl)	Pending
State vs. Staley, Danny	HW/Welfare	Closed
State vs. Jones, Stuart	HW/Welfare	Closed
State vs. Anderson, Edwin	HW/Welfare	Closed
State vs. Torres, Kenneth	HW/Welfare	Closed
State vs. Russette, Donald	HW/Welfare	Closed
State vs. Ramirez, Angel	HW/Welfare	Closed
State vs. Tetherow, Gary	AL/Labor/Wage Claim	Pending
State vs. Anderson, Dougias	AL/Employment	Pending
State vs. Woodland, Glen	HW/Welfare	Closed
State vs. Dayhoff, Christopher Sr.	HW/Welfare	Closed
State vs. Reyes, Alejandro	HW/Welfare	Closed
State vs. Forest-Gold, Inc.	AL/Labor/Wage Claim	Pending
Gearhard, Glen III vs.		
Landscape Architects, Id. Bd. of	AL/Self-Governing	Pending
Ada Cnty. vs. Hill, James & Susan		
vs. Hill, James & Susan vs.		
Ada Cnty-SOI	HW/Licensure	Pending

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State vs. Mathis, James	AP/Other (Misc)	Pending
McCulley, Mary vs. McCully, Patrick	HW/Welfare	Closed
State vs. Peterson, Kirk	HW/Welfare	Closed
State vs. McConnell, Jimmy	HW/Welfare	Closed
State vs. Ballou, David	HW/Welfare	Pending
State vs. Stein, James	HW/Welfare	Closed
Scott, Mary Ann (Myers) vs. Myers, Wilke E. III	HW/Welfare	Closed
Hamilton, Terry et al vs. Murphy, Al et al	CJ/Corrections	Pending
State vs. Pearson, Steve	AL/Employment	Pending
State vs. Sumner, Steve	AL/Labor/Wage Claim	Pending
Bell, Rhonda vs. Bell, Malcolm	HW/Mental Health	Closed
Balla, Bud et al vs. State	CJ/Corrections	Pending
Brown, Thomas vs. State	CJ/Corrections	Pending
State vs. Duncan, Edward	HW/Welfare	Closed
State vs. Jensen, Katherine	AL/Employment	Pending
State vs. Martinez, Perdro	HW/Welfare	Closed
State vs. Ferguson, Leonard	AL/Employment	Pending
State vs. Whitaker, Steven	HW/Welfare	Closed
State vs. Gomez, Raul	HW/Welfare	Closed
State vs. Ivie, David	HW/Welfare	Closed
State vs. Hite, Brenda	HW/Other (Misc)	Pending
State vs. Twitchell, Ruby	HW/Other (Misc)	Closed
State vs. Rankin, James	HW/Welfare	Closed
In the interest of Eberle, Scott & Cherin, Scott	CJ/P/A..Other (Misc)	Closed
Turnbeaugh, Norman vs. State	AP/Other (Misc)	Pending
State vs. Sima, Francis	HW/Other (Misc)	Pending
State vs. Gould, Randall	HW/Welfare	Closed
State vs. Coleman, Donnetta	HW/Other (Misc)	Pending
Sivak, Lacey vs. State	CJ/Corrections	Pending
Thomason, Perry vs. State	CJ/Corrections	Pending
Sivak, Lacey vs. State	AP/Other (Misc)	Pending
State vs. Cook, Emily	HW/Welfare	Closed
State vs. Behrend, Joseph	HW/Welfare	Closed
State vs. Meier, Fred	HW/Welfare	Closed
State vs. Annen, Gerald	HW/Welfare	Closed
State vs. Emery, Ronnie	HW/Welfare	Closed
State vs. Hilton, Mary Kay	HW/Welfare	Closed
State vs. Fiscus, Leland	HW/Welfare	Closed
State vs. Isley, Richard	AL/Labor/Wage Claim	Pending
State vs. Martin, Rayfield	AP/Other (Misc)	Closed
State vs. Soshea, Michael	HW/Welfare	Closed
State vs. Shaner, Howard	HW/Welfare	Closed
State vs. Birkholz, William	HW/Welfare	Closed
State vs. Young, John	AL/Labor/Wage Claim	Closed

ANNUAL REPORT OF THE ATTORNEY GENERAL

Garzee, Gary vs. State	CJ/Corrections	Pending
* Month Totals * 97 Listed, 97 Filed, 59 Closed . . . for Feb. 1984		
State vs. Mower, Gail	HW/Welfare	Closed
Hernandez, Jose vs. Murphy, A.	CJ/Corrections	Pending
State vs. Knutson, Robert	HW/Welfare	Closed
State vs. Ward, Joseph	HW/Welfare	Pending
State vs. Schmidt, Hermann	HW/Welfare	Closed
State vs. Bryant, Debbie	HW/Other (Misc)	Pending
State vs. Ink, Inc.	AL/Labor/Wage Claim	Pending
State vs. Phillips, Steve	AP/Other (Misc)	Pending
Coffin, B. Douglas vs. State	CJ/Corrections	Pending
State vs. Keller, Jim & Paula	HW/Welfare	Closed
State vs. Giacomini, Kathy	HW/Welfare	Closed
State vs. Zuniga, Porfirio	HW/Welfare	Closed
State vs. Russell, David	HW/Welfare	Closed
State vs. Tessier, Monty	AL/Labor/Wage Claim	Closed
Morrow, Jeffrey vs. State	CJ/Corrections	Pending
State vs. Farrell, Linda	HW/Welfare	Closed
State vs. Courville, Stanley	HW/Welfare	Closed
State vs. Shaffer, John	HW/Welfare	Closed
State vs. Vergel, Ted	HW/Welfare	Pending
State vs. Burton, David	HW/Other (Misc)	Pending
State vs. Hastings, Kenneth	AP/Other (Misc)	Pending
State vs. Earle, George	AL/Employment	Closed
In the interest of Henderson Children	HW/Welfare	Closed
Dallas, Claude vs. Gardner, D.	CJ/Corrections	Pending
Mitchell, Rick vs. Von Tagen, Bail, Palmer & Tax Comm.	AP/Other (Misc)	Pending
State vs. Nees, Rickie	HW/Welfare	Closed
State vs. Zitterkopf, Larry	HW/Welfare	Closed
State vs. Erickson, Jack	HW/Welfare	Closed
State vs. Ortega, Gerado	HW/Welfare	Closed
State vs. Bonneville Industries of Ida., Inc.	AL/Labor/Wage Claim	Pending
Schindler, Amy vs. SOI/HW	HW/Other (Misc)	Pending
State vs. Carter, Joseph A.	AP/Other (Misc)	Pending
State vs. Kinney, Eddie	HW/Welfare	Closed
State vs. McCreary, John	HW/Welfare	Closed
State vs. Sedillo, Orfie	HW/Welfare	Closed
State vs. Rose, Richard	HW/Welfare	Closed
State vs. Rundle, Mark	AP/Other (Misc)	Pending
State vs. Wilman, Terrill	HW/Welfare	Closed
State vs. Ziegler, Charlotte	HW/Welfare	Closed
State vs. Mayfield, James	HW/Welfare	Closed
State vs. Strickland, Sgt. James	HW/Welfare	Closed
State vs. Parkinson, Kenneth	AP/Other (Misc)	Pending
State vs. Flores, Gilbert	AP/Other (Misc)	Pending

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State vs. Lawrence, Vicki	AP/Other (Misc)	Pending
State vs. Merklein, Joe	HW/Welfare	Closed
State vs. McCullough, Lee	HW/Welfare	Closed
State vs. Maestas, Steve	HW/Welfare	Closed
State vs. Martinez, Fermin	HW/Welfare	Closed
State vs. McCammon, Clint	HW/Welfare	Closed
State vs. Waite, Jacqueline	HW/Welfare	Closed
State vs. Sellers, James	HW/Welfare	Pending
State vs. Morgan, Roger	HW/Welfare	Closed
State vs. McEnterffer, Greg	HW/Welfare	Closed
Human Rights Commn. vs Lewiston Care Center	AL/Human Rights	Closed
State vs. Carter, Joe T.	HW/Welfare	Closed
In the interest of Osborne, Steven	HW/Welfare	Closed
State vs. Hultz, Warren	AL/Labor/Wage Claim	Pending
State vs. Tierney, Richard Jr.	AP/Other (Misc)	Pending
State vs. Fulcher, Edward	AL/Employment	Closed
In the interest of Smith, Rachael	HW/Child Protective Act	Closed
State vs. Beam, Albert	AP/Other (Misc)	Pending
State vs. Martin, Gene	HW/Welfare	Closed
State vs. Burt, Daniel	HW/Welfare	Closed
State vs. Keckley, Randolph	HW/Welfare	Closed
State vs. Browne, Fred	HW/Welfare	Closed
State vs. Luney, Eldora	HW/Welfare	Closed
State vs. Estes, Virginia	HW/Other (Misc)	Pending
State vs. Brooks, James	AL/Labor/Wage Claim	Pending
Mallery, Robert vs. State	CJ/Corrections	Pending
Burton, Denver vs. State	CJ/Corrections	Pending
State vs. Fain, Charles	AP/Other (Misc)	Pending
State vs. Mesenbrink, Timothy	CJ/P/A..Other (Misc)	Closed
State vs. Sharette, Dick	HW/Welfare	Closed
State vs. Reece, Noel	HW/Welfare	Closed
State vs. Marcum, Les	HW/Welfare	Closed
State vs. Alaska Capital Corp., Inc.	BR/Finance	Pending
State vs. Palomarez, Fredrico	HW/Welfare	Closed
State vs. Wright, Dorothy	HW/Other (Misc)	Pending
State vs. Lopez, Rick	AP/Other (Misc)	Pending
Hoye, Ronald R. vs. Thomas, Lynn	AL/Administration Dept	Pending
State vs. Tinker, Rex	HW/Welfare	Closed
State vs. Branham, Robert	HW/Welfare	Closed
State vs. Frostrom, Robert	HW/Welfare	Closed
Miera, Richard vs. State	CJ/Corrections	Pending
State vs. Stansbury, Sally Ann	AP/Other (Misc)	Pending
State vs. Creech, Thomas	AP/Other (Misc)	Pending
State vs. Wilber, Floyd	HW/Welfare	Closed
State vs. Starr, Michael	HW/Welfare	Closed
State vs. Young, Clarence	HW/Welfare	Closed

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State vs. Candler, David	HW/Welfare	Closed
State vs. Haley, Dewey	HW/Welfare	Closed
State vs. Burton, M.D. & Patrick, Lillian	AL/Labor/Wage Claim	Closed
State vs. Pearson, Lewis	AP/Other (Misc)	Pending
State vs. Groves, Terry G.	AP/Other (Misc)	Closed
State vs. White, Jeffrey	HW/Welfare	Closed
State vs. Ayers, Warren	HW/Welfare	Closed
State vs. Buck, Steven	HW/Welfare	Closed
State vs. Burton, M.D. & Patrick, Lillian	AL/Labor/Wage Claim	Closed

* Month Totals * 98 Listed, 98 Filed, 62 Closed . . . for Mar. — 1984

State vs. Steffani, Leon	HW/Welfare	Closed
State vs. Spangler, Larry	HW/Welfare	Closed
State vs. Justesen, Keith	HW/Welfare	Closed
In the interest of Pace, Darrell	HW/Welfare	Pending
State vs. Pearson, Edna	HW/Other (Misc)	Pending
Williams, Lance vs. State	CJ/Corrections	Closed
State vs. Feather, Donald	AP/Other (Misc)	Closed
State vs. Hunter, Gene Jr.	HW/Welfare	Closed
State vs. Williams, Gary	HW/Welfare	Closed
State vs. McConnell, Sherry	HW/Other (Misc)	Closed
State vs. Kitchen, Nancy	HW/Other (Misc)	Pending
State vs. Garcia, Carol	HW/Other (Misc)	Pending
State vs. Stacey, John	HW/Other (Misc)	Closed
State vs. Curtis, Harry J. III	AP/Other (Misc)	Closed
State vs. Young, John	AL/Labor/Wage Claim	Pending
State vs. Haines, Sam & Frank	AL/Labor/Wage Claim	Pending
State vs. Beard, Gail	AL/Labor/Wage Claim	Pending
State vs. Beard, Gail	AL/Labor/Wage Claim	Closed
Alameda, County of (Cal.) vs. SOI, Twin Falls County	HW/Other (Misc)	Pending
State vs. Dewey, George	HW/Welfare	Closed
State vs. Falconburg, William	HW/Welfare	Closed
State vs. Gillespie, Gerald	HW/Welfare	Pending
State vs. Pena, Elida	HW/Other (Misc)	Closed
State vs. Potter, Joy	HW/Other (Misc)	Closed
State vs. Tri-West Ventures, Inc.	AL/Labor/Wage Claim	Pending
State vs. Kinley, Kristian	AP/Other (Misc)	Pending
State vs. Kaiser, John	HW/Welfare	Closed
State vs. Balls, Patricia	HW/Welfare	Closed
State vs. Balls, Keith	HW/Welfare	Closed
State vs. Walch, Bruce	HW/Welfare	Closed
State vs. Schweikart, Bobbie	HW/Welfare	Closed
State vs. Dunlap, Eugene & Harlow	AL/Labor/Wage Claim	Closed

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State vs.		
Northwest Commodities/Greenfeldt	BR/Finance	Closed
Lafon, Jonathon vs. State	CJ/Corrections	Closed
Rundle, Mark vs. State	CJ/Corrections	Pending
State vs. Blankenship, Everett	HW/Welfare	Closed
State vs. Pattee, John	HW/Welfare	Closed
State vs. Hernandez, Jose Cruz	HW/Welfare	Closed
Spurgeon, Brian vs. State	CJ/Corrections	Pending
State vs. Espino, Andres	HW/Welfare	Closed
State vs. Hertel, William	HW/Welfare	Closed
State vs. Little, Ricky	HW/Welfare	Closed
State vs. Greenwald, John	HW/Welfare	Closed
State vs. Miller, Oren	HW/Welfare	Closed
State vs. Lathrop, Jerry	HW/Welfare	Closed
Guardianship of Neff, Elizabeth	HW/Child Protective Act	Pending
State vs. Stoneking, Kathy	AL/Labor/Wage Claim	Pending
Cutler, Elden Earl vs.		
Thompson, C.E. et al	AP/Other (Misc)	Pending
State vs. Mesenbrink, Timothy	AP/Other (Misc)	Closed
State vs.		
Pioneer American Metals, Inc. et al	HW/Finance	Closed
State vs. O'Keefe, David	HW/Welfare	Closed
State vs. Snyder, Roy Dean	HW/Welfare	Closed
State vs. Dee Dee Enterprises, Inc.	AL/Labor/Wage Claim	Pending
Paradis, Donald vs. State	AP/Other (Misc)	Closed
State vs. Reese, James	HW/Welfare	Closed
State vs. Koehn, Marilu	AL/Labor/Wage Claim	Closed
SOI/Fish & Game vs. Dunn, Ken	NR/Water Resources	Pending
State vs. Anderson, Steve	HW/Welfare	Closed
State vs. Slabaugh, Kelly	HW/Welfare	Pending
State vs. Urizar, Dale	HW/Welfare	Closed
State vs. Tavenner, Glenn	HW/Welfare	Closed
State vs. Thomsen, Richard	HW/Welfare	Pending
State vs. Busha, Larry	HW/Welfare	Closed
State vs. Scroggins, Michael	AP/Other (Misc)	Pending
State vs. Snapp, Lynn	AP/Other (Misc)	Pending
State vs. Brown, David W.	HW/Welfare	Closed
State vs. Beckman, Dennis	HW/Welfare	Closed
State vs. Simmons, Buster	HW/Welfare	Closed
State vs. Windsor, Karla	AP/Other (Misc)	Pending
Gibson, Thomas vs. State	AP/Other (Misc)	Pending
Morrow, Jeffery vs. State	CJ/Corrections	Closed
State vs. Larkin, Michael	HW/Welfare	Closed
State vs. Hensley, Lloyd	HW/Welfare	Closed
State vs. Grant, Robert	HW/Welfare	Closed
State vs. Bjornn, Gorden	HW/Welfare	Closed
State vs. Blindman, Duane	HW/Welfare	Closed

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State vs. Burwell, Willard	HW/Welfare	Closed
State vs. Astle, Brad	HW/Welfare	Closed
State vs. Anselment, Julie	AL/Labor/Wage Claim	Closed
State vs. Schneiter, Dale	AL/Labor/Wage Claim	Closed
State vs. Checkpower of Idaho et al	BR/Finance	Closed
State vs. Onc Corp., Inc.	AL/Labor/Wage Claim	Closed
State vs. Beehive Pizza	AL/Labor/Wage Claim	Pending
Boatman, Patricia vs.		
Corrections, Ida. Bd. et al	CJ/Corrections	Pending
Ray, Donald P. vs. State	CJ/Corrections	Closed

* Month Totals * 85 Listed, 85 Filed, 59 Closed . . . for Apr. — 1984

State vs. Dykema, James	HW/Welfare	Closed
State vs. Riggs, Richard	AL/Labor/Wage Claim	Pending
State vs. Schutter, Richard	AP/Other (Misl)	Closed
State vs. Clawson, William	AP/Other (Misl)	Closed
State vs. Leyvas, Bacilio	HW/Welfare	Closed
State vs. Grover, Michael	HW/Welfare	Closed
State vs. Potts, Debra	AP/Other (Misl)	Closed
State vs. Weston, Herbert	HW/Welfare	Closed
State vs. Baslee, Dempsey & Helen	AL/Labor/Wage Claim	Pending
State vs.		
Sandpoint-Spokane Air Service, Inc.	AL/Labor/Wage Claim	Pending
State vs. Havey, Howard	HW/Welfare	Closed
State vs. Goble, Douglas	HW/Welfare	Closed
State vs. Goodrich, Gary	HW/Welfare	Closed
State vs. Dorman, James	HW/Welfare	Closed
Pardee, Carl vs. State	CJ/Corrections	Closed
Cordon, Randy vs. State	CJ/Corrections	Pending
Clark, Jack vs. State	CJ/Corrections	Closed
State vs. Mason, Timothy	AP/Other (Misl)	Pending
State vs. Arnold, Jody	HW/Welfare	Pending
State vs. Cheeks, Charles	HW/Welfare	Closed
State vs. Berrong, Fred & Carole	HW/Welfare	Closed
State vs. Roland, Alan	HW/Welfare	Closed
State vs. Spencer, Charles	HW/Welfare	Closed
Neilson, Kermit et al vs.		
Corrections, Dept. & Al Murphy	AP/Other (Misl)	Pending
State vs. Boren, Brett	HW/Welfare	Closed
State vs. Lindley, Noble	HW/Welfare	Closed
State vs. Reale, Carta	HW/Welfare	Closed
State vs. Sumner, Steve	AL/Labor/Wage Claim	Closed
State vs. Buchman, Larry	AL/Labor/Wage Claim	Pending
State vs. Reed, James	HW/Welfare	Closed
State vs. Palmer, John	HW/Welfare	Closed
State vs. Callaway, David	HW/Welfare	Closed
State vs. Shinn, Russell	HW/Welfare	Closed

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State vs. Lay, Richard	HW/Welfare	Closed
Potter, Tony vs. Murphy, Al	CJ/Corrections	Pending
Curl, Betty vs. Wilson, Joyce	CJ/Corrections	Pending
Schwartzmiller, Dean et al vs. Murphy, A. et al	CJ/Corrections	Pending
State vs. Plumley, Joseph	AP/Other (Misc)	Pending
Wolf, Steven vs. Gardner, Darrol et al	AP/Other (Misc)	Closed
State vs. Boley, Russell	HW/Welfare	Closed
State vs. Bratcher, Larry	HW/Welfare	Closed
State vs. Pulsifer, Michael	HW/Welfare	Closed
State vs. Smith, David	HW/Welfare	Closed
State vs. Todd, Timmy	HW/Other (Misc)	Closed
In the interest of Richards, Tammy	HW/Welfare	Closed
State vs. Taewest Corp	AL/Labor/Wage Claim	Pending
Anderson, Saxon vs. Anderson, Shawn & Hargraves, G.	AP/Other (Misc)	Pending
Jennings, Duane vs. State	CJ/Corrections	Closed
State vs. Ritchie, Brenda	HW/Welfare	Closed
State vs. Wegner, Mary	AL/Labor/Wage Claim	Pending
State vs. Tri Clean Janitorial, Inc.	AL/Labor/Wage Claim	Closed
SOI/Agricultural vs. Clement, Ross	CJ/P/A..Other (Misc)	Pending
Stone, Thomas Lee vs. State	AP/Other (Misc)	Pending
State vs. Fodge, Aaron	AP/Other (Misc)	Closed
State vs. Anglin, Carl	HW/Welfare	Pending
State vs. Baslee, Dempsey & Helen	AL/Labor/Wage Claim	Pending
State vs. Ankney, Douglas	AP/Other (Misc)	Pending
Purcell, Alan vs. Cory, Obe et al	NR/Water Resources	Closed
State vs. Laurent, Andre	AP/Other (Misc)	Closed
State vs. Martinez, Paul Jr.	HW/Welfare	Pending
State vs. Sullivan, Helen	HW/Welfare	Closed
State vs. Herold, Anita	HW/Welfare	Closed
State vs. Lovin, Roy Lee	HW/Welfare	Closed
State vs. Pederson, Charlene	HW/Other (Misc)	Pending
State vs. Peterson, Val	AL/Labor/Wage Claim	Pending
State vs. Morgan, William II	AP/Other (Misc)	Pending
State vs. Reyna, Ruben	HW/Welfare	Closed
State vs. Reynolds, Billy	HW/Welfare	Closed
State vs. Jordan, Leroy	HW/Welfare	Closed
State vs. Hill, Arnold	HW/Welfare	Closed
West, Walter vs. et al & Kosonen, Craig	AP/Other (Misc)	Pending
In re Holbrook, Sumner & Georgia	NR/Lands	Pending
In re Ralphs, Reynold L	NR/Lands	Pending
In re Arnold, Dennie & Janet	NR/Lands	Pending
State vs. Olsen, Cal & Commodity Credit	NR/Lands	Closed

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In re Arnold, Bruce & Nancy	NR/Lands	Pending
In re Arnold, Keith J. & Sons, Inc.	NR/Lands	Pending
State vs. Leer, William	AP/Other (Misc)	Pending
State vs. Curiel, Paul	HW/Welfare	Closed
State vs. Toomey, Walter	HW/Welfare	Closed
State vs. Gruver, Glen	HW/Welfare	Pending
State vs. Dahlby, Joyce	HW/Welfare	Pending
State vs. Moore, Susan	HW/Welfare	Closed
State vs. DeWitt. Karren	HW/Welfare	Closed
Moore, Roger vs. Murphy A. et al	CJ/Corrections	Pending
State vs. Lake, Michael	AP/Other (Misc)	Closed
State vs. Flores, Gilbert	AP/Other (Misc)	Pending
Rosencrantz, Keith vs. Munn, James	AP/Other (Misc)	Closed
State vs. Wics, Inc.	AL/Labor/Wage Claim	Pending
State vs. White, Robert	HW/Welfare	Closed
State vs. Ames, Roger L.	AP/Other (Misc)	Pending
State vs. Walker, James	HW/Welfare	Closed

* Month Totals * 92 Listed, 92 Filed, 55 Closed . . . for May — 1984

State vs. Dockstader, Kim	HW/Welfare	Closed
State vs. Holder, Cephas	HW/Welfare	Closed
State vs. Arvizo, Alfredo	HW/Welfare	Pending
State vs. Nesser, Paula	HW/Welfare	Closed
State vs. Daily, Harold & Lisa	AP/Other (Misc)	Closed
State vs. Duran, Anthony	HW/Welfare	Closed
State vs. Miller, Gregory	HW/Welfare	Pending
State vs. McMullen, Steven	AL/Labor/Wage Claim	Pending
Idaho Frozen Foods Corp. vs. H&W	NR/Environment	Pending
Garzee, Gary vs. Murphy A.	CJ/Corrections	Pending
State vs. Hamilton, Tony	AP/Other (Misc)	Pending
State vs. Cates, Scott	HW/Welfare	Closed
State vs. Vega, Robert	HW/Welfare	Closed
State vs. Salinas, Santos	HW/Welfare	Closed
State vs. Williams, Troy	HW/Welfare	Closed
State vs. Johnson, Jody	HW/Welfare	Pending
In the interest of Heileman, Grace	HW/Terminations	Closed
In the interest of McRoberts, Debra	HW/Terminations	Closed
State vs. Polisso, Salvador	HW/Welfare	Closed
State vs. Gilman, Dan	AL/Labor/Wage Claim	Pending
Allstate Ins. Co & Houdek, Richard vs. Corrections, Id. Bd. of	CJ/Corrections	Pending
State vs. Parker, Randy	AP/Other (Misc)	Pending
State vs. Burke, John	AP/Other (Misc)	Pending
In the interest of Galbraith, Michelle	HW/Welfare	Closed
State vs. Willis Shaw Frozen Express	AL/Human Rights	Closed
State vs. Newell, Michael	HW/Welfare	Closed
State vs. Decell, Marilyn	HW/Welfare	Closed

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State vs. Patterson, Dwayne	HW/Welfare	Closed
State vs. Ward, Brent	HW/Welfare	Closed
State vs. Ellsworth, Oliver	HW/Welfare	Closed
State vs. Clavette, Joseph	HW/Welfare	Closed
State vs. Lewis, ALbert & Hazel	HW/Welfare	Closed
Dambrell, William vs. State	CJ/Corrections	Pending
Stevens, Wayne vs. State	CJ/Corrections	Closed
Thompson, Charles Ray vs. State	CJ/Corrections	Closed
State vs. Brown, Jimmy	HW/Welfare	Closed
State vs. Bowlin, Danny	HW/Welfare	Closed
State vs. Collard, Gary	HW/Welfare	Closed
Roberts, Charles vs. Arave, A. et al	CJ/Corrections	Pending
Coffin, B. Douglas vs. Murphy, A. et al	CJ/Corrections	Pending
Davis, John vs. Murphy, A. et al	CJ/Corrections	Pending
Chapa, Gilbert & Medina, Pete vs. Arave, Arvon	CJ/Corrections	Pending
State vs. Ellis, Troy	HW/Welfare	Closed
State vs. Crump, Beverly	HW/Welfare	Closed
State vs. Cruz, Antonio Jr.	HW/Welfare	Closed
State vs. Cruz, Faye	HW/Welfare	Closed
State vs. Aguillar Pallets & Lumber Co.	HW/Welfare	Closed
Burk, Steven vs. State	CJ/Corrections	Closed
State vs. Gee, Patricia	HW/Other (Misc)	Pending
In the interest of Dawson, Leona	HW/Welfare	Closed
State vs. VanZandt, Robert	AL/Labor/Wage Claim	Pending
State vs. Heath, Dave	AL/Labor/Wage Claim	Pending
Human Rights Comm. vs. Mt. States Transport Co.	AL/Human Rights	Pending
Baker, Jerry L. vs. Gardner, D. et al	CJ/Corrections	Pending
McCabe, Melvin & Madsen, Mark vs. Arave, Arvon & Murphy, Al	CJ/Corrections	Pending
Walker, Michael Lee vs. Arave, Arvon	CJ/Corrections	Pending
State vs. Hays, Lee M.	AP/Other (Misc)	Pending
State vs. Ames, Floyd	HW/Welfare	Closed
State vs. Ward, Billy	HW/Welfare	Closed
State vs. Barandica, Jan	HW/Welfare	Closed
Garcia, Rogelio vs. State	CJ/Corrections	Pending
Red Buffalo, David vs. State	CJ/Corrections	Pending
State vs. Switter, Terry	HW/Welfare	Closed
State vs. Heideman, Matthew	HW/Welfare	Closed
Davey, et al vs. Land Bd.	LG/Other (Misc)	Pending
Bean, Scott & Lafon, Jon vs. State	CJ/Corrections	Pending
State vs. Perrigo, Gordon	HW/Welfare	Closed
State vs. Duke, Debbie	HW/Welfare	Closed

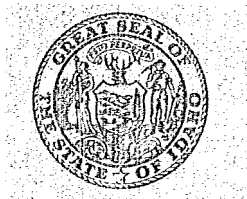
ANNUAL REPORT OF THE ATTORNEY GENERAL

State vs. Franklin, Terry	HW/Welfare	Pending
State vs. Hooper, Jack & Patricia	HW/Welfare	Closed
State vs. Stenkamp, Carl	HW/Welfare	Pending
State vs. Morris, Leroy	HW/Welfare	Pending
State vs. Bernhardt, Dale	HW/Welfare	Closed
State vs. Malespin, Ronald	HW/Welfare	Closed
State vs. Beckwith, Donald	HW/Welfare	Closed
State vs. Wilson, Ruby	HW/Welfare	Closed
State vs. Allred, Harold	HW/Welfare	Closed
State vs. Leedom, Jerry	HW/Welfare	Pending
Kroeger vs. Thomas	NR/Water Resources	Pending
State vs.		
First National Account Purch. et al	BR/Finance	Closed
State vs. York, Donald	HW/Welfare	Closed
State vs. Yielding, Vincent	HW/Welfare	Closed
State vs. Perschon, Brett	HW/Welfare	Closed
State vs. Terrell, Gordon	HW/Welfare	Closed
State vs. Burgin, Marshall	HW/Welfare	Closed
State vs. Broncho, Michael	Closed	
State vs. Rogers, Freddy	HW/Welfare	Closed
State vs. Bird, Randy	HW/Welfare	Closed
State vs. Gasper, Janie	HW/Welfare	Closed
Idaho Power vs. Ferc	NR/Parks & Rec.	Pending
Shelterhome Care, Inc. vs State	HW/Welfare	Pending

* Month Totals * 91 Listed, 91 Filed, 55 Closed . . . for Jun — 1984

* Month Totals * 1,127 Listed, 1,127 Filed, 666 Closed, 1,469 Currently Pending

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1984



Jim Jones
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 84-1

TO: Charles D. McQuillen
Executive Director, State Board of Education
650 W. State
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Does the service pay back portion of the proposed rules which are to implement the Professional Studies Program and Account, Idaho Code § 33-3720-3721, constitute illegal servitude?

CONCLUSION:

No. The rule in question does not constitute unconstitutional or illegal servitude.

ANALYSIS:

Idaho Code § 33-3720 establishes a "professional studies program," in order to "assist" Idaho residents who wish to pursue health-related studies which are not available in the State. Such assistance is to be by way of "(a) entering into compacts or contractual agreements which make such courses of study available to Idaho citizens, and (b) providing a mechanism to provide funds for such Idaho citizens." Idaho Code § 33-3720(1). The "mechanism to provide funds," apparently refers to the professional studies account, Idaho Code § 33-3721, which is to be used to receive funds from various sources, including state appropriations and the repayment of loans. Qualified recipients would enter into loan agreements which include repayment provisions. Under the statute, the "... repayment agreements may include provisions for decreasing or delaying or forgiving the repayment obligation in relationship to the recipient's course of study or agreement to return to Idaho to practice professionally." *Id.* The State Board of Education is authorized "... to adopt all necessary rules ... for the administration of the professional studies program." Idaho Code § 33-3720(4).

Pursuant to this rulemaking authorization, the State Board of Education is considering a set of rules to implement the Professional Studies Program. Proposed Rule 4, 3, 1 of Chapter G, includes a provision for the cancellation of the repayment obligation for certain qualified recipients:

Qualified recipients completing a qualified program in physical therapy or occupational therapy *shall be entitled to repay the loan amounts by returning to the State of Idaho and engaging in the full-time practice of physical therapy or occupational therapy.* For each year of such continuous full-time practice of physical therapy or occupational therapy, the qualified recipient shall be entitled to the cancellation of one (1) loan agreement obligation, beginning with the first educational year loan agreement and continuing with each successive year of the loan agreements for each year of continuous full-time practice. (Emphasis added).

The question, then, is whether the repayment by practicing in Idaho provision in the rule constitutes illegal servitude.

Under authority of the Thirteenth Amendment,¹ Congress passed the *Federal Anti-Peonage Act*, 42 U.S.C. § 1994. The Act states that:

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

The United States Supreme Court has had several occasions to interpret the statute. In *United States v. Reynolds*, 235 U.S. 133, 144 (1914), quoting *Clyatt v. United States*, 197 U.S. 207, 215 (1905), the Court explained the difference between peonage and voluntary labor in payment of debt.

. . . . peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case, the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.

The Court also found that it is “the constant fear of imprisonment under the criminal laws [which] renders the work compulsory.” *Id.* at 146; also, *Bailey v. Alabama*, 219 U.S. 219, 244 (1911); *Pollock v. Williams*, 322 U.S. 4 (1944). Under this rationale, the New York Court, in *People v. Lavender*, 398 N.E.2d 530 (N.Y. 1979), held that a New York City Administrative Code provision, which declared it a misdemeanor to abandon a home improvement contract without justification, violated 42 U.S.C. § 1994. The Court, quoting *Pollock v. Williams*, *supra*, 322 U.S. at 30, reiterated that the law does not allow a government “. . . to make failure to labor in discharge of a debt any part of a crime.” *People v. Lavender*, *supra*, 398 N.E.2d at 532. See also, *Opinion of the Justices*, No. 81-142, 431 A.2d 144, 151 (N.H. 1981) (statutory requirement that indigents provided legal assistance pay back the state by uncompen-

¹The Thirteenth Amendment to the United States Constitution states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

sated labor violated Thirteenth Amendment; but if work pay back provision made "optional," there would be no legal infirmity).

The proposed State Board Rule in question clearly contains no penal sanction. Any repayment by labor or service would be optional, and the qualified recipient, while "subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it," *United States v. Reynolds, supra*. The repayment by service option, therefore, would not violate the Thirteenth Amendment or 42 U.S.C. § 1994.²

A few cases have dealt with the construction and application of agreements by medical or social work students to work in particular locations or positions in exchange for financial aid in meeting costs of education.³ See, *Suther v. Booker Hospital District*, 543 S.W.2d 723 (Tex. 1976); *State v. Coury*, 359 N.Y.S.2d 486 (N.Y. 1974); *State v. Isaacson*, 322 N.Y.S.2d 380 (N.Y. 1971);⁴ *State Medical Education Board v. Robertson*, 6 Cal. App.3d 493, 86 Cal. Rptr. 258 (1970). In none of the cases cited was the issue of illegal servitude even discussed by the courts, and in all of these cases, agreements to work after graduation were upheld and damages awarded. In the *Suthers* case, *supra*, for example, an award in favor of an incorporated scholarship fund, which assisted a medical student in return for his promise to return to a particular area and practice medicine for ten years, was affirmed by the appellate court. The amount advanced plus accrued interest was awarded to the plaintiff.

While not dispositive of the issue, it is noteworthy that the Federal Program of Insured Loans to Graduate Students in Health Professions Schools, 42 U.S.C. § 294 *et seq.*, provides for cancellation of repayment obligations for loan recipients who enter into agreements to practice for at least two years "in an area in a State in a health manpower shortage area . . ." 42 U.S.C. § 294 (n) (f) (1). As far as we are able to determine, no reported case has questioned the legality of the provision under a servitude theory.

In summary, then, Rule 4, 3, 1 does not appear to violate the Thirteenth Amendment or its implementing statute. The cases dealing with service pay-back provisions of student loan agreements have generally been concerned with specific contractual or evidentiary issues rather than with broader constitutional issues.

²For a general discussion of servitude and peonage issues, see, 45 Am.Jur.2d, Involuntary Servitude §§ 1-12.

³For a discussion of the cases dealing with student service pay-back agreements, see, annot., 83 A.L.R.3d 1273.

⁴Note, in both New York cases cited, the State of New York obtained summary judgment against recipients of "public assistance intern scholarships" who had breached obligations to accept particular placements.

AUTHORITIES CONSIDERED:

1. Constitutions:

U.S. Const. amend XIII

2. Statutes:

42 U.S.C. § 1994 (1964)

42 U.S.C. § 294 (1982)

Idaho Code §§ 33-3720-3721 (Supp. 1983).

3. United States Supreme Court Cases:

Pollock v. Williams, 322 U.S. 4 (1944)

United States v. Reynolds, 235 U.S. 133 (1914).

Bailey v. Alabama, 219 U.S. 219 (1911).

Clyatt v. United States, 197 U.S. 207 (1905).

4. Other cases:

Opinion of the Justices, No. 81-142, 431 A.2d 144 (N.H. 1981).

People v. Lavender, 398 N.E.2d 530 (N.Y. 1979).

Suther v. Booker Hospital District, 543 S.W.2d 723 (Tex. 1976).

State v. Coury, 359 N.Y.S.2d 486 (N.Y. 1974).

State v. Isaacson, 322 N.Y.S.2d 380 (N.Y. 1971).

State Medical Education Board v. Roberson, 6 Cal. App.3d 493, 86 Cal.Rptr. 258 (1970).

5. Other Authorities:

45 Am.Jur.2d, Involuntary Servitude §§ 1-12.

Annot., 83 A.L.R.3d 1273.

DATED this 19th day of January, 1984.

ATTORNEY GENERAL
STATE OF IDAHO
JIM JONES

ANALYSIS BY:

BRADLEY H. HALL
Deputy Attorney General
Department of Education

BHH:sj

c c : Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 84-2

To : Mr. Darwin L. Young, Commissioner
Idaho State Tax Commission
700 W. State Street
STATEHOUSE MAIL

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Must county authorities collect and remit sales tax for photocopies sold by them?
2. If so, is the sales tax incorporated into the fee or charged in addition to the fee?

CONCLUSION:

1. County authorities must collect and remit sales tax for photocopies sold by them.
2. Sales tax is to be charged in addition to the normal fee charged for such photocopies.

ANALYSIS:

The questions presented require statutory construction and application. The initial task is to determine whether the appropriate statutes have an obvious and apparent meaning. The Idaho Supreme Court has stated: "When interpreting a statute this Court has stated that '[t]he plain, obvious and rational meaning is always preferred to any hidden, narrow or irrational meaning.' State ex rel. Evans v. Click, 102 Idaho 443, 448, 631 P.2d 614, ____ (1981) (citing Higginson v. Westergard, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979); Nagel v. Hammond, 90 Idaho 96, 408 P.2d 468 (1965))" *Union Pacific Railroad Co. v. The State Tax Commission of the State of Idaho*, ____ Idaho ____, 670 P.2d 878 (1983). If the meaning of a statute is clear on its face then the analysis need not proceed further. This rule of statutory construction is particularly

applicable to the Attorney General whose role is to construe existing law and not to create new law or policy.

1. The Idaho Sales Tax Act, Idaho Code §§ 63-3601 — 63-3640A (1976), generally requires that sales tax be collected by the seller from the buyer on all retail sales of tangible personal property. Idaho Code § 63-3619(b) (1976). There is no statutory exclusion or exemption for sales made by governmental entities. Sales Tax Regulation 22-16(e) [IDAPA 35.02.22-16(e)], states that:

Sales by the State, its departments or institutions, counties, cities, school districts or any political subdivision are subject to sales tax which is to be collected by the political subdivision.

Therefore, county authorities are subject to the collection requirements of the Idaho Sales Tax Act if they make retail sales of tangible personal property. A “retail sale” is defined in the Idaho Sales Tax Act as “. . . a sale of tangible personal property for any purpose other than resale of that property in the regular course of business” Idaho Code § 63-3609 (1976).

The term “sale” is, in turn, defined in Idaho Code § 63-3612 (1976) as:

. . . [A]ny transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration . . . “Sale” shall also include:

* * *

(d) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or *printed* to the special order of the customer, or of any publication.

[Emphasis added]

County officials who transfer possession of tangible personal property for a consideration are making a retail sale as contemplated by the Idaho Sales Tax Act. Tangible personal property is defined by Idaho Code § 63-3616 (1976) as “. . . personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.” Since photocopies may be weighed, measured, felt or touched, they constitute tangible personal property.

Accordingly, the sale of photocopies is a retail sale under the terms of the Idaho Sales Tax Act. County authorities who sell photocopies must collect sales tax when the photocopies are sold.

The only possible exception is where the buyer of the photocopies qualifies for an exemption under Idaho Code § 63-3622 (Supp. 1982, 1983). If the buyer provides the seller with a current and valid exemption certificate pursuant to the requirements of Idaho Code § 63-3622(aa) (Supp. 1982, 1983) and Idaho Sales Tax Regulation 22-1 [IDAPA 35.02.22-1], the seller is relieved of the obligation to collect and remit sales tax.

It may be questioned whether the fee charged is for the labor of making photocopies rather than the sale of the photocopies. Since the Idaho Sales Tax Act does not generally impose a tax on services, it might be argued that the labor segment of the fee is not taxable. This is answered by Idaho Code § 63-3613(a) (Supp. 1982, 1983):

(a) The term "sales price" means the total amount for which tangible personal property, *including services agreed to be rendered as a part of the sale*, is sold, . . . without any deduction on account of any of the following:

* * *

2. The cost of materials used, *labor or service cost*, losses, or any other expense.

[Emphasis added]

Since the labor involved in making photocopies is a service agreed to be rendered as a part of the sale, the entire fee charged for the photocopies is taxable. This issue is further clarified by Idaho Sales Tax Regulation 13-15.b [IDAPA 35.02.13-15.b.].

b. *Sales by Persons Engaged in Printing.* The receipts derived from sales to ultimate consumers for printing of tangible personal property upon special order are taxable.

"Printing of tangible personal property" shall include imprinting and all processes or operations connected with the preparation of paper or paperlike substances, the reproduction thereon of characters or designs and the alteration or modification of such substances by finishing and binding.

Upon such final sales, charges for materials, labor and production . . . and binding and finishing services shall be included in the selling price and the tax shall be computed upon such selling price whether the various charges are separately stated or not.

Clearly, the labor related to making the photocopies is defined as part of the sale and, therefore, taxable. However, other services which are not incidental to the sale will not be taxable so long as those services are separately stated. Idaho Sales Tax Regulation 09-1 (IDAPA 35.02.09-1). These would include services such as filing, notarization and recording.

2. The second question is whether sales tax should be incorporated into the fee charged for photocopies or whether sales tax should be charged in addition to the fee.

The Idaho Sales Tax Act contemplates that the seller of tangible personal property shall collect from the buyer a tax which is in addition to the sales price. E.g., Idaho Code § 63-3619(d) (1976) makes it "unlawful . . . to . . . state to the public . . . that the tax . . . will not be added to the selling price" The question then becomes whether this requirement of the Idaho Sales Tax Act is consistent with the statutes which authorize county officials to charge a fee for photocopies. This authorization is codified in Idaho Code §§ 31-3201 — 31-3220 (1983). These statutes generally allow various

county officials to charge fees for various duties performed by them. For example, the clerk of the district court may charge certain fees for filing, issuing or recording execution, taking affidavits or acknowledgements and for making and certifying photocopies. Idaho Code § 31-3201 (1983). Other county officials are likewise authorized to charge certain fees.

If the duty performed by the county official does not involve a taxable sale as defined in Idaho Code § 63-3612 (1976), then sales tax should not be collected. However, with respect to the sale of photocopies and other tangible personal property, sales tax must be collected and remitted.

None of the fee authorization statutes contained in Idaho Code §§ 31-3201 — 31-3220 (1983), make reference to whether sales tax should be charged in addition to the statutory fee. However, there is no conflict between the statutes in that the Idaho Sales Tax Act requires that sales tax be charged in addition to the sales price. In this case, the sales price is simply the statutory fee.

Even if it were considered that there is an ambiguity in the fee authorization statutes as to whether sales tax should be charged, the result would be the same. A basic rule of statutory construction is that wherever possible, statutes should be interpreted so as to be consistent with one another. The Idaho Supreme Court has stated:

. . . Where it is possible to do so, it is the duty of the courts, in the construction of statutes, the harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.

Sampson v. Layton, 86 Idaho 453, 457 387 P.2d 883 (1963), citing 50 Am.Jur. 367, Statutes § 363.

Here, the best way to interpret the fee statutes and the sales tax statutes consistently is to consider that the Idaho Sales Tax Act requires the statutory rate of tax to be charged *in addition* to the statutory fee. With such a construction of the statutes, there is no conflict and both statutes can be given their full force and effect.

AUTHORITIES CONSIDERED:

Idaho Code § 31-3201 (1983)

Idaho Code § 63-3609 (1976)

Idaho Code § 63-3612 (1976)

Idaho Code § 63-3613(a) (Supp. 1982, 1983)

Idaho Code § 63-3616 (1976)

Idaho Code § 63-3619(d) (1976)

Idaho Sales Tax Regulation 13-15.b. [IDAPA 35.02.13-15.b.]

Idaho Sales Tax Regulation 22-16.b. [IDAPA 35.02.22-16.e.]

Sampson v. Layton, 86 Idaho 457 387 P.2d 883 (1963), citing 50 Am.Jur. 367, Statutes § 363

Union Pacific Railroad Co. v. The State Tax Commission of the State of Idaho, ____ Idaho ____, 670 P.2d 878 (1983)

DATED this 26th day of January, 1984.

ATTORNEY GENERAL
OF THE STATE OF IDAHO
JIM JONES

ANALYSIS BY:

DAVID E. WYNKOOP
Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 84-3

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

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Is the funding of the department of law enforcement's administration from dedicated motor vehicle registration fees in compliance with Idaho Const. art. VII, § 17?

CONCLUSION:

If motor vehicle registration fees were the sole source of funding for the administration of the department of law enforcement, such funds could not be used to administer programs unrelated to highway construction, repair, maintenance or traffic supervision. However, the department of law enforcement's administration is currently funded from both motor vehicle registration fees and from non-dedicated funds. If the legislative appropriations for administration of the department of law enforcement

allocate an amount of non-dedicated funds sufficient to administer programs unrelated to highway construction, repair, maintenance, or traffic supervision, such appropriations would probably not be held to violate Idaho Const. art. VII, § 17.

ANALYSIS:

The administrative division of the department of law enforcement is funded from dedicated motor vehicle registration fees, other non-dedicated fees, and a small amount of federal funds not here at issue. The administrative division provides centralized services to the entire department. These services, including the director's office, budgeting, fiscal, personnel, training, procurement, legal and data processing services, are provided to the entire department, including the state police, police services, alcohol beverage control, brand board, horse racing commission and other non-highway related programs.

If the sole source of funding for the department of law enforcement's administration were motor vehicle registration fees, the non-highway related programs of the department could not be administered with these funds. Idaho Const. art. VII, § 17 contains a broad prohibition against using motor vehicle registration fees for non-highway related purposes. That section provides:

On and after July 1, 1941, the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

Thus, motor vehicle registration fees must be used, "exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payments of the interest and principal of obligations incurred for such purpose." "Traffic supervision" is a major function of the department of law enforcement, properly funded with motor vehicle registration fees. However, as noted above, the department also administers programs unrelated to highway traffic supervision, such as the horse racing commission and the brand board. The constitutional provision prohibits funding of such unrelated functions from motor vehicle registration fees. In *Williams v. Swensen*, 93 Idaho 542, 544, 467 P.2d 1 (1970) the Idaho Supreme Court held:

The plain meaning of art. VII § 17 of the Constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom. *State ex rel. Moon v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956). The only exception to that mandate is that the legislature may authorize the funds to also be used for refunds or credits or to defray costs of collection and administration.

In *State v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956), the court held unconstitutional an appropriation of \$50,000 from the highway fund for the purpose of advertising the highways of the State of Idaho and encouraging travel thereon. Similarly, the court held unconstitutional a statute providing for expenditure of dedicated highway funds for the relocation of public utility facilities located on public highways in *State v. Idaho Power Company*, 81 Idaho 487, 346 P.2d 596 (1959).

Thus, if the department of law enforcement's administration were funded entirely from dedicated motor vehicle registration fees, such funds could not be used to fund the administration of programs such as the horse racing commission and the brand board which perform functions unrelated to highway construction, repair, maintenance, and traffic supervision.

The funding of the administrative division of the department of law enforcement is not solely from dedicated motor vehicle registration fees. The appropriation for the 1983 fiscal year appears at ch. 272 Session Laws 1983, § 2, p. 706. That appropriation reads as follows:

SECTION 2. There is hereby appropriated to the department of law enforcement the following amounts, to be expended for the designated programs from the listed accounts for the period from July 1, 1983, through June 30, 1984:

I. CENTRAL ADMINISTRATION:

FROM:

Idaho Law Enforcement Account	\$1,025,400
Peace Officers Standards and Training Account	452,900
Training Account	<u>78,500</u>
TOTAL	\$1,556,800

The Idaho Law Enforcement Account is established and funded as described in Idaho Code § 49-1301. That statute provides funding for the account from three sources including three dollars from each drivers license fee, three dollars of each chauffeurs license fee and $\frac{1}{3}$ of all motor vehicle registration fees. Only the motor vehicle registration fees are restricted fees within the limits of Idaho Const. art. VII, § 17.

The peace officers standards and training account is created by Idaho Code § 19-5116. The funding for this account is provided by Idaho Code § 31-3201B. This funding is derived from a three dollar fee imposed on all persons convicted of felonies, misdemeanors, or traffic, conservation or ordinance violations, excluding parking violations. These funds are not restricted other than by the restrictions legislatively imposed. Accordingly, these restrictions could be eliminated by the legislature. The training account consists of federal funds which are restricted by the grant restrictions imposed federally.

Accordingly, the question which must be addressed is whether the restrictions imposed by Idaho Const. art. VII, § 17, prohibit the use of both dedicated funds and non-dedicated funds for the administration of department of law enforcement programs, some of which are unrelated to highway construction, repair, maintenance, and traffic supervision.

There does not appear to be a great deal of case authority considering whether dedicated funds may be used together with non-dedicated funds and applied to various programs, some of which could not be funded with dedicated funds. The Idaho cases discussing the nature of public school endowment funds do not satisfactorily answer the question. The most recent of these, *State ex rel. Moon v. State Board of Examiners*, 104 Idaho 640, 662 P.2d 221 (1983), discusses the history of school endowment funds and holds that those funds constitute an inviolate trust. However, those cases do not appear to be applicable to motor vehicle registration funds. Idaho Const. art. IX, § 3 dealing with public school endowment funds provides in pertinent part:

No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided.

The above-quoted provision focuses upon maintaining the fiscal separation of the endowment fund. In contrast, Idaho Const. art. VII, § 17 provides that dedicated highway taxes can be used only for enumerated purposes, stating in pertinent part:

. . . and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

Idaho Const. art. VII, § 17 does not create a highway fund and does not contain provisions focused upon maintenance of the separation of revenues. Rather, it focuses upon the purposes for which certain taxes may be expended.

Also, the public school endowment funds are restricted by the terms of the federal grant of endowment lands to the state at the time of its admission to the union as discussed in *Moon, supra*. No such considerations are applicable to dedicated highway funds.

The Idaho cases which appear to be closest on point are *State v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956) and *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432 (1959).

In *State v. Jonasson*, the court held unconstitutional a legislative appropriation in the amount of \$50,000 from the highway fund to the Idaho Development and Publicity Fund for the purpose of advertising the highways of the state and encouraging travel thereon. The court held that advertising the highways is not within any of the categories of permissible uses of highway funds enumerated in Idaho Const. art. VII, § 17.

The case is noteworthy because the appellant contended that monies paid into the highway fund from sources other than motor fuel taxes and motor vehicle registration fees were sufficient to pay the \$50,000 appropriated. The appellant argued that the state treasurer could and should have paid the money to appellant from these other unrestricted funds which had been paid into the highway fund.

The court noted that the legislature had not provided in the appropriation bill that only non-dedicated funds were appropriated to the Idaho Development and Publicity Fund.

The court then rejected appellant's argument stating:

The fund in the treasurer's office is not required to be, and is not segregated as to source.

To assert that only funds undedicated by the Constitution were intended by the Legislature to be appropriated, and that Mrs. Moon should have paid the sum appropriated from non-dedicated receipts would, in effect, make a judicial officer of the State Treasurer and require her to place a judicial construction and determination and meaning on the constitutional provision above quoted and the legislative enactment here attacked, and to judicially determine what funds, if any, might have been legally appropriated.

78 Idaho at 209

Thus, it is clear from *Jonasson* that the deposit of some non-dedicated funds to the dedicated highway fund does not, absent some segregation of accounts, justify utilization of the dedicated account to fund an activity which is entirely unrelated to the dedicated purposes for which highway funds may be expended.

The legislative appropriation for the administration of the department of law enforcement, however, presents a very different factual situation. The legislative appropriation to the department involves the appropriation of dedicated funds together with a substantial amount of non-dedicated funds for a predominantly dedicated purpose, namely the administration of the department of law enforcement. In contrast, *Jonasson* involved the use of a predominantly dedicated fund for an exclusively non-dedicated purpose.

The appropriation to the department of law enforcement presents a factual situation more akin to that addressed by the court in the later case of *Rich v. Williams, supra*. In that case, the Idaho Supreme Court was asked to determine the propriety of funding a building housing the administration of the department of transportation and the department of law enforcement with dedicated funds restricted under art. VII, § 17. The court approved the legislative appropriation although the department of law enforcement performed various functions at that time unrelated to traffic supervision such as enforcement of criminal laws anywhere in the state and regulation of various licensed occupations. The court did not specifically address these incidental functions. However, when the court's attention was directed to the fact that the department of law enforcement had duties which were not within the allowable limits of art. VII, § 17, the court held that the use of the building would be presumed to be restricted to the permissible purposes. The court stated:

Clearly the legislature intended the use of the building contemplated by chapter 83 only by those departments of government to which is delegated the performance of duties within the purview of Idaho Const. art. 7, § 17. This prohibition is implicit in such section of the constitution.

By presuming permissible use of the funds where their use was applied predominantly to permissible purposes, the court followed its well-established rule favoring the constitutionality of statutes and required clear proof of facts which would invalidate the act. The court stated in *Rich v. Williams*:

A legislative act is presumed to be constitutional and all reasonable doubt as to its constitutionality must be resolved in favor of its validity. (citations omitted)

* * *

The further rule is stated in *Petition of Mountain States Telephone and Tel.Co.*, 76 Idaho 747, 284 P.2d 681, 683:

. . . The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. (citations omitted)

81 Idaho at 316, 317.

Thus, *Rich v. Williams* holds that it will be presumed that appropriations of dedicated funds to the department of law enforcement will be used for dedicated purposes absent proof to the contrary. To prove a violation, it would therefore appear to be necessary to show that the expense of administering non-dedicated programs exceeded the non-dedicated revenues provided. Conversely, if the legislature appropriates sufficient non-dedicated funds to support the non-dedicated activities, the appropriation would not violate art. VII, § 17.

Therefore, appropriations to the department of law enforcement should be carefully scrutinized by the legislature to insure that an allocation of non-dedicated funds are provided in an amount sufficient to fund administration of non-dedicated activities.

In conclusion, if motor vehicle registration fees were the sole source of funding for the administration of the department of law enforcement, such funds could not be used to administer programs unrelated to highway construction, repair, maintenance or traffic supervision. However, the department of law enforcement's administration is currently funded from both motor vehicle registration fees and from non-dedicated funds. If the legislative appropriations for administration of the department of law enforcement allocate an amount of non-dedicated funds sufficient to administer programs unrelated to highway construction, repair, maintenance, or traffic supervision, such appropriations would probably not be held to violate Idaho Const. art. VII, § 17.

AUTHORITIES CONSIDERED:

1. Constitutions:

Idaho Const. art. VII, § 17

Idaho Const. art IX, § 3

2. Statutes:

Idaho Code § 19-5116

Idaho Code § 31-3201B

Idaho Code § 49-1301

3. Idaho cases:

Williams v. Swensen, 93 Idaho 542, 467 P.2d 1 (1970)

State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959)

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

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

DATED this 27th day of January, 1984.

ATTORNEY GENERAL
STATE OF IDAHO
JIM JONES

ANALYSIS BY:

DAVID G. HIGH
Deputy Attorney General

C.A. DAW
Deputy Attorney General

c c: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 84-4

TO: Mr. Thomas D. Lynch
Valley County Prosecuting Attorney
P.O. Box 532
Cascade, ID 83611

Mr. Richard L. Harris
Canyon County Prosecuting Attorney
P.O. Box 668
Caldwell, ID 83606

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You have each asked for a formal opinion on different issues of a related subject. The subject deals with the allocation between cities and counties of the cost of extraditing

and confining prisoners who have violated state statutes. More specifically, the issues can be phrased as follows:

- (1) Who bears the cost of extraditing a prisoner charged with violation of a state statute where the violation was committed within city limits and investigated by city officers?
- (2) Who bears the cost incurred by the county jail in housing a prisoner who has been charged with a state law violation committed within city limits and investigated by city police officers; and in cases where the city bears the jail costs can a sheriff refuse to accept city prisoners until the city has paid its past due bills?

CONCLUSION:

Essentially, counties are responsible for the cost and enforcement of state statutes, including the cost of extraditing and housing prisoners charged by city law enforcement officers with violations of state law. And while counties may bring legal action to recoup jail costs incurred for city prisoners charged under city ordinances or state motor vehicle laws, sheriffs cannot refuse to accept city prisoners.

ANALYSIS:

To understand the questions presented and the answers reached, a brief historical background of the relationships between state and local levels of government is helpful. This analysis will then show in greater relief the interrelationship between state government and local law enforcement entities etched into Idaho's law. Finally, this opinion will focus on specific statutes pertaining to the extradition and housing of prisoners who have been charged by city law enforcement officers.

The State of Idaho in the third quarter of the 20th Century must not forget its origins: in doctrines of law and in systems of government Idaho is a scion of England. Common law and local government principle have, since before the Norman conquest of England in 1066, had a shared evolution; together they have survived the hazards of colonization and revolution. These durable principles have survived conditions more inimical than the economic tensions which strain the relationship between the levels of government in Idaho today.

For present purposes, it is of sufficient historical elucidation to recall that "(i)n England and all the American states, the system of ministerial officers is essentially the same that existed in the earliest ages of English jurisprudence." MURFREE, Williams, A TREATISE ON THE LAW OF SHERIFFS § 2 (2d Ed., 1890). As to that ancient system of ministerial officers, one salient point deserves emphasis: long before the rise of cities, local government consisted of counties protected by sheriffs. Even after the seeds of municipalities grew in the decay of the English feudal system, the king was sovereign and the sheriff was the keeper of his peace. The word "sheriff" derives from the saxon word "schyre," meaning county and the word "reeve" signifying keeper, administrator, or head of an array of soldiers. 1 ANDERSON ON SHERIFFS § 2; RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, (Unabridged Edition.) Not just etymologically, but literally, the modern sheriff is still the "keeper of the county."

Except for minor changes, Idaho statutes still adhere to the principle that:

[I]n the exercise of executive and administrative functions, in conserving the public peace, and vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the state and he has no superior in his county.

ANDERSON, *supra*, § 6.

With this historical perspective, Idaho Code § 31-2227 is significantly enhanced in meaning:

Irrespective of police powers vested by statute in state, precinct, county, and municipal officers, *it is hereby declared to be the policy of the State of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney in each of the several counties.*

Idaho Code § 31-2227 (emphasis supplied).

After the American revolt against the king, state legislatures exercised the rights and powers of sovereignty to prescribe what actions would constitute crimes against the peace and dignity of the state. *Ex Parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed.2d 129 (1916); *State v. Webb*, 96 Idaho 325, 528 P.2d 669 (1974). When our state was formed it exercised that sovereignty and it provided, like other states, governments of general and county jurisdiction to execute its laws. Counties are subdivisions of state government which enforce state law and are self-funding. Neither the county nor the office of county sheriff has a choice as to whether or not it shall exist and act. These entities and offices are subdivisions of this state and are involuntarily created by constitution and statute. Idaho Const. art. XVIII, §§ 1-5. As for its primary law enforcement officer, the constitution commands the legislature to “provide . . . for the election of a sheriff . . . every four (4) years in each of the several counties of the state.” Idaho Const. art. XVIII, § 6.

Like his medieval counterpart in distant England, the sheriff must:

- (1) Preserve the peace.
- (2) Arrest . . . all persons who attempt to commit or who have committed a public offense . . .
- . . .
- (6) Take charge of and keep the county jail and the prisoners therein.
- . . .
- (8) Serve all process and notices in the manner prescribed by law.
- . . .
- (10) Perform such other duties as are required of him by law.

Idaho Code § 31-2202.

The sheriff is entitled to compensation and reimbursement for these services as provided by Idaho Code § 31-3302. The sheriff is not autonomous, however. His office is

under the direction of the county commissioners. One of the duties of the commissioners is to raise revenue, budget and provide the means so that other county officers, including the sheriff, are able to perform their lawful duties. In the words of the statute, the county commissioners are:

To supervise the official conduct of all county officers . . . ; see that they faithfully perform their duties; (and) direct prosecution of delinquencies.

Idaho Code § 31-802.

In contrast to the genesis of county governments, the constitution provides for the voluntary incorporation of municipalities. Unlike counties, which are subdivisions of the state brought into existence by constitutional fiat, Idaho cities are born through a petition to the county commissioners as provided for by statute. Idaho Const. art. XII, § 1; Idaho Code § 50-101. Cities, voluntary corporations that they are, do not have the obligations which are the devoir of counties, to enforce and execute state criminal laws.

These cardinal differences between cities and counties are clearly underscored in the language of the Idaho Supreme Court's landmark case, *Strickfaden v. Greencreek Highway District*:

(Counties) are legal political subdivisions of the state, created or superimposed by the sovereign power of the state of its own sovereign will, without any particular solicitation or consent of the people within the territory affected. (citations omitted)

Cities, towns and villages . . . are voluntarily organized under the general law at the request and with the concurrent consent of their members.

42 Idaho 738, 748-750, 248 P.2d 456 (1926).

In their administrative functions, both county and city governments have power to establish laws not in conflict with the general laws of the state, Idaho Const. art. XII, § 2, and to enforce their ordinances by prescribing misdemeanor penalties for violations thereof, Idaho Code §§ 31-714; 50-302; *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902), but felony and misdemeanor offenses of general import are described and punished by state law. It is the duty of the sheriff within his county to enforce the criminal statutes of this state. Idaho Code § 31-2202. While a sheriff indisputably exercises discretion as to how the criminal laws of this state are to be enforced in his jurisdiction, he has no choice but to enforce them or be removed from office. Idaho Code §§ 31-2202, 31-2227.

While cities have the power to appoint police officers who are accorded by statute the authority to enforce state law within their jurisdiction, there is no affirmative duty to appoint such officers nor is there a statutory responsibility for city police officers to enforce state penal statutes.

The policemen of every city, *should any be appointed*, shall have power to arrest all offenders against the law of the state, or of the city, by day or by night, in the same manner as the sheriff or constable.

Idaho Code § 50-209 (emphasis supplied).

In construing this statute on appointment of police officers, the Idaho Supreme Court has held that “(t)he appointment of police officers . . . is not mandated by statute. Indeed, Idaho Code § 59-209 . . . indicates that the decision to appoint police officers is entirely discretionary with the municipality.” *State v. Whelan*, 103 Idaho 651, 653, 651 P.2d 916 (1982).

This statutory perspective adds emphasis to the plain meaning of Idaho Code § 31-2227, the provisions of which should be restated and underscored:

Irrespective of police powers vested by statute in state, precinct, county, and municipal officers, it is hereby declared to be the policy of the State of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney in each of the several counties.

(Emphasis supplied).

It is indisputably clear that the sheriff has the constitutional and statutory responsibility to enforce the state laws within his county irrespective of any efforts made or omitted by the policemen of any cities within his county. The county sheriff should not view the appointment of city police officers as supplanting his authority within the county but rather as aiding him in carrying out his responsibility to see that the state’s criminal statutes are vigorously executed within his county.

On the basis of this analysis alone it stands to reason that the sheriff must bear the cost of housing within the county jail any prisoners charged with violations of the state criminal code, regardless of whether the charges arise out of offenses committed within or beyond city limits and regardless of which law enforcement agency performs the investigation and proffers the charges. Likewise, it should be clear on this authority alone that it is the county sheriff’s responsibility and cost to return to this state by extradition any prisoner who has violated a state statute and who is a fugitive from the State of Idaho, regardless of whether the criminal offense was committed within or outside of a city of the county and notwithstanding which police agency may have proffered the charges against the prisoner. However, even more specific authority compels these same conclusions and requires separate analysis.

COST OF EXTRADITION

To those unfamiliar with the relationship between cities and counties there is a specious appeal in the idea that a city police agency should be responsible for the costs of extraditing prisoners who have violated state law in city boundaries. However, there is no support for such a position in any of the statutes of this state, nor is it the general law of American jurisdiction. See Uniform Criminal Extradition Act § 24.¹

¹When the punishment of the crimes shall be the confinement of the criminal in the penitentiary, the expenses [for extradition] shall be paid out of the state treasury, on
(Footnote continued)

Idaho adopted the Uniform Criminal Extradition Act in 1927 and appears to have been the first of 48 states to do so. It is found in Idaho Code §§ 19-4501 through 19-4534. Idaho has not, however, adopted Extradition Act § 24 on costs and expenses.

A review of three early Idaho cases dealing with the costs of agents appointed to return prisoners to this state sets out some important principles bearing upon the issues under consideration and may help explain why the legislature grafted onto the Uniform Criminal Extradition Act a section on costs and expenses different than that proposed by the drafters for the American Law Institute.

In 1868 George Settle was commissioned by contract with the governor to go to the State of Indiana for the purpose of returning fugitive John A. Andrew to Alturas County, Territory of Idaho, where he had been charged with a felony. After Mr. Settle carried out his commission, he presented a claim for his expenses but the state refused to pay. A writ of mandate issued; the question before the Idaho Supreme Court was whether or not the extradition agent was bound by a contract which he had entered into with the governor and which recited that “[I]n consideration of the sum of One Dollar (\$1.00), advanced by the governor, . . . I hereby agree to accept said agency, and proceed to the State of Indiana with said requisition, . . .” *Settle v. Sterling*, 1 Idaho 259, 262 (1869). The court held that the governor has a right to appoint an agent but that he cannot fix the agent’s costs; the position of the agent named in a requisition to receive and return a fugitive from justice is an office and such officer is entitled to the fees and emoluments set by law for his services. In its essence, the *Settle* case stands for the principle that by naming an agent to extradite a prisoner from another state, the governor obligates the resources of the State of Idaho for any expenses incurred. No statutory authority dealing with the issue of costs and expenses for extradition seems to have been in place at that early moment of Idaho’s history.

The Revised Statutes of the Territory of Idaho, promulgated in 1887, contained a section 8425 which read:

When the governor of this territory in the exercise of the authority conferred by section 2, article 4 of the constitution of the United States, or by the laws of this territory, demands from the executive authority of any state . . . the surrender to the authorities of this territory of a fugitive from justice, who has been found and arrested in such state, . . . the accounts of the person employed by him to bring back such fugitive must be audited by the controller and paid out of the territorial treasury.

This early statute made the costs of extradition a charge against state government. After this statute was passed, two similar cases arose reaffirming the principles of the *Settle*

(Continued from previous page)

the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county where the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made and not exceeding _____ cents a mile for all necessary travel in returning such prisoner. Uniform State Laws Annotated, Uniform Criminal Extradition Act § 24.

case. In the first, *Kroutinger v. Board of Examiners*, 8 Idaho 463, 69 P. 279 (1902), the agent, under requisition of the governor, returned a fugitive to Nez Perce County from the State of Tennessee. The board of examiners rejected the agent's claim for expenses on the basis that the county should be charged. The Idaho Supreme Court, emphasizing § 8425 of the revised statutes, held that the expenses were a charge against the state rather than the County of Nez Perce. Seven years later, the Idaho Supreme Court reaffirmed the same principle and upheld the Custer County commissioners' rejection of a deputy sheriff's claim for expenses incurred in pursuing a fugitive from justice. *Roberts v. Board of Commissioners of Custer County*, 17 Idaho 379, 105 P. 797 (1909).

After Idaho became a state, it enacted, in 1917, section 9348 of the Compiled Statutes of Idaho, (which section was in all respects the same as the Revised Statutes, section 8425, of Idaho's territorial law). The legislature, in 1927, when it adopted the Uniform Criminal Extradition Act, added some very important language to its existing section 9348 rather than using the section on costs and expenses from § 24 of the Extradition Act. Section 9348 of the Compiled Statutes of Idaho has remained unaltered since its amendment in 1927 and gives the clearest answer to the question of who bears the cost of extraditing prisoners. As originally passed and as presently found, this statute reads:

Claims for services of executive agents — When the governor of this state, . . . demands from the executive authority of any state . . . the surrender to the authorities of this state of a fugitive from justice, . . . the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners and paid out of the state treasury, provided that in any case where a person against whom criminal proceedings are pending in any court of this state is to be brought into this state for such proceedings, whether with or without any demand or proceedings by the governor of this state and there is *no appropriation of state funds available* for the purpose at the time, reasonable compensation for the services of any person employed to bring the defendant in such criminal proceedings to this state and his expenses and the *expenses on account of the said defendant may be allowed and paid at the discretion of the board of county commissioners of the county where such criminal proceedings are pending from the general fund of said county*, but no compensation for services as distinguished from expenses other than the regular salary shall be allowed any sheriff or deputy sheriff from either state or county funds.

Idaho Code § 19-4528 (emphasis supplied).

The statute essentially directs the extradition agent named by the governor to look to the state for his expenses, and if it has no funds for extradition, then to look to the county initiating the requisition. In exercising the discretion which this statute gives the county commissioners as to whether or not they will pay the expenses of extradition, it would be a mistake for the commissioners to be guided solely by financial considerations, as important as these are. While a county need not extradite every fugitive from justice who is charged with a felony offense in that county, it would be a serious breach of duty to allow offenders to escape with impunity by fleeing from Idaho justice.

The county commissioners' stewardship under Idaho Code § 31-802 to supervise other county officers and to see that they "faithfully perform their duties," includes the supervision of the county prosecuting attorney. The prosecutor, under Idaho Code § 31-2227, shares with the county sheriff primary responsibility for enforcing all of the penal provisions of the statutes of this state, and services authorized by him in the criminal justice process are county expenses. Idaho Code § 31-3302. The decision to apply to the governor for a warrant of extradition is committed to the discretion of the county prosecuting attorney.

When the return to this state of a person charged with a crime in this state is required, *the prosecuting attorney of the county in which the offense is committed* shall present to the governor his written application for a requisition for the return of the person charged.

Idaho Code § 19-4523 (emphasis supplied).

In making the decision to extradite a fugitive, the county prosecutor goes through a process of balancing costs and needs. The criteria which guide a county prosecutor's discretion are set out in the Idaho Extradition Manual prepared by the Attorney General's office.² These same factors may assist county commissioners in the exercise of their decision to pay the costs of extradition. It is noteworthy that none of the criteria set out in the extradition manual concerns whether or not a prisoner has been charged by the city police rather than the county sheriff.

Absent an abuse of discretion by the prosecuting attorney, the county commissioners must honor his decision by paying the costs of extradition. Indeed, by initiating extradition, the county prosecutor may, under an agency theory, obligate the county; therefore, it is advisable for the prosecutor and the commissioners to act in concert.

The prosecuting attorney also nominates to the governor an agent to be appointed to receive the fugitive and return him to the State of Idaho. It is common practice for the prosecuting attorney to nominate as agent the sheriff or his deputy. Regardless of who is commissioned, the agent is then required to return the prisoner to the proper officer of the *county* — another statutory provision signifying that extradition is a county responsibility.

²In applying for requisition, the following factors should be considered: (1) The basic circumstances of the offense. (2) The character of the offense. (3) The magnitude of the offense. (4) The evidence by which it is claimed that the crime may be proved. (5) The substantive and procedural law applicable to the circumstances. (6) The character of the defendant. (7) The number of his prior convictions and the nature of the crimes involved. (8) The probability of his committing similar crimes in other communities. (9) The probable length of time he will be incarcerated and the effect of imprisonment upon the defendant after his release in deterring further acts of crime in this state. (10) Does the prosecutor think the individual is guilty? (11) Consider all the factors often used to determine whether or not a prosecutor should bring charges. See *The Prosecutor's Deskbook*, Second Ed., p.7. These facts and factors are all weighed against: (1) The probability of a Warrant of Rendition being authorized by the governor of the asylum state. (2) The financial cost of the accused's return for prosecution. (3) The effect of a refusal upon those who may contemplate the commission of a crime in the state.

Whenever the governor of this state shall demand a person charged with crime in this state from the chief executive of any other state, . . . he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and *convey him to the proper officer of the county in this state in which the offense was committed.*

Idaho Code § 19-4522 (emphasis supplied).

Just as a county sheriff exercises discretion in the manner in which the law shall be enforced, the county prosecuting attorney exercises discretion as to what crimes shall be charged and whether prosecution shall proceed. Any decision thereafter to extradite a prisoner is a non-usurpable function of the prosecuting attorney. Idaho Code § 19-4523. Because the decision to extradite imposes expenses upon the county, the prosecutor should surely consult the board of commissioners. Indeed, once the prosecutor has extradited a prisoner, the expenses are a charge against the country.

RESPONSIBILITIES AND COSTS FOR PRISONERS IN THE COUNTY JAIL

Bearing in mind the policy of the State of Idaho that it is the primary responsibility of the sheriff and the prosecuting attorney of each of the several counties to enforce the penal provisions of the state, this analysis now examines the responsibility of the sheriff to accept and be responsible for the costs of prisoners who have been charged with violation of state statutes by city police officers. Also considered is the sheriff's obligation to accept prisoners from a city which has not paid its prisoner costs where it is obligated to do so.

It is a duty of the sheriff to "take charge of and keep the county jail and the prisoners therein." Idaho Code § 31-2202. Other sections of the Idaho Code are of like command:

The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated.

Idaho Code § 20-601.

Moreover, the county bears "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.

The state's statutes deal with *county* jails. There are no statutes which require that cities keep jails. When one understands the relationship of the county viz a viz the city as discussed above, this is understandable, for it is the responsibility of the county officers to enforce state laws.

This is not to say that counties must bear the costs of housing all prisoners delivered to the county by city police officers. By statute, the county need not bear the cost of housing prisoners who have violated city law.

. . . (A)ny city shall have the right to use the jail of the county for the confinement of (persons who are charged with or convicted of violation of a city ordinance) but it shall be liable to the county for the costs of keeping such prisoner.

Idaho Code § 50-302A.

The city should, logically, be responsible for jail costs of enforcing its ordinances. Aside from the lack of interest counties have in the enforcement of city ordinances, the logic of the statute's cost provisions is enhanced when read beside the statutes pertaining to revenue generated by fines for forfeitures: cities receive 90 percent of the fines and forfeitures remitted for violation of city ordinances. Idaho Code § 19-4705. Cities also receive 90 percent of fines and forfeitures resulting from their enforcement of state motor vehicle laws; therefor, they bear the cost of imprisoning such offenders in the county jail.³ Idaho Code § 20-605. While the sheriff, for reasons discussed below, cannot refuse to accept city prisoners for failure of the city to pay for its prisoners, the county would be justified in taking legal measures to recoup its charges, should the city refuse to pay for its prisoners as required by law.

Inasmuch as cities provide police officers who assume responsibility similar to the sheriff's in enforcing the state's penal laws within that area of the county which lies within city limits, the legislature has apparently deemed it fair to apportion to the city 90 percent of any fines and forfeitures arising out of state criminal violations where an arrest is made by a city police officer. Idaho code § 19-4705. The sheriff's costs for housing a prisoner on state misdemeanor or felony charges brought by a city officer are justified by the contribution toward the sheriff's responsibilities for enforcing state laws. It should also be noted that city residents also pay taxes to the county — another justification for having the county bear the expenses of housing city prisoners who have violated state law.

Discussion of financial allotments of fines and forfeitures between the sheriff and city police simply suggest that there is fairness in the statutory scheme. Of greater significance is the fact that the statutes require that room be made in the county jail for prisoners charged by other law enforcement agencies, for instance, city prisoners (Idaho Code §§ 50-302A, 20-605), federal prisoners (Idaho Code § 20-615), and prisoners arrested by the Idaho State Police (Idaho Code § 19-4809). The sheriff cannot refuse to house prisoners simply because it is not an advantageous business arrangement for the county.

Idaho Code § 20-612 also makes it abundantly clear that the sheriff must accept all prisoners: "The sheriff must receive all persons committed to jail by competent authority." Despite the numerous code sections cited above showing that the sheriff has an affirmative duty to house prisoners arrested by other agencies, the dispute as to costs may lead some persons to quibble over the words "committed . . . by competent authority." The argument might be made that, all of the other code provisions notwithstan-

³While Idaho Code § 20-605 by itself might give the impression that cities are responsible only to counties other than the one in which they are located for costs of prisoners they have charged with motor vehicle violations, such a conclusion is illogical and unwarranted when Idaho Code § 20-605 is read in the context of companion statutes. For instance, Idaho Code § 19-604 allows a judge to commit an offender to "any county or municipal jail or other confinement facility within the judicial district in which the court is located," (emphasis supplied), and the city will be liable therefor for the cost of its prisoners.

ding, a sheriff has no duty to accept a prisoner from another agency until the prisoner has been *committed* by a court. Without lengthy exegesis, this position has no merit. It is true that the word "committed," while nowhere defined in the code, probably does have reference to the order of a court confining a prisoner.⁴ However, prisoners are not detained only on court order. Idaho law gives city police officers and state police officers authority to arrest criminals in the same manner as the sheriff. Idaho Code §§ 19-4804, 50-209. The process of confinement of criminal defendants is commenced in most cases by lawful arrest, which means "taking a person into custody in a case and in the manner authorized by law." Idaho Code §§ 19-601, 19-603. Moreover, in a probable cause arrest a person is charged before he is committed by any court process. It would be unreasonable for a peace officer to have the statutory authority to arrest and take into custody a law violator, but not have the authority to confine the person in jail until the person is committed by a court process, which may be from 24 to 72 hours after arrest. Idaho Criminal Rule 5(b), Idaho Code §§ 18-702, 19-615, 19-515. (Moreover, such an interpretation of Idaho Code § 20-612 would not only preclude cities and other agencies from housing prisoners in the county jail until committed by a magistrate, but it would also preclude the sheriff from housing his own prisoners there until committed by a judge! The absurdity of this logic is patent.) Police officers having the implied powers necessary in order to accomplish their lawful duties, also have the power to confine prisoners in the county jail to await first appearance without warrants or orders of confinement.

Where officers are entrusted with general powers to accomplish a given purpose. such powers include as well all incidental powers or those that may be deduced from the ends intended to be accomplished.

Cornell v. Harris, 60 Idaho 87, 93, 88 P.2d 498 (1939).

In *Lanson v. Washington County*, 16 Idaho 618, 102 P. 344 (1909), the Idaho Supreme Court upheld a sheriff's exercise of implied powers in a case analogous to the question presented here. Having no secure facility for housing a seriously ill, female defendant, the sheriff of Washington County posted a guard outside of her hospital room. The issue was stated and answered as follows:

Can the sheriff, when the necessity arises, appoint guards and employ assistants to aid him in performing the duties of his office, and will the expenses incurred thereby become a county charge? . . . Under such circumstances, in addition to the general authority expressly given by the statute to the sheriff, he is also by implication given such additional authority as is necessary to carry out and perform the duties imposed upon him by law . . . In other words, the express authority given to the officer by statute carries with it by implication such additional authority as is necessary to efficiently execute the express authority given.

⁴A computer identification of the use of "commit!" in titles 19 and 20, Idaho Code, lists 272 references in 149 statutory sections. The term is used with greater frequency to refer to the commission of a crime, nevertheless 115 references leave no doubt that "commitment" means to confine by court order, which is the general usage of the word in other American jurisdictions. Ballentine's LAW DICTIONARY 3rd Ed. "Commitment" page 225. See also, 21 Am. Jur. 2d "Criminal Law" § 450.

Lansdon, 16 Idaho at 623-24, 102 P. at 346.

That the sheriff is to receive prisoners before they are formally committed to jail by court order is clear from Idaho Code § 50-302A which gives a city the right to use its county's jail for "persons who are *charged* with" a law violation. This statute is silent as to any requirement that the charged person be received into jail on a court commitment.

Finally, and most significantly, giving Idaho Code § 20-612 the erroneous reading suggested above, would bring it into conflict with another statute, the command of which is unequivocal and the violation of which is punishable by imprisonment:

Every sheriff, coroner, keeper of a jail, constable or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense, is punishable by fine not exceeding Five Thousand (\$5,000) and imprisonment in the county jail not exceeding one (1) year.

Idaho Code § 18-701.

In conclusion, while the county has the right to collect costs incurred in housing city prisoners confined there on city ordinance violations or on motor vehicle violations committed in city limits, it would be a serious breach of the county's responsibilities to refuse to house prisoners charged by city police officers because of the city's failure to pay its costs. There are remedies by which such costs can be collected and the sheriff has a duty to accept the prisoners regardless of payment. Despite the lack of provision for reimbursement, the sheriff must accept and house city prisoners charged with state law violations. The consequences for a sheriff who refuses to perform his duties are more than financial: he may be removed from office or he may, himself, be charged with a crime.

AUTHORITIES CONSIDERED:

1. Constitutions:

Idaho Const. art. XVIII, §§ 1-5
Idaho Const. art. XII, §§ 1 and 2
Idaho Const. art. XVIII, § 6

2. Statutes:

Idaho Code § 18-701
Idaho Code § 18-4528
Idaho Code § 20-605
Idaho Code § 19-4522
Idaho Code § 19-4523
Idaho Code § 19-4705
Idaho Code § 20-601
Idaho Code § 20-612

Idaho Code § 31-802
 Idaho Code § 31-714
 Idaho Code § 31-2202
 Idaho Code § 31-2227
 Idaho Code § 31-3302
 Idaho Code § 50-101
 Idaho Code § 50-209
 Idaho Code § 50-302
 Idaho Code § 50-302A

3. Rules and Regulations:

Uniform Criminal Extradition Act § 24

4. Idaho cases:

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

State v. Whelan, 103 Idaho 651, 63, 651 P.2d 916 (1982)

State v. Webb, 96 Idaho 325, 528 P.2d 669 (1974)

Cornell v. Harris, 60 Idaho 87, 93, 88 P.2d 498 (1939)

Roberts v. Board of Commissioners of Custer County, 17 Idaho 379, 105 P. 797 (1909)

Lansdon v. Washington County, 16 Idaho 618, 102 P. 344 (1909)

State v. Quong, 8 Idaho 191, 67 P. 491 (1902)

Kroutinger v. Board of Examiners, 8 Idaho 463, 466, 69 P. 279 (1902)

Settle v. Sterling, 1 Idaho 259, 262 (1869)

5. Cases Cited From Other Jurisdictions:

Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed.2d 129 (1916)

6. Other Authorites:

MURFREE, Williams, A TREATISE ON THE LAW OF SHERIFFS § 2, (2d Ed., 1890).

1 ANDERSON ON SHERIFFS § 2

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, (Unabridged Edition).

DATED this 10th day of February, 1984.

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

ANALYSIS BY:

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

ATTORNEY GENERAL OPINION NO. 84-5

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

Per Request for an Attorney General Opinion

QUESTION PRESENTED:

You have asked whether Idaho Code § 18-1502 (c), which requires the department of transportation to suspend the driving privileges of person under the age of 19 who have been convicted of alcohol offenses not related to the operation of a motor vehicle, is constitutional?

CONCLUSION:

Paragraph (c) of Idaho Code § 18-1502 is unconstitutional on equal protection grounds — and probably on substantive due process grounds — because the suspension of driver's licenses of minors following convictions for offenses having no rational relationship to the operation of a motor vehicle does not substantially further a legitimate, articulated state purpose. The statute also fails to provide procedural due process which the Constitution requires before any right or interest, such as that represented by a driver's license, is suspended by the state; before a driver's license is forfeited, a motorist must have an opportunity to challenge the suspension, including the lack of relationship between the statute violated and the sanction imposed.

ANALYSIS:

Idaho Code §§ 18-1502 (a) and (b) make it a misdemeanor for a person to violate any federal, state, or municipal law or ordinance which forbids, on the basis of age, the procurement, possession, or use of an alcoholic beverage. In 1983 the legislature enacted an additional penalty section which reads as follows:

The department of transportation shall suspend the operator's license or permit to drive and any non-resident's driving privileges in the State of Idaho for sixty (60) days of any person under nineteen (19) years of age who is found guilty or convicted of violating the law pertaining to the use, possession, procurement, or attempted procurement or dispensing of any beer, wine or any other alcoholic beverage

Idaho Code § 18-1502 (c).

Essentially, this statute requires the suspension of the privilege to drive, a privilege granted to qualified persons under 19 years of age (see the provisions of ch. 3, title 49, Idaho Code), in order to enforce statutes which forbid the possession or consumption of alcoholic beverage at school functions on school property (Idaho Code § 23-612) and which forbid a person under the age of 19 from purchasing, attempting to purchase, possessing, serving, dispensing or consuming any alcoholic beverage (Idaho Code § 23-949).

Reduced to its essence the issue presented asks: Do these laudable and well-established laws pertaining to licensing of young drivers and regulating drinking by persons under the age of 19 have a common point, a crux, at which they meet and intersect, or do they present discrete state interests? Or, rephrased, is there a sufficient nexus between the mere possession or use of alcohol by persons under the age of 19 and the privilege or right extended by the state to operate a motor vehicle, such that suspension of the driver's license can be used as a sanction against persons who violate possession or use statutes?

Unquestionably, it lies within the state's police power to regulate the use of its highways through licensing and registration, *Hendrick v. Maryland*, 235 U.S. 610 35 S.Ct. 146, 49 L.Ed. 379 (1914); *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966); *Berberian v. Lussier*, 87 R.I. 226, 139 A.2d 869 (1958). And though still occasionally challenged, it is too well established to seriously dispute that the state has the power to prohibit minors from driving; reasonable prohibitions against the operation of motor vehicles on the basis of age do not offend due process or equal protection principles. *Berberian v. Petit*, 118 R.I. 448, 374 A.2d 791 (1977); 86 A.L.R. 3rd 475. Although statutes dealing with the granting or denying of driver's licenses on the basis of age may not correlate perfectly with the abilities of particular individuals, age restrictions will be upheld against constitutional challenges. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 251 Ed.2d 491 (1970); *Berberian v. Petit*, 118 R.I. 448. The state has a legitimate interest in preventing the operation of motor vehicles by those who are unable to exercise mature judgment, therefore it is reasonable for the state to establish a minimum age requirement in order for a person to engage in an adult activity like driving.

A similar analysis obtains when considering the constitutionality of laws restricting teenage drinking, for it is also within the interest and power of the state to protect the safety, health and morals of its youth by forbidding the procurement, possession or use of alcoholic beverage until a person has reached an age set by the legislature, and to forbid their consumption not only on public school grounds but anywhere. Such regulation does not violate the constitution, for it is designed to keep impressionable youths out of taverns and liquor establishments, and to save them from the harmful conse-

quences which use of liquor can cause, especially when used by those of immature judgment. Deciding what age categories of persons are of immature judgment requires that a line be drawn somewhere. Such a line is necessarily inexact; however, where rationality is the test, “a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” *Dandridge v. Williams*, *supra*, 379 U.S. at 485. Moreover, research has not disclosed any case in which age restrictions for drinking alcoholic beverages have been held to violate the equal protection clause.

While the prohibitions against minors using alcohol are rationally related to accomplish a legitimate state purpose and, therefore, are not constitutionally infirm, it is a wholly different inquiry whether they can be enforced by a particular means — for instance, by suspension of the driver’s license.

The constitutionality of Idaho Code § 18-1502 (c) must be measured against both the due process and equal protection clauses of the federal Constitution which are binding upon the states through the Fourteenth Amendment. Consequently, a brief discussion of these constitutional principles is here appropriate.

Substantive due process and procedural due process are the two hemispheres of the constitutional protection that citizens are given from being “deprived of life, liberty, or property, without due process of law; . . .” U.S. CONST. amend. XIV, § 1.

Procedural due process, for present analysis, means that when a state seeks to take away a freedom, property right, or entitlement, before the action becomes effective it must afford notice and opportunity for hearing appropriate to the nature of the case. *Bell v. Burson*, 402 U.S. 535, 542, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971).

Substantive due process refers, in essence, to the judicial principle of scrutinizing legislation to ascertain whether “the means selected shall have a real and substantial relation to the object sought to be attained.” *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Analysis of the Supreme Court’s opinions shows that the Court has retreated from its early activism of invalidating economic legislation while becoming increasingly interventionist regarding legislation which restricts legal processes or which deals with rights of privacy and autonomy. Though in a state of flux, the standard of review for testing claims of substantive due process violations appears to be whether a statute or state action impinges upon fundamental right, in which case the state must show that it has a compelling state interest which is advanced by the statute or action questioned, and such state action seldom survives such withering scrutiny. 16 Am.Jur.2d Constitutional Law § 816. If no fundamental right is at stake then the court takes a more restrained approach, seeking only a rational relationship between the means used by the statute and the legitimate ends sought to be attained by the legislature. Analysis of the existence of any rational relationship between Idaho Code § 18-1502(c) and the state’s objective is similar, whether under a substantive due process or equal protection approach, and will be treated simultaneously in this opinion.

It is generally agreed that construction of the equal protection clause underwent a revolution in the Warren era of the Supreme Court. Going beyond the deferential scrutiny traditionally applied to equal protection challenges, the Warren Court established areas where it applied a new standard of strict scrutiny. In cases where “suspect classifica-

tions” were involved or cases which involved an impact upon “fundamental rights,” the Court required a showing that a compelling state interest was at stake before it would uphold a challenged statute or a challenged state action. (See generally, GUNTHER, “Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,” 86 HARV. L. REV. 1 (1972)). The Supreme Court during Chief Justice Burger’s tenure has added two additional concepts to equal protection analysis: first, the Court has required that the means (that is, the classification), must *substantially* further the ends (that is, the statutory objective), *Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190 (1976); second, the Court no longer seems willing to hypothesize conceivable state purposes against which to test the rationality of the means but asks “whether the legislative classification . . . is rationally related to achievement of the statutory purposes.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Schweiker v. Wilson*, 450 U.S. 221 (1981). These two principles are applicable whether the standard of review is strict scrutiny or deferential review.

Applying substantive due process and equal protection principles to the present analysis, it is first necessary to select the appropriate standard of review. The statute in question, Idaho Code § 18-1502(c), does not bear upon a fundamental right, for neither the “right” to drink nor the “right” to drive have been held to constitute fundamental rights. Nor do minors qualify as a suspect class of persons who have historically been subjected to invidious discrimination. Therefore, the standard of review is deferential: whether there exists a rational relationship between the statute in question and an articulated, legitimate state interest which will be substantially furthered.

The purposes of the statutes cross-referenced to Idaho Code § 18-1502(c) are not substantially, if at all, furthered by suspension of driver’s licenses, for driver privileges have no rational relationship to the state’s interests articulated by the statutes. Idaho Code § 23-612 is part of a chapter setting out penal provisions relating to the Idaho Liquor Act whose purposes are stated as preserving “the personal privilege of a responsible adult to consume alcoholic liquor as a beverage, except in cases of the abuse of that privilege to the detriment of others,” Idaho Code § 23-102, and providing for state control of the sale of liquor. By its own statement of intent the law appears to have no relationship to minors and their driver’s licenses. Any reading of ch. 1, title 23, Idaho Code or Idaho Code § 23-612 which suggests any connection between adults or minors consuming alcoholic beverages at school functions on school property and the operation of a motor vehicle by minors is speculative and attenuated. To assume that some persons who might contravene the statute might then also operate a motor vehicle would be an illusory and manufactured justification, not a rational relationship.

Likewise, Idaho Code § 23-949, prohibiting the possession, use or procurement of liquor, has no rational relationship to driver’s licenses. The statute is found in a chapter dealing with retail liquor by the drink. The chapter expressly states that one of its purposes is to restrict minors from entering or loitering about establishments whose primary purpose is to serve liquor, Idaho Code § 23-941. The statute goes beyond the express statement of purpose for it does not punish the possession of alcohol only on such premises; it is a ubiquitous prohibition against the use of alcohol by minors under the age of 19. While a reviewing court will not go in search of a possible relationship between the statute and driver’s licenses, it is possible to suggest another remote purpose for the statute: one can assume that whenever minors are drinking, driving is sometimes involved. In fact, the strongest defense of a statute like Idaho Code § 18-1502(c) would

be to suggest that the law is an attempt to restrict the incidence of minors driving while under the influence of intoxicants, or of minors being in possession of intoxicants or open containers while in the operation of a motor vehicle. There is a legitimate state interest in suspending the driver's license in order to punish the illegal possession or use of alcohol where possession or use are combined with driving. Such a relationship between the statutes in question, unlike the suspension of driving privileges of a person guilty of driving while under the influence of alcohol, is, at best, however, a very attenuated one. Moreover, there are already multifarious state and local ordinances under which a person of any age, including minors, can be punished for such violations. (See for instance, Idaho Code §§ 49-1102, 49-1102, 49-1102B, 49-352). If the state's interest is as here postulated, rather than as expressed by the statute, then the statutes should be drawn into a tighter fit of classification and purpose. But, if the statute in question is designed to punish any kind of drinking or possession of alcohol by a minor in times and places unrelated to the operation of a motor vehicle, then there is clearly not a rational relationship between the two so as to justify suspension of the driver's license.

The likely, albeit tacit, design of Idaho Code § 18-1502(c) is to deter minors from violating possession, use or procurement of alcohol laws by threatening to take away one of their most cherished possessions: their driver's license. While such a fear would, indeed, be likely to have a chilling effect on a minor's use of alcohol, the statute still must posit rational relationship between the suspension of the license and the legitimate object of deterrence and must substantially further that objective.

A driver's license is not to be viewed as some kind of currency which may be exchanged for goods or surrendered to the state to satisfy a fine.

The right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions.

Adams v. city of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966) (citations omitted). It is not to be suspended by or forfeited to the state in an arbitrary manner as a punishment for a crime which is unrelated to the use of the driver's license or the operation of a motor vehicle.

Loss of a driver's license for violation of a law unrelated to driving amounts to an arbitrary forfeiture of a state created property interest without justification. Such a forfeiture also violates procedural due process if suspension is done without fair notice and hearing. The legal principles set out in a landmark case, *Bell v. Burson*, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971), are applicable here. Mr. Bell was a clergyman who needed his automobile in order to carry on his ministry. He was uninsured. While he was driving his car, a child accidentally rode her bicycle into the side of his automobile. His refusal to post security for the amount of the damages which the child claimed brought him within the purview of a statute requiring, as a condition for an uninsured motorist to keep his driver's license, that the motorist post security after accident claims. At a suspension hearing he argued that he was not at fault, that he would ultimately be found not liable for any damages, and therefore, the requirement of posting security was unfair to him. The administrative agency refused to consider any evidence of lack

of fault and suspended his driving privileges. The ruling was upheld by the Georgia courts. The United States Supreme Court reversed and held that before the state can suspend a driver's license or registration, a driver must be accorded procedural due process of notice and a hearing which is meaningful and appropriate to the nature of the case, including the opportunity to challenge the lack of relationship between the suspension of driving privileges and the purpose which the state sought to advance by the suspension. While the state may regulate driving privileges by granting or withholding a license in a fair and uniform manner, once a license is granted, it becomes a property interest or entitlement the forfeiture of which is subject to the constitutional restraints which limit state action. *Bell v. Burson, supra*.

In conclusion, once a driver's license is granted by the state, it becomes an entitlement or property interest which cannot be suspended without due process of law. Procedural due process requires that notice be given and that a person have an opportunity to be heard before the state suspends a driver's license. Idaho code § 18-1502(c) does not provide for notice or hearing before a license is suspended. Because of the lack of a rational relationship between driving or driving privileges and the state's interests in prohibiting a minor's non-traffic possession, procurement, or use of an alcoholic beverage, Idaho code § 18-1502 (c) requiring suspension of driving privileges for teenagers convicted of liquor offenses is unconstitutional on equal protection grounds and probably on substantive due process grounds as well.

AUTHORITIES CONSIDERED:

1. Constitutions:

U.S. CONST. amend. XIV, § 1

2. Statutes:

Idaho Code § 18-1502(c)
 Idaho Code § 23-102
 Idaho Code § 23-612
 Idaho Code § 23-941
 Idaho Code § 23-949
 Idaho Code § 49-352
 Idaho Code § 49-1102
 Idaho Code § 49-1102B

3. Idaho Cases:

Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46

4. Cases Cited From Other Jurisdictions:

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)
Schweiker v. Wilson, 450 U.S. 221 (1981);
Craig v. Boren, 429 U.S. 190 (1976)

Reed V. Reed, 404 U.S. 71 (1971)

Bell v. Burson, 402 U.S. 535, 542, 29 L.Ed. 2d 90, 91 S.Ct. 1586 (1971)

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 251 Ed.2d 491 (1970)

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)

Hendrick v. Maryland, 235 U.S. 610 35 S.Ct. 146, 49 L.Ed. 379 (1914)

Berberian v. Petit, 118 R.I. 448, 374 A.2d 791 (1977)

Berberian v. Lussier, 87 R.I. 226, 139 A.2d 869 (1958)

5. Other Authorities:

GUNTHER, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 HARV. L. REV. 1 (1972)

16 Am.Jur.2d Constitutional Law § 816

DATED This 14th day of February, 1984.

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

ANALYSIS BY:

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

ATTORNEY GENERAL OPINION NO. 84-6

TO: TOM D. McELDOWNEY, C.F.E.
Director
Department of Finance
State of Idaho

Per Request for Attorney General's Opinion:

QUESTIONS PRESENTED

The twelve questions posed by the Department of Finance concerned the limitations and interrelationship of Idaho Code §§ 1-2301 A and 28-3-510A. Each question is discussed in detail later in this Opinion.

CONCLUSION

These two sections which allow for civil collection on bad checks are mutually exclusive. Idaho Code § 1-2301A is limited to use in small claims court, and suits under either section are limited to the requirements of each section.

ANALYSIS

1. Are Idaho Code §§ 1-2301A and 28-3-510A the only statutory remedies for collection on dishonored checks?

The two referenced sections are the only statutes which explicitly provide for recovery on dishonored checks. The first, § 1-2301A, was created to allow civil recovery on dishonored checks in addition to existing criminal penalties. The other remedy, § 28-3-510A, is part of the Idaho Uniform Commercial Code (UCC).

The UCC governs most aspects of checks and provides several remedies for their collection. These remedies include the right of a holder to collect from drawers and indorsers (§ 28-3-507(2)) and rights of a holder to collect in cases where the implied warranties have been broken (§§ 28-3-417 and 28-4-207). However, § 28-3-510A creates a specific procedure for enforcement of some of these remedies. This section, entirely an Idaho creation supplementing the standard UCC sections, specifies the procedure to be followed in collecting on checks. It does not restrict any other UCC rights, but sets out a procedure for their enforcement.

Thus, § 28-3-510A is the only specific remedy under the UCC but it is not the only right created by that act. In sum, the two referenced sections are the only specific civil, statutory remedies for collecting on checks.

There are, however, numerous criminal penalties for writing bad checks. Idaho Code § 18-3106 provides the general rule as to criminal penalties. A number of other statutes provide specific penalties for various other dishonored checks. For example, § 22-1316 provides criminal penalties for a dishonored check by a farm products dealer and § 69-520 penalties apply to commodity dealers.

2. Are these two sections mentioned above mutually exclusive: must a creditor elect his remedies?

Yes, these remedies are mutually exclusive. While both sections allow for collection on dishonored checks, the sections have different requirements that must be met, allow different recoveries and are located in separate areas of Idaho Code.

STATUTORY ELEMENTS

Section 1-2301A initially appears to allow its remedies to be used in any action, but, the language goes on to indicate its remedies are limited to that section. The section begins by stating: "In any action . . . the plaintiff may recover." However, later language indicates that the remedies are limited to use in an action under this provision. The second sentence states "damages recovered under the provisions of *this* section shall not exceed . . ." (emphasis added). Thus, the permitted treble damages must be col-

lected in an action under § 1-2301A. This section, unlike the UCC remedy, does not appear to allow collection of attorneys fees, interest, or collection costs.

An action under § 28-3-510A similarly has limited remedies. This section provides that when the statutory prerequisites have been satisfied, the drawer of the check is liable for the check, interest, collection costs and attorneys fees. It does not allow for collection of the treble damages permitted by § 1-2301A.

DIFFERENCES

By their very terms, these statutes indicate that they are mutually exclusive. Neither allows for the collection of amounts not specifically provided for in the statute. Moreover, the fact that the statutes have different requirements, allow different recoveries and are located in separate areas of the Idaho Code, indicates that they are not to be used together.

That the two statutes do not have the same remedies is significant. As the supreme court stated in *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979): “Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.” 100 Idaho at 164, citing authorities. The two statutes are intended to be used separately and are mutually exclusive.

To argue that these sections are not mutually exclusive would result in the contention that someone could choose the simplest prerequisites of the two sections but still collect the best remedies of both. Such a contention would appear to violate the intent of the legislature and would abolish the existing matching of the required notice and available remedies.

3. Is § 1-2301A limited to use in small claims court?

Yes. Analyzing the history, location, intent and principles of statutory construction, the use of § 1-2301A appears to be limited to use in small claims court.

BACKGROUND

The 1982 legislature created this statute to allow civil damages for dishonored checks in addition to the criminal penalties. The heading of Idaho House Bill No. 649, which created the new statute, stated the intent as: “to provide civil liability for the issuance of a check without funds or with insufficient funds under certain conditions.” The bill was approved March 23, 1982, as § 18-3107 of the criminal code. It provided that when the required conditions were met, a plaintiff could recover treble damages.

In 1983, the legislature moved this section from the criminal code to Chapter 23 of title 1, entitled “Small Claims Department of the Magistrate Division.” House Bill No. 283 amended § 18-3107 to redesignate it as § 1-2301A. By taking this section out of the criminal code and placing it in the small claims section, it allowed actions under this provision to be brought in small claims court. The question now is whether actions under this section can also be brought outside small claims court.

In determining whether actions can be brought outside small claims court, we must first look to the literal language of the statute. If the actual language does not give the answer, we must then look to the legislative intent to determine the extent of the statute's provisions. *Local 1494 of International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346 (1978).

WORDING OF THE STATUTE

Section 1-2301A does not state where an action can be brought under its provisions. The literal language does not indicate any limitations or give any expansive powers. Indeed, the provision is entirely silent on this issue.

An indication of the intended use of the statute can, however, be found in the heading of the act and by the placement of the statute. These considerations will be discussed below as elements of legislative intent which may be considered in construing the meaning of a statute.

LEGISLATIVE INTENT

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

In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, "such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like."

See also, *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950); *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965); *Idaho Public Utilities Commission v. V-1 Oil Company*, 90 Idaho 415, 412 P.2d 581 (1966); *State of Idaho ex rel Andrus v. Kleppe*, 417 F. Supp. 273 (1976); *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948); *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1979); *Smith v. Department of Employment*, 100 Idaho 520, 602 P.2d 18 (1979); *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980).

Plain, Obvious and Rational Meaning. The Idaho Supreme Court has also recently stated that: "In construing statutes, the plain, obvious and rational meaning is always to be preferred to any curious, narrow, hidden sense." *Higginson v. Westergard*, 100 Idaho 687, 691, 604 P.2d 51 (1979) (citing other Idaho cases). In applying this rule of statutory construction, the initial apparent restriction of the statute to small claims court is to be preferred. Since there is no hint in the statute that it is to be used outside small claims court, the more restrictive view would be preferred.

Construction to Avoid Harsh Result. The supreme court in *Higginson* also stated that "when choosing between alternative constructions of a statute, courts should presume that the statute was not enacted to work a hardship or to effect an oppressive result."

100 Idaho at 691. This same rule was also enunciated in *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980) and *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977). Applying this rule we must consider the effects of an alternative construction. This section imposes a treble damage penalty on the writer of a bad check and awards that amount to the person suing. If such suits were allowed in district court, it would require the defendant to not only pay treble damages but also hire an attorney and possibly pay attorneys fees for the plaintiff. Such a harsh result appears to exceed that which the legislature intended.

Construction to Conform with Other Statutes. A related rule states that the statute should be construed together with other statutes concerning the same subject matter. *Stearns v. Graves*, 61 Idaho 232, 242, 99 P.2d 955 (1940). See also *Higginson*. Utilizing this rule, this section should be read along with § 28-3-510A. As discussed previously, the two sections are mutually exclusive. Therefore, they should not be read as being duplicative nor should they be construed in a way that would rob the other of potency. If § 1-2301A were implied to allow suits in other than small claims court, it would reduce the use and effectiveness of the UCC remedy by making the UCC penalties unattractive. Such a construction would violate this rule of construction. For the same reason, constructions which will result in reasonable operations of the law are favored. *Higginson*, 100 Idaho at 691 and *State ex rel. Evans v. Click*, 102 Idaho 443, 448, 631 P.2d 614 (1981).

Accordingly, since a restrictive reading would result in more reasonable operation of the statutes, it is to be preferred.

Policy Grounds. As discussed above, courts have consistently endorsed public policy as an important element to be considered in statutory construction. This rule is also expressly recognized in *Sutherland Statutory Construction* (4th ed. 1973), where the author states:

Where legislative source materials fail to supply a clearly dispositive answer as to how an issue should be decided, it is not a violation of the principle of legislative sovereignty for a Court to take extra legislative as well as legislative source materials into account in reaching a decision as to what disposition conforms best to emergent public policy.

Id. § 45.09 at 30. See also *id.* § 54.03 at 354-55.

These public policies to be considered include “social and economic results.” The supreme court said that: “When the language of a statute is ambiguous, we must consider the social and economic results . . .” *Smith v. Department of Employment*, 100 Idaho at 522. In the question before us, an expansive reading would mean that a person being sued for collection of a dishonored check in the amount of \$5.00 could have to pay the \$5.00 face amount, a \$100.00 statutory penalty, court cost, and attorneys fees in addition to hiring his own attorney. Such a compounding of penalties would appear to violate social and economic policy as well as the rule of construction requiring avoidance of harsh results (discussed above).

Policy grounds compel a construction of legislative intent that the treble damages in § 1-2301A were intended to be awarded to a plaintiff in lieu of the attorneys fees

he could collect under § 28-3-510A. In order to make collection of dishonored checks in small amounts worthwhile, this section allows treble damages with a \$100.00 minimum damage award. The incentive to collect under § 28-3-510A is the ability to recover the permitted collection fee and attorneys fees. The treble damage award appears intended to reward a holder of a dishonored check for his own collection efforts should he elect not to employ an attorney. Public policy considerations also would favor a construction that encourages parties to resolve problems as informally as possible.

Placement of the Statute. The placement of the statute can also be used to determine the legislative intent. Section 1-2301A was originally located in the criminal code. When it was moved, in 1983, it is significant that it was moved to title 1, chapter 23. This chapter deals with small claims court. In fact, what the legislature did not do is crucial. This section was not placed in title 1, chapter 22, "Magistrate Division" nor was it placed in title 6, "Actions in Particular Cases." The legislature also did not add a provision explaining that placement in the small claims section did not limit its use.

It would have been very simple for the legislature to place this section somewhere else or to provide for a broader use had it so desired. Since it failed to do so, it must be presumed to have not so intended. This means that the actual placement indicates a legislative preference for a restrictive reading.

Statement of Purpose. The statement of purpose for Idaho House Bill No. 283 only explains that the bill "moves the civil damage provisions for bad checks from the criminal code to the civil section of the Code." Unfortunately, this "Statement of Purpose" does not explain legislative intent as to the question with which we are faced. It indicates an intent to move the section to the civil section but it fails to indicate which civil section, a reason why it was placed in the small claims section, or whether it is limited to use in small claims court. Considering these factors, the statement of purpose does not appear to indicate an intent either way on this question.

Amendment Implies Intent. Another rule of construction is also applicable. The Idaho Supreme Court has held: "When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded it before the amendment." *Pigg v. Brockman*, 79 Idaho 233, 244, 314 P.2d 609 (1957) (citing other cases); *Futura Corporation v. State Tax Commission*, 92 Idaho 288, 442 P.2d 174 (1968); *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973); *Totusek v. Department of Employment*, 96 Idaho 699, 535 P.2d 672 (1975); *Leonard Const. Co. v. State ex rel. State Tax Comm.*, 96 Idaho 893, 539 P.2d 246 (1975); *Lincoln City v. Fidelity & Deposit Co. of Md.*, 102 Idaho 489, 632 P.2d 678 (1981); *Messenger*.

When this rule of construction is applied to the question of whether the action of the legislature in moving this section intends only a different location or intends a more limited application of the statute, it must be presumed that the legislature intended that its use be restricted to small claims court. To contend that the statute is not so limited violates this presumption.

Construction of Statutes Together. In *Magnuson v. Idaho State Tax Commission*, 97 Idaho 917, 556 P.2d 1197 (1976), the Idaho Supreme Court declared: "We must attempt to construe this provision consistent with the primary rules of statutory construc-

tion — that all sections of the applicable statutes should be considered and construed together to determine the intent of the legislature.” (citing other cases) 97 Idaho at 920. *See also Stearns v. Graves*, 61 Idaho 232, 242, 99 P.2d 955 (1940).

Complying with this stated rule, § 1-2301A must be read in conjunction with § 1-2301, which governs the general jurisdiction of small claims court. The same bill that created § 1-2301A also amended § 1-2301 by adding new provisions. The addition says that if an action is brought under § 1-2301A, jurisdiction is allowed in small claims court in any of several counties.¹ Thus, § 1-2301A creates the right and § 1-2301 controls the venue for that right.

The venue provisions of § 1-2301 do not allow for suits outside small claims court. Accordingly, an expanded reading of § 1-2301A is not permissible. And, since both changes were contained in the same house bill, the presumption that the legislature intended a restrictive reading is all the more compelling. Moreover, it should be noted that while § 1-2301 was amended to provide for venue, no other sections of the code were similarly amended to provide for suits on checks. This appears to evidence an intent that venue is to lie nowhere but small claims court. A finding of jurisdiction outside small claims court would seem to require at least a reference to such jurisdiction in title 6 or title 1, chapter 22. Since no such additional provisions exist, venue is limited to small claims court.

Heading of Statute. Another tool used in statutory construction is reference to the heading of the act. *Sutherland Statutory Construction*, allows reference to the heading to explain the section “and show the intention of the law maker.” *Id.* § 47.04 at 77. *See also id.* § 47.03 at 73. The Idaho Supreme Court adopted this principle in *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 629 P.2d 662 (1981), when it declared that “where the meaning of a statute is unclear, resort may be had to the statutory heading as an aid in ascertaining legislative intent.” 102 Idaho at 268 (citing other cases).

The heading of Idaho House Bill No. 283 which moved § 1-2301A declares: “Relating to Jurisdiction of the Small Claims Court.” By its literal language, this act relates to jurisdiction of this court and indicates that the use of § 1-2301A is so limited. It should also be pointed out here that the heading for chapter 23 of title 1 is “Small Claims Department of the Magistrate Division.”

Summation. In summary, the conclusion that the use of § 1-2301A is limited to small claims court is compelled by evidence that such is the legislative intent as revealed by the legislative history, the desire to avoid harsh results, comparison with other statutes and sections, policy grounds, social and economic consequences, the placement of the statute, its heading, and other principles of statutory construction.

4. If the use of § 1-2301A is limited to use in small claims court, must a suit under its provisions be brought by the owner of the check, thereby excluding collection agencies and attorneys from use of this remedy?

¹The 1984 Legislature, in House Bill No. 628, is considering changes that will limit venue in these cases to the county in which the check was made.

Since § 1-2301A is a small claims court remedy, its use is restricted to actions by the owners of checks.

Idaho Code § 1-2308, provides that:

No attorney-at-law or any other person than the plaintiff and defendant shall concern himself or in any manner interfere with the prosecution or defense of such litigation in said department, nor shall it be necessary to summon witnesses, but the plaintiff and defendant in any claim shall have the privilege of offering evidence in their behalf, themselves and witnesses appearing at such hearing, and being duly sworn as in other cases, and the magistrate shall render and enter judgment as in other cases.

Thus, the law prohibits attorneys from representing anyone in an action in small claims court. Consequently, an attorney could not use § 1-2301A for collection on a dishonored check unless the check had been made to him. Section 1-2308 also directs that no person other than the parties can be involved in small claims court. This remedy is, therefore, limited to use by owners of checks. An owner could, however, sue under this section and then turn the judgment over to a collection agency or attorney for collection.

5. Was § 1-2301A designed to give the holder of a dishonored check an incentive to collect on the check himself without having to employ an attorney, thereby allowing the holder to get treble damages in lieu of attorneys fees?

Since there is virtually no legislative history to explain this section, we must utilize rules of statutory construction to recreate legislative intent. As discussed above (question #3), this section does appear to be designed to give an incentive to collect on dishonored checks when the incentive might not otherwise exist (i.e. when a holder elects not to hire an attorney). This conclusion is strengthened by recognition of the fact that attorneys fees for dishonored checks are only allowable under the UCC remedy. The § 1-2301A remedy allows treble damages as a reward while the UCC remedy allows attorneys fees, interest, and collection costs.

In any event, the collection of treble damages instead of attorneys fees is the practical result, if not the intent, of the law.

6. Does a suit under § 1-2301A preclude imposition of (a) attorneys fees, (b) interest on the check for the period before the date of judgment, and (c) collection costs?

As discussed in question 2, above, a creditor must elect his remedies. He cannot sue under § 1-2301A and recover the awards of the UCC remedy.

Attorneys Fees

Since use of § 1-2301A is limited to small claims courts and attorneys are not allowed in small claims court, no attorneys fees can be collected.

It appears well settled that: "A person who is not an attorney and conducts his own suit in person is not entitled to attorneys fees." 20 C.J.S. Costs § 218(b), p. 460. *See also* 20 Am Jur. 2d. Costs § 77, p. 63.

In addition, since attorneys fees are not provided for in this section, they probably should not be implied. Indeed, in *Rodwell v. Serendipity*, 99 Idaho 894, 591 P.2d 141 (1979), the Idaho Supreme Court stated that a party could not collect attorneys fees where he had already been awarded treble damages. 99 Idaho at 895.

Interest

Prejudgment interest is awarded only by statute. Idaho Code, § 28-22-104(2) allows for the collection of interest for the period after a judgment is obtained. The UCC remedy allows prejudgment interest but it cannot be used under § 1-2301A to collect prejudgment interest.

A creditor must elect his remedies. If he elects § 1-2301A, he is not allowed prejudgment interest. Furthermore, § 1-2301A only allows treble damages. It makes no allowance for the collection of interest or other charges.

Collection Costs

For the reasons set forth above, a creditor, who elects as his remedy a suit under § 1-2301A, cannot recover collection costs in addition to the treble damages allowed. The statute does not allow such costs and instead allows recovery only of the amount of the check and treble damages.

7. In a suit under 28-3-510A, can a creditor ever impose or recover collection costs exceeding \$20.00 or interest exceeding 6% from the date of dishonor?

No. Section 28-3-510A is the UCC remedy and contains two variations of the remedy. The person accepting the check can notify the drawer of the check, by means of a notice posted at the point of sale, that if the check is dishonored the drawer will be required to pay a set collection fee (not to exceed \$10.00). In such a case, the noticed collection fee is the only other cost that can be imposed in addition to the face amount of the check. However, if court action is required, the holder of the check may recover, at the time of judgment, the face amount of the check, the noticed collection fee, attorneys fees and court costs. Under this section, the holder can never receive prejudgment interest or collection costs exceeding \$10.00.

The second UCC variation requires that notice be given to the drawer allowing 15 days in which to pay the check. Section 28-3-510B gives the statutory form for the required notice of dishonor — which must be sent by certified mail. If the drawer pays the check within the 15 day notice period, he is only obligated to pay the face amount of the check. If the check is paid after the notice period but before a lawsuit is filed, the drawer can be obligated to pay (1) the check, (2) interest calculated at 6% per annum from the date of dishonor to the date paid,² and (3) a collection fee equal to the face amount of the check (up to a maximum of \$20.00). If a lawsuit is required, the holder can collect attorneys fees and court costs in addition to these enumerated amounts.

²There is a proposal before the 1984 Legislature to increase this interest rate to 12 % (Senate Bill No. 1228).

Thus, the maximum collection cost allowable is \$20.00 and this is recoverable only if the check is for an amount of \$20.00 or more and if the holder has given the statutory notice. Interest may not exceed 6% from the date of dishonor until paid, if paid before a court judgment. If the holder should attempt to collect more than the allowable collection fee or more than allowable interest, there are penalties provided by § 28-3-510C. If the check is paid after judgment, the holder may recover interest at 6% from the date of dishonor to the date of judgment, then 18% thereafter. (See § 28-22-104(2)).

8. In a suit under § 1-2301A, does the judge have discretion to reduce the amount of treble damages if the statutory requirements of suit have been met?

Yes. The treble damages allowed by § 1-2301A are not mandatory. The statute says “the plaintiff *may* recover” treble damages (emphasis added). Use of the discretionary word “may” in lieu of a more mandatory term such as “will” or “shall” indicates that recovery of treble damages is not automatic nor mandatory. The small claims court judge therefore has discretion to award the amounts allowed or to reduce the award of damages.

9. Under either of these provisions, may a creditor impose attorneys fees, collection costs, or interest before obtaining a court judgment? If so, when?

Attorneys Fees

As discussed above, attorneys fees can only be collected in a suit under § 28-3-510A and may then only be awarded by the court. The holder of the check may never impose attorneys fees before a judgment is obtained.

Collection Costs

As discussed earlier, collection costs are allowed only under the UCC remedy (§ 28-3-510A). They may be collected in the noticed amount (up to \$10.00) if there was a “point of sale” notice. If the statutory form of notice was mailed, a collection fee equal to the amount of the check (up to a maximum fee of \$20.00) may be collected if the check is not paid during the notice period. These costs may be imposed before judgment but only if the necessary requirements have been made.

Interest

Interest is allowed only under the UCC remedy and only when the statutory notice is sent. Even then, interest charges may be imposed only if the check is not paid during the notice period and it must be calculated according to the statute.

In summary, under the small claims court remedy, attorneys fees, collection costs and interest may never be imposed. Under the UCC remedy, interest and collection costs may be imposed when certain limited conditions have been satisfied. These conditions are set out in § 28-3-510A and emphasized in § 28-3-510C which provides penalties for violations. Attorneys fees can never be imposed before a judgment.

No other charges such as handling fees or other such costs may be imposed before or after judgment.

10. If a debtor pays a bad check during the required notice time, can he be obligated to pay more than the face amount of the check?

No. If the drawer pays the check during the required notice time, he can never be obligated to pay more than the face amount. However, under the UCC point of sale remedy, the notice is posted at the point of sale and the creditor is not required to mail a notice of dishonor. In such a case, the drawer may be obligated to pay the noticed amount of the collection fee — up to the \$10.00 maximum. (*See also* § 28-3-510C for a prohibition against collecting other charges).

If there was no ‘point of sale’ notice, payment during the notice period can be made without imposition of any other charges.

11. May a creditor threaten a debtor with criminal penalties if the debtor fails to pay a bad check or is the creditor’s only remedy to sue?

A creditor or holder may not threaten criminal penalties. Punishment for crimes is imposed by the courts of this state (Idaho Code § 18-106). Additionally, § 31-2227 provides that: “the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties.” Moreover, the criminal penalties require a showing of an “intent to defraud” which is not required under the civil liability sections (*See* § 18-3106 for criminal penalty elements).

The legislature has created civil remedies to allow a holder to proceed against the drawer of a dishonored check. A holder can file a civil lawsuit, advise check writers or debtors of the criminal penalties for writing bad checks, and/or request that the sheriff or prosecuting attorney directly bring a criminal action. It would then be up to the sheriff and prosecuting attorney to prosecute. The holder, however, cannot himself bring a criminal action against the debtor and should not threaten such action. This recourse is only available to the sheriff or prosecuting attorney.

12. What are the remedies of a debtor when a creditor has violated provisions of one of these sections? What is their recourse for violations?

A drawer of a check who has had his rights or the law violated in this regard has two main recourses. He may refuse to pay more than he is obligated to pay and may bring suit to recover any amounts wrongfully collected by a holder.

Section 28-3-510C explicitly provides for these remedies in case the UCC provisions have been violated. This section provides that if the holder has demanded interest, collection costs or attorneys fees which are not permitted, the holder may not collect *any* interest, collection costs or attorneys fees. Thus, if the holder violates the UCC remedy, he may collect only the amount of the check. This forfeiture of additional charges should serve to discourage any abuse of this section.

A drawer should be aware of his rights and refuse to pay any charges not properly imposed.

It should also be emphasized that if a drawer promptly pays on dishonored checks when they are notified of the dishonor, the drawers will only have to pay the face amount of the check and sometimes an additional collection cost of up to \$10.00. Such prompt payment will avoid any court appearances or imposition of interest, attorneys fees, court costs or a larger collection fee.

If the drawer's rights have been violated by a collection agency, the drawer has one additional recourse. That person may make a complaint to the Idaho Department of Finance. The Department of Finance regulates collection agencies and is charged with ensuring that they are complying with the law. Thus, the department would undertake to remedy any wrong actions taken by a licensed collection agency.

ATTACHMENT

Accompanying this opinion is a chart designed to clarify the requirements and limitations of each of the discussed remedies.

AUTHORITIES CONSIDERED

1. *Idaho Code*

Title 1, chapter 22

Title 1, chapter 23

§ 1-2301

§ 1-2301A

§ 2-2308

Title 6

§ 18-106

§ 18-3106

§ 22-1316

§ 28-3-417

§ 28-3-507(2)

§ 28-3-510A

§ 28-3-510B

§ 28-3-510C

§ 28-4-207

§ 28-22-104(2)

§ 31-2227

§ 69-520

2. *Idaho Cases*

Stearns v. Graves, 61 Idaho 232, 99 P.2d 955 (1940)

Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948)

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

Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957)

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

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

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

Futura Corp. v. State Tax Commission, 92 Idaho 288, 442 P.2d 174 (1968)

DeRousse v. Higginson, 95 Idaho 173, 505 P.2d 321 (1975)

Totusek v. Department of Employment, 96 Idaho 699, 535 P.2d 246 (1975)

Leonard Const. Co. v. State Tax Comm., 96 Idaho 893, 539 P.2d 246 (1975)

Magnuson v. Idaho State Tax Comm., 97 Idaho 917, 556 P.2d 1197 (1976)

Lawless v. Davis, 98 Idaho 175, 560 P.2d 497 (1977)

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

Maguire v. Yanke, 99 Idaho 829, 590 P.2d 85 (1979)

Rodwell v. Serendipity, 99 Idaho 894, 591 P.2d 141 (1979)

Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979)

Smith v. Department of Employment, 100 Idaho 520, 602 P.2d 18 (1979)

Higginson v. Westergard, 100 Idaho 687, 604 P.2d 41 (1979)

Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980)

Walker v. Nationwide Fin. Corp. of Idaho, 102 Idaho 266, 629 P.2d 662 (1981)

Lincoln City v. Fidelity & Deposit Co. of Md., 102 Idaho 489, 632 P.2d 678 (1981)

State ex rel. Evans v. Click, 102 Idaho 266, 629 P.2d 662 (1981)

State ex rel. Andrus v. Kleppe, 417 F. Supp. 273 (Id. 1976)

3. Other Authorities

Sutherland Statutory Construction §§ 45.09, 47.03, 47.04, 54.03 (4th ed. 1973)

DATED This 28th day of February, 1984.

ATTORNEY GENERAL
State of Idaho

JIM JONES

ANALYSIS BY:

R. WAYNE KLEIN
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 84-7

TO: The Honorable Terry Reilly
Idaho State Senate
STATEHOUSE MAIL

Per Request for an Attorney General's Opinion

QUESTION PRESENTED:

(1) Whether Idaho's Relative Responsibility Act, Idaho Code § 32-1008A, conforms with federal laws regulating the use of Medicaid funds;

(2) Whether § 32-1008A is facially inconsistent with the constitutional right to equal protection of the law; and

(3) Whether the procedures adopted by the department of health and welfare to implement § 32-1008A render the statute constitutionally infirm.

CONCLUSION:

It is our opinion that Idaho Code § 32-1008A is inconsistent with federal law regulating the use of Medicaid funds. A continuation of the statutory scheme may subject Idaho to federal sanctions and/or private court actions which could result in a declaration of the invalidity of the enactment.

We do not believe that § 32-1008A, on its face, violates equal protection. However, it is conceivable that enforcement procedures could produce an inequitable application of the law which may result in its characterization as an unconstitutional deprivation of equal protection.

ANALYSIS:

I

CONFORMITY WITH FEDERAL LAW

A. Idaho's Statute:

The statute at issue, Idaho Code § 32-1008A, provides as follows:

RESPONSIBILITY OF RELATIVES TO PARTICIPATE IN THE COST OF NURSING HOME CARE — (1) When it is necessary for a person to reside as a medicaid patient in a licensed skilled nursing facility or licensed intermediate care facility as either is defined in section 39-1301, Idaho Code, such person's relatives as described in this section shall be responsible to the extent of their ability to repay the department of health and welfare for the cost of necessary medical or remedial care provided by the facility. Each responsible relative of a medicaid recipient may be required to pay not more than twenty-five percent (25%) of the amount which was paid for such patient under the medical assistance program pursuant to chapter 1, title 56, Idaho Code, but not more than one hundred percent (100%) of the amount which was paid under the medical assistance program shall be collected by the department from all responsible relatives of a medicaid recipient.

(2) Relatives responsible to participate in the cost of skilled or intermediate facility care include spouses, natural and adoptive children, or natural or adoptive parents when the patient is under eighteen (18) years of age, or blind, or disabled as defined in section 1514(a) of the social security act.

The statute includes additional provisions empowering the director of the department of health and welfare to promulgate and enforce regulations, authorizing the director to enter into reciprocity agreements with other states having similar statutes and providing for the deposit of monies collected under the enactment in a special account.

B. Federal Authorities:

We have attempted to review federal statutory and regulatory authority in order to determine whether there exist any federal impediments to implementation of Idaho's law or any inconsistencies between the relevant federal enactments and our statute which may endanger the state's continued eligibility to participate in Medicaid programs or result in the imposition of other sanctions.

Section 1902(a) (17) (D) of the Social Security Act, 42 U.S.C. § 1396a(a) (17) (D), enacted in 1965, provides that, in calculating benefits, state Medicaid plans must not:

take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse, or such individual's child who is under age 21 or [in certain circumstances] is blind or disabled . . .

While the language of subsection (17) may, on its face, be interpreted as addressing only the issue of the extent to which a relative's income may be "deemed" that of

a recipient for purposes of determining eligibility, legislative history indicates that the intent of Congress went beyond the eligibility determination processes. For example, the report of the Senate Finance Committee states, in relevant part:

The committee has heard of hardships on certain individuals requiring them to provide support and to pay for the medical care needed by relatives. The committee believes that it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children . . . Such requirements for support may reasonably include the payment by such relative, if able, for medical care. Beyond such degree of relationship, however, requirements imposed are often destructive and harmful to the relationships among members of the family group. Thus, *States may not include in their plans provisions for requiring contributions from relatives other than a spouse or a parent of a minor child . . .* (emphasis added)

S.Rep. No. 404, 89th Cong. 1st Sess. 78 (1965); Accord, H.R.Rep. No. 213, 89th Cong. 1st Sess. 68 (1965).

In 1983, the Health Care Financing Administration of the Department of Health and Human Services issued a Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3, No. 3812 (February, 1983), wherein it was stated that, in certain circumstances, the states may require contributions from relatives of an aid recipient. In this transmittal, the agency adopted a narrow construction of the statutory language. The transmittal, in pertinent part, states:

The law and regulations permit States to require adult family members to support adult relatives without violating the Medicaid statute by the use of a statute of general applicability. Such contribution requirements are permissible as a State option. There are two legally supported interpretations of Section 1902(a) (17) (D) of the Act upon which to base this policy. First, if support is required under a State statute of general applicability, and not under a State plan requirement applicable only to Medicaid recipients, the statute would not violate the requirements of 1902(a) (17) (D) of the Act that a State plan cannot take into account the financial responsibility of relatives other than parents or spouses. Second, Section 1902(a) (17) (D) of the Act can be interpreted as prohibiting only the "deeming" of income (that is, the assumption that income is available to the Medicaid applicant or recipient whether or not it is actually received), except in limited specified circumstances. Thus, a policy which would permit States to consider only income actually received even though relative contributions are required by a general support statute, would not be in violation of Section 1902(a) (17) (D). Furthermore, such a policy is consistent with Section 1902(a) (17) (B), which provides for taking into account only such income and resources as are actually available.

Required contributions must be imposed under a State statute of general applicability, and cannot be imposed just as a State plan provision. This means that the law cannot limit provisions requiring contributions from relatives . . . Within these guidelines, the State may determine who is a relative, how much relatives must contribute under the statute of general applicability, and the methods of enforcement. . . .

It has been suggested that the transmittal does not embody an appropriate interpretation of the relevant provisions of the Social Security Act.¹ However, even assuming the efficacy of the construction advanced in the transmittal, it is doubtful that Idaho's law would be found to be consistent with section 1902(a) (17) (D) as interpreted by the transmittal.

Idaho Code § 32-1008A imposes financial obligations only upon relatives of Medicaid recipients. It does not purport to establish a general support obligation such as that credited by Idaho Code § 32-1002 which sets forth the reciprocal duties of parents and children of poor persons to contribute to the maintenance of an impoverished parent or child.² If § 32-1008A were amended to replace references to "medicaid" and "medicaid recipient," with "patients," the statute then would be of general applicability and, therefore, permissible within the terms of the transmittal.

It should be noted that Idaho's attempt to implement relative responsibility was accomplished through the enactment of a statute; the attendant obligations are not merely created in a Medicaid plan. It is arguable that the transmittal disallows only *plan* provisions which attempt to create relative responsibility and that the document allows statutory enactments which accomplish the same end. However, we do not feel we can ignore the repeated references in the transmittal to statutes of "general applicability". We believe that the transmittal precludes the states from enacting "special" statutes to the same extent that it prohibits Medicaid plan provisions which establish support obligations solely for the relatives of Medicaid recipients.

The phrase "statute of general applicability" does not have a narrow and easily defined meaning. A "general law" is defined as:

A law that affects the community at large. A general law, as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class . . . A law, framed in general terms, restricted to no locality and operating equally upon all of a group of objects, which having regard to the purposes of a legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law.

¹In June, 1983, Representative Mario Biaggi of New York submitted a proposed House Concurrent Resolution protesting the position taken in the transmittal and expressing a sense of Congress that the transmittal should be withdrawn; as of the date of this writing, Representative Biaggi's proposal remains in the House Committee on Energy and Commerce.

²Section 32-1002, which was passed in the 19th Century as part of the county poor laws, does purport to create a general support obligation. We note parenthetically that it is highly unlikely that § 32-1002 has significant continuing viability as the intent of the statute was to provide for family responsibility for the basic necessities of relatives. The concept predates the implementation of modern welfare systems and was adopted at a time when nursing homes, Medicaid, etc. could not have been envisioned. We do not believe the courts would construe § 32-1002 as a "statute of general applicability" as that term is used in the Medicaid transmittal.

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A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situations . . .

Jones v. Power Company, 27 Idaho 656, 665, 150 P. 35 (1915)

As aforementioned, Idaho Code § 32-1008A is applicable only to Medicaid recipients. Although it is in the form of a statute rather than a Medicaid plan, we feel that this is a distinction without consequence in that the net effect on Medicaid recipients and their relatives is identical to that which would have resulted had the state merely adopted a plan which required contributions solely from the relatives of Medicaid patients. It is our opinion that the limitation of the applicability of § 32-1008A to relatives of Medicaid recipients renders it a statute of special rather than general applicability and, as a consequence, we believe that it does not comport with the requirements of the transmittal or with the Social Security laws which the transmittal attempts to interpret. Therefore, it is our opinion that Idaho is not in compliance with the requirements of the federal Medicaid program.

C. Possible Sanctions:

It is difficult to speculate as to what sanctions, if any, federal authorities would impose upon a determination of Idaho's nonconformance. It has been suggested that the state may incur substantial monetary liability. Although it is probable that the government has the authority to pursue recovery of amounts found not to have been expended in accordance with federal requirements,³ it is important to recall that § 32-1008A does not relate to expenditures but rather it deals with collections — portions of which are to be shared with the federal government. Accordingly, we do not believe there is a grave risk that the government will seek return of monies used by Idaho while § 32-1008A would be presented to a court in an action brought by a relative in response to an attempt to enforce a collection. We anticipate that the end result of such a suit would be the issuance of an injunction declaring that the state provision may not be enforced so long as the state continues to accept federal funds under Medicaid. Cf. *Fabula v. Buck*, 598 F.2d 869 (3rd Cir. 1979); *Townsend v. Swank*, 404 U.S. 282 (1971) (Burger, C. J., concurring).

We must emphasize that any consideration of sanctions which may be imposed as a result of the existence of § 32-1008A is extremely speculative as this is a matter which rests largely within the discretion of federal regulators. However, in view of the possible imposition of substantial penalties, we believe that any implementation or enforcement of § 32-1008A would entail some risk.

³The relevant federal statutes do not include a provision specifying sanctions which may be imposed upon states which, although initially qualifying, fall into noncompliance as a result of the implementation of a law or regulation.

II

CONSTITUTIONALITY OF § 32-1008A

We have also been asked to consider whether § 32-1008A is “unconstitutional.” The primary concern seems to be that the imposition of financial responsibility on relatives of Medicaid recipients may constitute a denial of equal protection of the laws which is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Initially, we do not believe that the relative responsibility law touches upon a “fundamental interest” and does not create a “suspect classification” as those terms have been defined in relevant case law. See, e.g. *Swoap v. Superior Court of Sacramento County*, 111 Cal. Rptr. 136, 516 P.2d 840 (1973). Accordingly, the constitutionality of § 32-1008A would likely be determined by the “rational relationship” test, i.e., by requiring merely that distinctions drawn by the statute bear some rational relationship to a conceivably legitimate state purpose.⁴ See, *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976); *Serranno v. Priest*, 5 Cal. 3rd 584, 96 Cal. Rptr. 601, 47 P.2d 1241 (1971).

A similar equal protection claim was addressed by the California Supreme Court in the case of *Swoap v. Superior Court of Sacramento County*, *supra*, which involved a challenge to California’s Welfare Institution’s Code sections providing for contributions by adult children to defray the costs of public assistance for destitute parents;

⁴A court conceivably could subject the statute to the somewhat more exacting standard of the “means-focus” test set forth in *Jones v. State Board of Medicine*, *supra*. Although this standard of review is not so difficult to satisfy as the “compelling state interest test” applied to analysis of statutes which create suspect classifications, it nevertheless requires greater justification than the rationality test. Even under this test, it is quite likely that § 32-1008A would be permissible. In any event, “the burden of showing the absence of a reasonable relationship under the means-focus test remains with the one who assails the classification.” *Id.* at 867.

Further, it has been suggested that § 32-1008A would be subject to strict scrutiny because it desperately impacts the handicapped and may violate § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 784. See, testimony of James R. Baugh before the Senate Committee on Health, Education and Welfare of the Idaho State Legislature (March 8, 1984). While any classification based upon handicap is “suspect”, we believe that § 32-1008A contains no such classification. The characteristic upon which applicability of § 32-1008A is premised is the receipt of Medicaid. While many of those impacted by § 32-1008A may be relatives of handicapped persons, the existence of a handicap is not a condition precedent to application of the statute, nor does it impact all handicapped persons who are residents of the designated facilities.

Neither is there discrimination based on wealth inherent in the statute. The state selects the relatives to bear the burden not on the basis of wealth, but on the basis of the existence of a familial relationship. Cf. *Swoap v. Superior Court of Sacramento County*, *supra*.

also assailed was a civil code section creating a general duty of children to support their needy parents. In upholding the constitutionality of the California laws, the court stated:

As indicated earlier, we recognized in [*County of San Mateo v. Boss*, 3 Cal. 3rd 962, 992 Cal. Rptr. 294, 479 P.2d 654 (1971)] that the state purpose of the relatives' responsibility statutes is to "relieve the public treasury of part of the burden cast upon it by the public assumption of responsibility to maintain the destitute." It is uncontested that this is a legitimate state purpose (citation omitted). The sole question therefore is whether placing the burden of this support upon the adult children bears some rational relationship to the accomplishment of the state purpose of relieving the public treasury.

It seems eminently clear that the selection of the adult children is rational on the ground that the parents, who are now in need, supported and cared for their children during their minority and that such children should in return now support their parents to the extent to which they are capable. Since these children received special benefits from the class of "parents in need," it is entirely rational that the children bear a special burden with respect to that class.

516 P.2d at 851.⁵

Despite the fact that Idaho's law is limited to the relatives of Medicaid recipients, we believe that an analysis similar to that of the California court in *Swoap*, supra, would prevail. The legitimacy of the state interest in relieving the public treasury of some of the burden of support seems clear; similarly, the selection of parents and children are "responsible" parties is rational in view of the special and, presumptively, perpetual nature of the relationship between parent and child. Accordingly, we do not believe that Idaho Code § 32-1008A is facially violative of equal protection.⁶

⁵In a number of other decisions involving a statutory provision requiring reimbursement by a child for financial assistance to his parents, equal protection challenges have been disallowed. See, *Groover v. Essex County Welfare Board*, 264 A.2d 143 (D.C.App. 1970); *Kerr v. State Public Welfare Commission*, 3 Or. App. 27, 470 P.2d 1167 cert. den. 402 U.S. 950 (1970); *Application of Peterson*, 271 Wis. 505, 74 N.W.2d 148 (1956); *Atkins v. Curtis*, 259 Ala. 311, 66 S.2d 455 (1953); *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646 (1949).

⁶It remains to be seen whether viable equal protection claims may arise as a result of the implementation of the statute. It is conceivable that equal protection problems may stem from inequality of enforcement. One such concern relates to enforcement against relatives who reside beyond our borders. Section 32-1008A does not address the issue of its extra-territorial effect and it appears highly questionable whether the department of health and welfare can obtain jurisdiction over non-resident relatives. We anticipate that claims based upon equal protection may be advanced by Idaho residents who are forced to bear a support burden not shared by their out-of-state counterparts.

III

IMPLEMENTATION OF § 32-1008A

We do not find it appropriate to comment further upon your inquiry as to the administrative inequities which you perceive in the enforcement of § 32-1008A. We do not believe there is a sufficient history of enforcement to venture an opinion as to whether implementation procedures render the statute unconstitutional as applied.

AUTHORITIES CONSIDERED:

1. Statutes:

Idaho Code § 32-1002

Idaho Code § 32-1008A

Social Security Act § 1902(a) (17) (D); 42 U.S.C. §1396a(a) (17) (D)

2. Idaho Cases:

Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976)

Jones v. Power Company, 27 Idaho 656, 665, 150 P. 35 (1915)

3. Cases Cited from Other Jurisdictions:

Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971)
(Burger, C. J., concurring)

Fabula v. Buck, 598 F.2d 869 (3rd Cir. 1979)

Atkins v. Curtis, 259 Ala. 311, 66 S.2d 455 (1953);

Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949).

Swoap v. Superior Court of Sacramento County, 111 Cal. Rptr. 136, 516 P.2d 840 (1973)

Serranno v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 47 P.2d 1241 (1971)

Groover v. Essex County Welfare Board, 264 A.2d 143 (D.C.App. 1970)

Kerr v. State Public Welfare Commission, 3 Or. App. 27, 470 P.2d 1167
cert. den. 402 U.S. 950 (1970)

Application of Peterson, 271 Wis. 505, 74 N.W.2d 148 (1956)

4. Other Authorities:

S. Rep. No. 404, 89th Cong. 1st Sess. 78 (1965);

H.R. Rep. No. 213, 89th Cong. 1st Sess. 68 (1965)

Medicaid Manual transmittal, H.C.F.A. Pub. 45-3, No. 3812 (February, 1983)

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DATED this 23rd day of March, 1984

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

ANALYSIS BY:

P. MARK THOMPSON
Deputy Attorney General
Chief, Administrative Law
and Litigation Division

ATTORNEY GENERAL OPINION NO. 84-8

TO: Ms. Ellie Kiser
Commission for Pardons & Parole
P.O. Box 2773
Boise, ID 83701

Per Request for Attorney General Opinion

QUESTIONS PRESENTED

1. Does the Idaho Commission for Pardons and Parole have the authority to commute the death penalty?
2. Does the commission have the authority to commute death sentences to fixed life?
3. Does the commission have the authority to commute an indeterminate sentence to a fixed sentence?
4. Does the commission have the authority to commute a fixed sentence to a lesser fixed sentence?
5. May the commission conduct a commutation hearing absent a petition submitted by the inmate or on behalf of the inmate?

6. May the commission conduct a commutation hearing on inmates with death sentence prior to reprieve by the governor?

CONCLUSION

1. The commission does have the authority to commute the death penalty, to commute a death sentence to a fixed life term, to commute an indeterminate sentence to a lesser fixed sentence and to commute a fixed sentence to a lesser fixed sentence. The commission has broad power to commute sentences, but commutation is designed to decrease the severity of the inmate's sentence.

2. The commission may not conduct a commutation hearing absent a petition submitted by the inmate or on behalf of the inmate. A commutation hearing on inmates with the death sentence may be conducted prior to reprieve by the governor. In Idaho, pardon, parole and commutation are not matters of right. They are matters of grace. The decision to grant commutation is therefore discretionary in nature. In the exercise of that discretion the commission is limited by constitutional or statutory prerequisites. There is no constitutional or statutory authority which mandates that a commutation hearing can be granted only after the governor has determined whether to grant a reprieve. The prerequisites with which the commission must comply are primarily public notice requirements designed to inform interested parties of the commission's action.

ANALYSIS

Your request for an opinion involves an analysis of existing statutory and case law regarding two areas of the duties of the Idaho Commission for Pardons and Parole:

1. Questions 1 through 4 address the scope of the commission's authority to commute specific sentences.

2. Question 5 and 6 address procedural limitations on the conduct of commutation hearings.

This opinion is therefore rendered in two parts.

I.

The clemency powers of the Idaho Commission for Pardons and Parole are granted by art. IV, § 7 of the Idaho Constitution. The commission has power to remit fines and forfeitures and to grant commutations and pardons after conviction and judgment, and the governor has power to grant respites and reprieves. *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957). It is clear that the constitution grants the commission only the powers to commute and pardon and that the commission's authority to grant parole must be created by statute. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975). See also *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979). The scope of the commission's power to grant commutations and pardons is broad. The court in *Rawson* emphasized that breadth:

Art. IV, § 7 of the Idaho Constitution specifically provides that the board of pardons is vested with the power to grant pardons and commutations in *all*

cases of offenses against the state except treason or a conviction on impeachment.

State v. Rawson, 100 Idaho 308, 310, 597 P.2d 31, 33 (1979).

Specifically, art. IV, § 7 states that the commission has the power to pardon or commute "either absolutely or upon such conditions as they may impose." In *Standlee* the court defined commutation and pardon:

A pardon does away with both the punishment and the effects of a finding of guilt. A commutation diminishes the severity of a sentence, e.g., shortens the term of punishment.

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778 (1975).

A reading of these definitions in conjunction with the breadth of the commission's power as emphasized in *Rawson* prescribes the limits of the power to commute sentences. Assuming that a sentence of death for the offenses of treason or impeachment is not at issue, the commission has the authority to commute virtually any sentence so long as the effect of its action is to diminish that sentence in severity. This conclusion is additionally supported by a well-settled comment on the function of the Idaho Commission for Pardons and Parole:

[The Commission] is a board of clemency rather than a punitive body. Instead of pronouncing judgment and sentence and imposing punishment, its prerogative and authority is that of forgiving offenses and remitting penalties, wiping out judgments and sentences of conviction either in whole or in part. Whenever such board undertakes *to increase or extend the penalty or punishment* imposed upon a convict by a decree of court, they at once pass beyond the realm of their jurisdiction and authority, and infringe upon the judicial power of the state. (emphasis added)

Ex Parte Prout, 12 Idaho 494, 498, 86 P. 275, 276 (1906).

Our state courts have not been faced with the task of determining whether certain commuted sentences increase an original sentence and are thus impermissible. However, there is other case law which states that the commutation of the death sentence to life imprisonment without the possibility of parole does not reflect a greater punishment than the one commuted. *Biddle v. Perovich*, 274 U.S. 480, 47 S. Ct. 664, 71 L.Ed2d 1161 (1926); *People v. Frost*, 117 N.Y.S. 524, 133 N.Y. App. Div. 179, 23 N.Y. Crim. Ct. 544 (1909); *Bean v. State*, 535 F.2d 542 (Nev. Ct. App. 1976). This assumes, of course, that there is a valid sentence of death in existence at the time of the commutation. *Sellers v. Estelle*, 400 F. Supp. 854 (S.D. Tex. 1975), *aff'd*, 536 F.2d 1104 and 536 F.2d 1106, *reh'g denied*, 540 F.2d 1085 (5th Cir. 1976), *cert. denied*, 429 U.S. 1076, 97 S. Ct. 1188, 51 L.Ed.2d 589 (1976); *Huffman v. Estelle*, 536 F.2d 1106, *reh'g denied*, 540 F.2d 1085 (5th Cir. 1976).

Thus, there is little doubt that the commission has broad authority to commute sentences. A valid sentence of death may be commuted to a fixed life term. Either an

indeterminate or a fixed term sentence may be commuted to a lesser fixed sentence. Commutation of an indeterminate sentence, however, deserves additional comment.

Of particular concern is the possibility that the commission, by commuting an indeterminate sentence to a fixed term sentence, can deprive the inmate of a parole date arising earlier than the date of expiration of the fixed term. Would such a commutation actually increase the severity of the adjudged sentence? Under the indeterminate sentence statute, Idaho Code § 19-2513, an offender is theoretically eligible for parole the day of being sentenced to the custody of the state board of correction. Idaho Code § 20-223 requires certain other offenders to serve one third or five years of their sentence before being eligible for parole. An offender serving a fixed term sentence under Idaho Code § 19-2513A, however, is not eligible for parole. See Attorney General Opinion 82-9. The commutation of a 15-year indeterminate sentence to, say, a 10-year fixed term sentence could therefore deprive the offender of an early parole date.

Whether such a commutation is constitutionally permissible depends largely on the nature of the interest which an inmate has in commutation and parole. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d. 228 (1972). The fourteenth amendment protects only against deprivations of life, liberty, or property without due process of law, and a prisoner who alleges violations of the right to due process must first show a protectable "liberty interest." *Paratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 69 L.Ed.2d 228 (1981). If an inmate's interest in commutation or parole amounts to a right, rather than a mere expectation, then the inmate is entitled to some measure of due process of law before being deprived of that right. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Connecticut Board of Pardons v. Demshat*, 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981).

In Idaho, however, pardon, parole, and commutation are not matters of right or privilege. They are matters of grace or clemency. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *Malloroy v. State*, 91 Idaho 914, 435 P.2d 254, 255 (1967). Furthermore, the Idaho Supreme Court has determined that there is no right to parole under Idaho Code § 20-223 and therefore no right to written reasons for denial of parole. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (1983). In *Connecticut Board of Pardons* the court analyzed the Connecticut commutation statute and determined that the mere existence of a power to commute, which imposed no limit on what procedure was to be followed, what evidence was to be considered, or what criteria was to be applied by the board of pardons, created no right or entitlement recognized by the due process clause. A Connecticut felon's expectation that a lawfully imposed sentence would be commuted was nothing more than a mere unilateral hope. *Connecticut Board of Pardons*, *supra*, at 465. Comparison of Connecticut's commutation statute with Idaho's constitutional grant of authority for commutation reveals that the two are similar and discretionary.

The case law cited above supports the proposition that commutation of a lawfully imposed sentence which effectively deprives an inmate of a parole date is not violative of due process.

II.

May the commission conduct a commutation hearing absent a petition submitted by the inmate or on behalf of the inmate?

In granting commutations, the commission for pardons and parole exercises the rights, powers, and authority of the board of pardons referred to in art. IV, § 7 of the state constitution. That power extends to the granting of pardons and commutations “either absolutely or upon such conditions as they may impose. . .” *Malloroy, supra*, at 915, and *Evans, supra*, at 60, hold that commutation in Idaho is not a matter of right or privilege, but is a matter of grace. Clearly, the power to grant commutations is of a discretionary nature. In the exercise of that discretion, however, prerequisites to the issuance of a commutation of a sentence prescribed by the constitution or a valid statute must be complied with. *Jamison v. Flanner*, 116 Kan. 624. 228 P. 82 (1924).

Article IV, § 7 of the Idaho Constitution places three procedural prerequisites on the power to grant commutations:

1. The legislature shall by law prescribe the board’s sessions, the manner in which *application* shall be made, and regulate the proceedings thereon.
2. A commutation can be granted only by a decision of a majority of the board after a full hearing in open session and after previous notice of the time and place of the hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks.
3. The proceedings and decision of the board shall be reduced to writing, including the dissent of any member; all papers used at the hearing must be filed with the Secretary of State.

Our state supreme court has held that the full hearing in open session mentioned above must “be noticed, as the constitution provides, in order that the board may have the reasonably contemporaneous opinion from interested parties.” *Miller v. Meredith*, 59 Idaho 385, 83 P.2d 206 (1938). The court, however, failed to elaborate on exactly what constituted a “fair and open hearing” or who qualified as “interested parties.” Whether the prisoner was such an “interested party” as to be required to be present at the commutation hearing was not addressed. It has been held, though, that a commutation of sentence by the pardoning power may be effected without the consent and against the will of the prisoner. *Cherry v. State*, 488 S.W.2d 744 (Tex. Crim. App. 1972), *cert. denied*, 411 U.S. 909, 93 S.Ct. 1538, 36 L.Ed.2d 199 (1973)

Idaho Code § 20-213 represents the legislature’s exercise of the constitutional provision of art. IV, § 7 that it prescribe the sessions and the manner in which application shall be made:

The commission shall meet at such times and places as it may prescribe, but not less than quarterly. If *applications* for pardon or commutation are scheduled to be considered at such meeting, notice shall be published in some newspaper of general circulation at Boise, Idaho, at least once a week for four (4) consecutive weeks, immediately prior thereto. Such notices shall list the names of all persons making *application* for pardon or commutation and a copy of such notice shall immediately, upon the first publication thereof, be mailed to each prosecuting attorney of any county from which any such person was committed to the penitentiary, and provided further that the commission may

in its discretion consider but one (1) *application* for pardon or commutation from any one (1) person in any twelve (12) month period. (emphasis added)

It is interesting to note that although the legislature is required by law to prescribe the manner in which application for pardon or commutation shall be made, art. IV, § 7 of the constitution does not state that pardon or commutation can be granted only upon application. If *Malloroy* and *Evans* are given literal interpretation, then commutation is an act of grace and application is not a prerequisite. The commission's power would be analogous to that of a court acting "sua sponte," that is, "of its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1277 (rev. 5th ed. 1979).

The resolution of this matter will depend on interpretation of that part of art. IV, § 7 of the constitution which states that the legislature shall prescribe the sessions of the commission and the manner in which application shall be made. Does this language restrict the pardon and commutation power to cases where application is made? Should it be interpreted to mean that if the legislature shall prescribe the manner in which application shall be made, it shall have no power to prescribe procedures where no application is made? This latter interpretation would constitute recognition that the commission has the power to grant pardons and commutation with or without an application.

The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers, and provisions must be construed or interpreted in such a manner as to fulfill the intent of the people. *Haile v. Fotte*, 90 Idaho 261, 409 P.2d 409 (1965); *Engelking v. Investment Board*, 93 217, 458 P.2d 213, *motion denied* 93 Idaho 739, 471 P.2d 594 (1969). Unfortunately history reveals that art. IV, § 7 was adopted without debate by the framers of the state constitution. 2 IDAHO CONSTITUTIONAL CONVENTION. at 1415 (1889).

One method of determining constitutional or legislative intent which has both ancient heritage and modern relevance is to determine the common law before the making of the act and the mischief and defect for which the common law did not provide. *Engelking, supra*, at 217. Under the laws of the Idaho territory the power to grant pardons, commutations and reprieves was vested in the governor. An examination of the relevant territorial law does not clarify whether the power to grant commutations could be exercised in the absence of the petition. Only two sections of the territorial code mention the word "application":

SEC. 8250. When an *application* is made to the Governor for a pardon, he may require the judge of the Court before which the conviction was had, or the District Attorney by whom the action was prosecuted, to furnish him, without delay, with a statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing the pardon.

SEC. 8251. At least ten days before the Governor acts upon an *application* for a pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the District Attorney of the county where the conviction was had, and proof, by affidavit, of the service must be presented to the Governor. (emphasis added)

Rev. Statutes Idaho Territory, Tit. X, Ch. XIII, §§ 8250-52 (1889)

There can be no doubt, however, that the territory determined that publication and notice limitations upon the gubernatorial power to grant commutations was very important. At the beginning of every session of the legislature, the territorial governor was required to provide reasons why he granted commutation, pardon, or reprieve during the preceding year. Additionally, the applicant was required to publish notice of his intention to seek a pardon for thirty days in a paper in the county in which he was convicted or at the capital of the territory. *Rev. Statutes Idaho Territory, supra*, §§ 8249 and 8252.

In construing a statute or constitutional provision, consideration must be given not only to literal wording and historical background, but also to context, public policy, and recent legislation. *Local 194 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978). There can be little doubt that analysis of the context of both art. IV, § 7 and the territorial law which preceded it reveals that the people of Idaho have never intended that the commuting authority have absolute power in the literal sense, but that a measure of accountability be included which would permit public monitoring of the commission's actions and input into its decision making process.

The more sound construction of the intent of art. IV, § 7 of the constitution, and the interpretation of that provision which is more consistent with public policy is that commutation and pardon may be granted only upon application, and that the legislature shall prescribe the sessions of the commission and the manner in which application for pardon and commutation shall be made so long as certain notice requirements are met. An analysis of the more specific notice of Idaho Code § 20-213 reveals that not only have the general notice requirements been met, but they have been exceeded. This expansion of public notice is consistent with public policy favoring notice to interested parties.

May the commission conduct a commutation hearing on inmates with a death sentence prior to reprieve by the governor?

The power of the governor to grant reprieves arises under art. IV, § 7 of the state constitution, which states:

The governor shall have power to grant respites and reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense as herein provided.

Clearly, the governor does not have the authority to grant an indefinite stay of execution of a sentence of death. The reprieve is operative only until the next session of the board of pardons which, meeting quarterly, could be as short as one day or as long as three months. It is the board of pardons which has the power to continue the reprieve. A reprieve has been defined as a temporary suspension of the execution of a sentence. 67 C.J.S. *Pardons & Parole* § 30 (1983). It is extended to a prisoner in order to afford an opportunity to procure some amelioration of the sentence which has

been imposed. *Palka v. Walker*, 198 A. 265, 124 Conn. 121 (1938). If the governor grants a reprieve shortly before the next meeting of the commission, it is possible that the commission, without any anticipation of the reprieve or the matters to be presented by the petitioner, may not be adequately prepared to consider any ameliorating factors or have sufficient time to comply with the four week publication requirement. This could necessitate a continuance until the following quarterly meeting.

Such a lengthy continuation could be avoided if the commission exercised its authority under Idaho Code § 20-213 "to meet at such times and places as it may prescribe but not less than quarterly." A current analysis of the POLICIES AND PROCEDURES OF THE IDAHO COMMISSION FOR PARDONS AND PAROLE (Revised March, 1984) reveals that the commission has not developed a procedure for convening special meetings to expedite the process of considering petitions or conducting commutation hearings. It has, however, deleted its former policy that "a petition for commutation on a sentence of death *shall* be granted a hearing." POLICIES AND PROCEDURES OF THE IDAHO COMMISSION FOR PARDONS AND PAROLE § II A (Revised March, 1984) (emphasis added). This may affect the role of the governor in granting reprieves. So long as an inmate could rely on the policy to grant a hearing on a petition for commutation of a sentence of death, reprieve from the governor need be sought only as a last resort. In the absence of a guarantee that his petition will be heard by the commission, it is now more likely that the inmate will attempt to enlist the aid of the governor.

In anticipation of circumventing delays effected by "eleventh hour" petitions for commutation or reprieve it is advisable that the governor notify the commission as soon as possible that there is consideration for granting a reprieve. If a regularly scheduled meeting of the commission adjourns without determining that a commutation hearing is warranted, and the governor determines that a reprieve is warranted, a timely exercise of gubernatorial power could provide the commission with as much as three months to prepare for the commutation hearing. The convening of an early meeting by the commission would provide further assurance that needless delays could be avoided.

In summary, there is no constitutional or statutory provision which states that a commutation can be granted only upon a reprieve by the governor. The commission need not defer a decision to grant a commutation until the governor has determined whether to exercise the right to grant a reprieve. An analysis of art. IV, § 7 of the state constitution and the territorial law which preceded it reveals that it was the intent of the framers of the state constitution that the commission not have absolute discretion regarding matters of commutation and pardon. Accordingly, the constitutional grant of authority to the commission to consider matters of commutation should not be interpreted in a manner which would permit the grant of a commutation or pardon in the absence of a petition. Furthermore, the commission should also consider exercising its power to convene special meetings. This could eliminate needless delays by allowing commutation matters to be considered earlier than they would be at a regularly scheduled meeting.

AUTHORITIES CONSIDERED:

1. Constitutions:

Idaho Constitution art. IV, § 7

2. Statutes:

Idaho Code § 19-2513
 Idaho Code § 19-2513(a)
 Idaho Code § 20-213
 Idaho Code § 20-223
Rev. Statutes Idaho Territory, Tit. X, Ch. XIII (1889)

3. Rules & Regulations

POLICIES & PROCEDURES MANUAL OF THE IDAHO
 COMMISSION FOR PARDONS & PAROLE § II A1
 (Revised March, 1984)

4. Idaho Cases:

State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957)
Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975)
State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979)
Ex Parte Prout, 12 Idaho 494, 86 P. 275 (1906)
State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952)
Malloroy v. State, 91 Idaho 914, 435 P.2d 254, 255 (1967)
Izatt v. State, 104 Idaho 597, 661 P.2d 763 (1983)
Miller v. Meredith, 59 Idaho 385, 83 P.2d 206 (1938)
Haile v. Fotte, 90 Idaho 261, 409 P.2d 409 (1965)
Engelking v. Investment Board, 93 Idaho 217,
 458 P.2d 213, *motion denied*, 93 Idaho 739
 471 P.2d 594 (1969)
Local 194 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene,
 99 Idaho 630, 586 P.2d 1346 (1978)

5. Cases Cited From Other Jurisdictions:

Biddle v. Perovich, 274 U.S. 480, 47 S. Ct. 664,
 71 L.Ed.2d 1161 (1926)
People v. Frost, 117 N.Y.S. 524, 133 N.Y.
 App. Div. 179, 23 N.Y. Crim. Ct. 544 (1909)
Bean v. State, 535 F.2d 542 (Nev. Ct. App. 1976)

Sellers v. Estelle, 400 F. Supp. 854 (S.D. Tex. 1975)
aff'd, 536 F.2d 1104 and 536 F.2d 1106, *reh'g denied*,
 540 F.2d 1085 (5th Cir. 1976), *cert. denied*, 429 U.S. 1076, 97 S. Ct. 1188,
 51 L.Ed.2d 589 (1976)

Huffman v. Estelle, 536 F.2d 1106, *reh'g denied*,
 540 F.2d 1085 (5th Cir. 1976)

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701,
 33 L.Ed.2d 228 (1972)

Paratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908,
 69 L.Ed.2d 228 (1981)

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,
 99 S. Ct. 2100, 60 L.Ed.2d 668 (1979)

Connecticut Board of Pardons v. Numshat, 452 U.S. 458, 101 S. Ct. 2460,
 69 L.Ed.2d 158 (1981)

Jamison v. Flanner, 116 Kan. 624, 288 P. 82 (1924)

Cherry v. State, 488 S.W.2d 744 (Tex.Crim.App. 1972), *cert. denied*,
 411 U.S. 909, 93 S. Ct. 1538, 36 L.Ed.2d 199 (1973)

Palka v. Walker, 198 A. 265, 124 Conn. 121 (1938)

6. Other Authorities:

Attorney General Opinion 82-9

BLACK'S LAW DICTIONARY 1277 (rev. 5th ed. 1979)

67 C.J.S. *Pardon & Parole* § 30 (1983)

2 IDAHO CONSTITUTIONAL CONVENTION, at 1415 (1889)

DATED This 18th day of May, 1984.

JIM JONES
 ATTORNEY GENERAL
 State of Idaho

ANALYSIS BY:

TIMOTHY R. McNEESE
 Deputy Attorney General
 Correction Section

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

ATTORNEY GENERAL OPINION NO. 84-9

TO: State Board of Land Commissioners

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Is the contract requirement set forth in Idaho Code § 58-403 valid and enforceable?

CONCLUSION:

No. The contract requirement is unconstitutional under the Commerce Clause and should not be enforced.

ANALYSIS:

The Idaho State Board of Land Commissioners is required by statute to put certain contractual restrictions in all state timber sales. The pertinent language reads:

The state board of land commissioners are hereby required when contracting for the sale of timber on lands owned by the state to prescribe that the timber cut from said lands under said contract shall be manufactured into lumber or timber products within the state of Idaho; provided, that the sale of any timber to be used in the manufacture of wood pulp shall be excepted from the above provision.

Idaho Code § 58-403.

Lumber or timber products as used in Idaho Code § 58-403 is not clearly defined. However, in the Department of Lands Operation Memorandum 904, dated April 19, 1976, and entitled "LIMITATIONS ON SALE OF STATE TIMBER," unpeeled cedar poles, rough green lumber and cants, if manufactured in Idaho and sold to a separate entity, qualify as lumber or timber products.

On May 22, 1984, the United States Supreme Court announced its plurality decision in *South-Central Timber Development Inc. v. Esther Winnicke, Commissioner, Department of Natural Resources of Alaska*, 52 LW 4631 (1984). In *South-Central*, the Court held that a state restriction on the place of "primary manufacture" of state-owned timber constitutes an unconstitutional burden on interstate commerce. The Alaska regulation which was held invalid granted the Director of the Department of Natural Resources of Alaska the option of restricting the primary manufacture of state owned timber to within the state:

PRIMARY MANUFACTURE

- (a) The Director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

11 Alaska Admin. Code § 76.130 (1974) (repealed 1982) (The local processing requirement is now authorized by Alaska Administrative Code §§ 71-230, 71.910 (1982)).

The Court stated that this Alaska restriction “falls within the rule of virtual *per se* invalidity of laws that ‘bloc[k] the flow of interstate commerce at a state’s borders.’” *South-Central Timber Development Inc.* at 4635 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Further, the Court stated that although there was a clear federal policy which imposes a primary manufacture requirement on timber taken from federal lands in Alaska, in order for a state regulation to be constitutional under the Commerce Clause, congressional intent must be unmistakably clear that the state could also impose a primary manufacture requirement. Here such intent was lacking the Court held.

Idaho Code § 58-403 is even more restrictive than the Alaska regulation in that the land board *must* restrict rather than *may* restrict timber exports; on the other hand, the Idaho statute does not restrict the export of pulp logs, whereas the Alaska regulation allows the director to do so.

Because the Alaska regulation and Idaho Code § 58-403 seek to accomplish the same thing - restrict the first step in the manufacture of state-owned timber to state businesses - that part of Idaho Code § 58-403 requiring a contractual export restriction is clearly unconstitutional and should not be enforced.

Therefore, the Idaho State Board of Land Commissioners and the Idaho State Department of Lands should cease enforcement of the export restriction in all existing contracts and delete the offending statutory language in future timber sale contracts.

AUTHORITIES CONSIDERED:

1. Constitution:

U.S. Const. art. I, § 8, cl. 3.

2. Statutes:

Idaho Code § 58-403.

3. Administrative Rules

11 Alaska Admin. Code § 76.130 (1974) (repealed 1982).

4. United States Supreme Court Cases:

South-Central Timber Development Inc. v. Esther Winnicke, Commissioner, Department of Natural Resources of Alaska, 52 LW 4631 (1984).

DATED this 17th day of August, 1984.

ATTORNEY GENERAL
STATE OF IDAHO
JIM JONES

ANALYSIS BY:

ROBERT J. BECKER
Deputy Attorney General
Department of Lands

RJB/pks

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ATTORNEY GENERAL OPINION NO. 84-10

TO: LARRY G. LOONEY
Chairman
Idaho State Tax Commission
STATEHOUSE MAIL

RE: Request for Attorney General's Opinion

QUESTION PRESENTED:

Did House Bill 387 of the Second Regular Session of the Forty-Seventh Idaho Legislature, 1984 Session Laws, ch. 35, p. 55, effectively repeal § 63-3022 (a)(1), Idaho Code?

CONCLUSION:

Because of a lack of unity of subject and title, House Bill 387 did not effectively repeal Idaho Code § 68-3022 (a)(1) as it failed to conform with art. III, § 16, of the Idaho Constitution.

ANALYSIS:

House Bill 387, as originally introduced, was a single section bill amending Idaho Code § 63-3004 to cause portions of Idaho income tax law to conform to the Internal Revenue Code. As such, it was introduced January 16, 1984. See, House Journal, 47th Leg., 2d Reg. Sess. 1984 at p. 15. The bill subsequently was amended on February 14, to add an additional section containing two amendments to Idaho Code § 63-3022 dealing with the definition of taxable income. One amendment related to taxability of certain Social Security and Railroad Retirement Benefits. The second amendment, at question here, purported to repeal all of Idaho Code § 63-3022 (a)(1) which denies income tax deductions to corporations for expenses incurred in the production of non-business income which is not subject to Idaho income tax. Once the two amendments were made to § 63-3022, the title was corrected by the addition of the following:

On page one of the printed bill, in line 4, following "1983;", insert: "AND AMENDING SECTION 63-3022, IDAHO CODE, TO PERMIT DEDUCTION OF CERTAIN SOCIAL SECURITY AND RAILROAD RETIREMENT BENEFITS SUBJECT TO FEDERAL INCOME TAX;". House Journal, 47th Leg. 2d Reg. Sess. 1984 at p. 72.

The House failed, however, to correct the title insofar as it related to the repeal of § 63-3022 (a)(1). Subsequently, the bill, as amended, became law.

The full title of the bill, as passed, found in 1984 Session Laws, ch. 35, p. 55 states:

AN ACT RELATING TO INCOME TAXES: AMENDING § 63-3004, IDAHO CODE, TO INCORPORATE AMENDMENTS MADE TO THE FEDERAL INTERNAL REVENUE CODE BY CONGRESS IN 1983; AND AMENDING § 63-3022, IDAHO CODE, TO PERMIT DEDUCTION OF CERTAIN SOCIAL SECURITY AND RAILROAD RETIREMENT BENEFITS SUBJECT TO FEDERAL INCOME TAX; DECLARING AN EMERGENCY AND PROVIDING FOR RETROACTIVE APPLICATION.

While the act made three changes to Idaho Law, only two can be found in the title. As can be seen, no reference is made in the title of the bill to the amendment repealing § 63-3022 (a)(1).

Art. III, § 16 of the Idaho Constitution states:

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.

Most likely a court would conclude that House Bill 387 contains but one subject. As stated by the Idaho Supreme Court in *Boise City v. Baxter*, 41 Idaho 368, 376, 238 P. 1029 (1925):

It is said that if the provisions of an act all relate directly or indirectly to the same subject, having a natural connection therewith and are not foreign to the subject expressed in the title, they may be united in one act; that however numerous the provisions of an act may be, if they can be by fair intendment considered as falling within the subject matter legislated upon in such act or necessary as ends and means to the attainment of such subject, the act will not be in conflict with this constitutional provision; that if an act has but one general subject, object or purpose, and all of its provisions are germane to the general subject and have a necessary connection therewith, it is not in violation of this constitutional provision; that said provision was not intended to prevent the incorporation into a single act of the entire statutory law upon one general subject. We think this is a correct exposition of the purpose, meaning and rules for the application of this constitutional provision.

See also, *Cole v. Fruitland Canning Company*, 64 Idaho 505, 134 P.2d 603 (1943), and *State v. Doherty*, 3 Idaho 384, 29 P. 855 (1892). As each of the three provisions of House Bill 387 deals with income taxation and the computation of taxable income for Idaho income tax purposes, they appropriately belong in the same subject, and therefore do not cause H.B. 387 to violate art. III, § 16, by having more than one subject.

Art. III, § 16, further provides that the single subject of the act must be set forth clearly in the title to the act. As stated by the Idaho Supreme Court, the purpose of this provision:

. . . is to prevent fraud and deception in the enactment of laws, and to provide reasonable notice to the legislators and the public of the general intent and subject matter of the act.

See also, *Kerner v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360 (1978). The court stated this purpose slightly differently in *Federal Reserve Bank v. Citizens Bank and Trust Company*, 53 Idaho 316, 324-25, 23 P.2d 735 (1933) to the effect that:

the title *should not* be of such a character as to *mislead* or deceive, either the law making body, or the public as to the legislative intent. (emphasis added)

State v. O'Bryan, 96 Idaho 548, 555, 531 P.2d. 1193 (1975); *State ex rel. Graham v. Enking*, 59 Idaho 321, 335, 32 P.2d 649 (1938). See also, *State of Idaho v. Pioneer Nursery Company*, 26 Idaho 332, 336, 143 P. 405 (1914).

Yet the title of an act need not be an exhaustive compilation of the provisions contained therein. As stated by the court in *State v. O'Bryan*, 96 Idaho at 555: "The title of the legislative act must set forth the general subject, but need not serve as a catalog or index to the subject matter." (emphasis added) See also, *Golconda Lead Mines v. Neill*, 82 Idaho 96, 103, 360 P.2d 221 (1960) and *Idaho Gold Dredging Company v. Balderston*, 58 Idaho 692, 704, 78 P.2d 105 (1938).

A separate rule of law, however, has been established to deal with acts which amend existing provisions of the law. The distinction between the standards of review for titles of amendatory and original acts was enunciated in *State v. Jones*, 9 Idaho 693, 701, 75 P. 819 (1904), as follows:

[A] title to an amendatory act which amends a section or certain sections of a prior act is sufficient if the title refers to the section sought to be amended by number.

Apparently, therefore, the title to an amendatory act need not be as exhaustive as the court has required titles of original acts to be. See, *Barry v. Koehler*, 84 Idaho 170, 183, 369 P.2d 1010 (1962), in which the court commented:

This is an amendment to a previous act, and the title is sufficient, as it refers by number to the section being amended and is germane to the subject of the original act.

In *Hammond v. Bingham*, 83 Idaho 314, 362 P.2d 1078 (1961), the court reiterated this basic rule for review of titles to amendatory acts, but placed upon it a crucial, and in this instance determinative, limitation. In that case, the court dealt with a challenge to the validity of an act authorizing the issuance of certain school bonds. Plaintiffs sought to compel the clerk of a school district to counter-sign bonds whose issuance had been authorized by the school board of trustees. The clerk had refused to counter-sign the bonds due to uncertainty regarding the validity of their issuance which stemmed from an inconsistency between the title and the body of the act authorizing the issuance of such bonds. In that act, the legislature had amended a number of provisions of a single code section. The legislature referred to the code section in the title of the bill and proceeded to itemize *some, but not all*, of the specific amendments to the section. After reviewing the general rules for the review of sufficiency of titles, and reaffirming the general rule as it applies to amendatory acts, the court stated:

The rules as to original and amendatory acts are not wholly determinative here, for there is another problem presented by the title. In addition to the title stating that I.C. § 33-909 is being amended, it proceeds to particularize some, but not all, of the changes . . . *When such specifications are made, the legislation is limited to the matters specified and anything beyond them is void*, however germane it may be to the subject of the original act.

83 Idaho at 320.

Although in *Hammond v. Bingham* the court did not refer to the rationale upon which its decision was based, it is a logical outgrowth of the purpose of art. III, § 16 that titles not mislead readers about the content of a bill.

The burden of demonstrating the invalidity of a statute based upon an insufficient title was set forth in *Golconda Lead Mines v. Neill*, 82 Idaho at 103, as follows:

To warrant the nullification of a statute because its subject or object is not properly expressed in its title, the violation must not only be substantial but must be plain, clear, manifest and unmistakable.

See also, *State v. O'Bryan*, 96 Idaho at 55.

Applying the foregoing standards of review to House Bill 387, 1984 Session Laws, ch. 35, it is apparent that the rule laid down in *Hammond v. Bingham* is controlling. In this instance, although the title of the amendatory act referred to the section of the Idaho Code being amended, when its title referred to one specific change in § 63-3022 but omitted reference to the other substantive specific change in that section, the unspecified change, the repeal of § 63-3022(a) (1), must be deemed ineffective and void. *Hammond v. Bingham*, 83 Idaho at 320. In this instance, there is ample room to speculate that legislators and the public in general may have been misled or deceived by the title. Further, the omission in the title is "plain, clear, manifest and unmistakable," *State v. O'Bryan*, 96 Idaho at 555.

Art. III, § 16, provides that if a title is insufficient "such act shall be void only as to so much thereof as shall not be embraced in the title." Black's Law Dictionary, Revised Fourth Edition, defines "void" as "null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." Applying the rule of law enunciated in *Hammond v. Bingham*, the attempted repeal of § 63-3022(a) (1), if subjected to judicial scrutiny, should be found to be ineffective, causing that code section still to be a valid portion of Idaho law. While this opinion is advisory only and a binding, final determination can be provided only by a court of competent jurisdiction, we conclude that should a court be asked to rule upon the issue it would find Idaho Code § 63-3022(a) (1) not to have been repealed by H.B. 387 and therefore still a valid portion of Idaho law.

DATED This 28th day of August, 1984.

ATTORNEY GENERAL
STATE OF IDAHO

JIM JONES

ANALYSIS BY:

KENNETH R. McCLURE
Deputy Attorney General
Chief, Legislative/Administrative
Affairs Division

KRM/tal

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

AUTHORITIES CONSIDERED:

I. Constitutions:

Idaho Constitution art. III, § 16.

2. Statutes:

Idaho Code § 33-909

Idaho Code § 63-3002

Idaho Code § 63-3004

Idaho Code § 63-3022

3. Session Laws

Session Laws 1984, Chapter 35 (H.B. 387)

4. Idaho Cases:

Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978).

State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975).

Berry v. Koehler, 84 Idaho 170, 369 P.2d 1010 (1962).

Hammond v. Bingham, 83 Idaho 314, 362 P.2d 1078 (1961).

Golconda Lead Mines v. Neill, 82 Idaho 96, 350 P.2d 221 (1960).

Cole v. Fruitland Canning Company, 64 Idaho 505, 134 P.2d 603 (1943).

Idaho Gold Dredging Company v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

State ex rel. Graham v. Enking, 59 Idaho 321, 32 P.2d 649 (1938).

Federal Reserve Bank v. Citizens Bank and Trust Company, 53 Idaho 316, 23 P.2d 735 (1933).

Boise City v. Baxter, 41 Idaho 368, 238 P. 1029 (1925).

State of Idaho v. Pioneer Nursery Company, 26 Idaho 332, 143 P. 405 (1914).

State v. Jones, 9 Idaho 693, 75 P. 819 (1904).

State v. Doherty, 3 Idaho 384, 29 P. 855 (1892).

5. Other Authorities:

House Journal 47th Leg., 2d Reg. Sess. 1984 at p. 15

Black's Law Dictionary (rev. 4th ed. 1968)

ATTORNEY GENERAL OPINION NO. 84-11

SCOTT B. McDONALD
Director
Idaho Department of Employment
STATEHOUSE MAIL

RE: Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Idaho Department of Employment's promulgation of IDAPA 09.30.055 within the authority delegated to the director of the Idaho Department of Employment?

CONCLUSION:

Yes. The promulgation of IDAPA 09.30.055 was a proper exercise of the director's statutory authority under Idaho Code §§ 72-1333(b) and 72-1341(a).

ANALYSIS:

The State of Idaho, Department of Employment, was notified by letter dated September 6, 1984, from Secretary of Labor Raymond J. Donovan, that the U.S. Department of Labor had commenced conformity proceedings against it because:

. . . the Idaho unemployment compensation law has not been amended to conform to the requirements of clause (iv) of Section 3304(a)(6)(A), FUTA.

Conformity proceedings are initiated when the secretary of labor determines that a state's unemployment compensation law does not conform to certain provisions of the Federal Unemployment Tax Act (FUTA) which are required for federal certification. FUTA and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. However, a state qualifies for these benefits within a given taxable year, only if the secretary of labor certifies on October 31 of that year that the state's unemployment compensation program conforms to FUTA requirements. A final denial of certification by the secretary of labor to any state would subject that state to the loss of federal grants for administration of its unemployment compensation laws and public employment offices and would subject the private employers in that state to the loss of credits against the Federal Unemployment Tax.

Prior to notification of the conformity proceedings, the Idaho Department of Employment had taken action to conform its law to federal requirements by promulgating a rule that is a mirror image of the federal proposed draft language implementing clause (iv) of section 3304(a)(6)(A) of the Federal Unemployment Tax Act. The rule, IDAPA 09.30.055, provides as follows:

With respect to any services described in Section 72-1366(q)(1) and (2) of the Employment Security Law, benefits shall not be payable on the basis of ser-

vices in any such capacities as specified in Section 72-1366(q)(1) and (2) and (3), Employment Security Law, to any individual who performed such services in an educational institution while in the employ of an educational service agency. For purposes of this rule the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

Ref. Section 72-1366(q)(1)(2)(3) *Idaho Code*

The question presented is whether the promulgation of the above rule is within the authority delegated to the director of the Idaho Department of Employment.

In order for a rule promulgated by an administrative agency to be valid, it must be within the authority delegated to such agency. *State v. Heitz*, 72 Idaho 107, 238 P.2d 439 (1951). An agency may not use its delegated power either to abridge the authority given it by the legislature or to enlarge its powers beyond the scope intended by the legislature. *General Engineering, Inc. v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965). Statutory provisions control with respect to what rules may be promulgated by an administrative agency, as well as with respect to what fields are subject to regulation by it. *Urie v. Thompson*, 337 U.S. 163 (1949). Accordingly, an agency may not make rules or regulations which conflict with, are inconsistent with, or are contrary to, the statutes it is administering, or which are in derogation of, or defeat, the purpose of such statutes, *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980).

With respect to the rulemaking authority granted to the director of the Idaho Department of Employment, Idaho Code § 72-1333(b) provides:

The director shall have the power and authority to adopt, amend, or rescind such rules and regulations as may be necessary for the proper administration of this act, subject, however, to prior approval by the governor of the proposed action.

By Executive Order No. 83-9, the Honorable John V. Evans, Governor of the State of Idaho, delegated his right of prior approval under Idaho Code § 72-1333(b) to the director of the Idaho Department of Employment. Consequently, the director of the department of employment has broad authority to promulgate such rules as may be necessary for the proper administration of Idaho's Employment Security Law.

Idaho Code § 72-1341(a) specifically addresses the director's rulemaking authority with regard to his duty to cooperate with the United States Department of Labor. It provides, in pertinent part, as follows:

In the administration of this act, the director shall cooperate to the fullest extent, consistent with the provisions of this act, with the United States department of labor through the secretary of labor, *and is authorized and directed to take such action through the adoption of appropriate rules, regulations, administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under federal laws providing for federal - state cooperation in the administration of unemployment com-*

pensation laws, the reduction or prevention of unemployment, and the full development of the manpower resources of this state . . . (Emphasis added).

This statute not only authorizes, but directs the director of the department of employment to adopt appropriate rules to secure to the citizens of Idaho all advantages available under federal laws. Idaho Code § 72-1302(b) likewise evidences a legislative intent that the director exercise his authority to secure maximum benefits under federal law, specifically the Social Security Act, as amended. It states:

This law is enacted for the purpose of securing for this state the maximum benefits of the Act of Congress, approved August 14, 1935, known as the "Social Security Act," as amended, and to enable the workmen of Idaho to benefit from the provisions of said act.

The Idaho Department of Employment receives all of its funding for the administration of the unemployment insurance program pursuant to section 302(a) of the Social Security Act, 42 U.S.C. § 502. That section provides that a state must have its law approved by the secretary of labor under the Federal Unemployment Tax Act before the U.S. Secretary of the Treasury will grant money to the state's administrative fund in an amount that has been determined to be necessary for the proper and efficient administration of the state's unemployment compensation law.

The promulgation of IDAPA 09.30.055 by the Idaho Department of Employment was necessary for certification of Idaho's Employment Security Law, and consequently, for federal funding of the costs of administering Idaho's unemployment insurance program. In addition, the rule is not inconsistent with the Idaho Employment Security Law or any of the rules promulgated thereunder. Idaho Code § 72-1366(q) denies unemployment insurance benefits to employees of an educational institution "between terms" and during an "established and customary vacation period or holiday recess." The rule at issue complements Idaho Code § 72-1366(q) by applying its denial provisions to employees of educational service agencies who perform services in an educational institution. Finally, IDAPA 09.30.055 was reviewed and approved by subcommittees of the senate commerce and labor committee and the house business committee pursuant to Idaho Code § 67-454, which indicates that the rule is consistent with legislative intent. *Fredericks v. Kreps*, 578 F.2d 555 (5th Cir. 1978). Consequently, the promulgation of IDAPA 09.30.055 by the director of the department of employment was a proper exercise of his authority under Idaho Code §§ 72-1333(b) and 72-1341(a) of the Idaho Employment Security Law.

AUTHORITIES CONSIDERED:

1. Statutes:

Idaho Code § 67-454

Idaho Code § 72-1302(b)

Idaho Code § 72-1333(b)

Idaho Code § 72-1341(a)

Idaho Code § 72-1366(q)

Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(6)(A)(iv)

Social Security Act § 302(a); 42 U.S.C. § 502

2. Rules and Regulations:

IDAPA 09.30.055

3. Idaho Cases:

State v. Heitz, 72 Idaho 107, 238 P.2d 439 (1951).

4. Cases cited from other jurisdictions:

Urie v. Thompson, Mo., 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282 (1949)

Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980)

Fredericks v. Kreps, 578 F.2d 555 (5th Cir. 1978)

General Engineering, Inc. v. N.L.R.B., 341 F.2d 367 (9th Cir. 1965)

5. Other Authorities:

Executive Order No. 83-9, Governor of the State of Idaho

DATED this 27th day of September, 1984.

ATTORNEY GENERAL
STATE OF IDAHO

JIM JONES

ANALYSIS BY:

CAROL L. BRASSEY
Deputy Attorney General

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

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January 17, 1984

Senator David Little
Co-Chairman, JFAC
Representative Kitty Gurnsey
Co-Chairman, JFAC
STATEHOUSE MAIL

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

Dear Senator Little and Representative Gurnsey:

You have requested legal guidance regarding the appropriate rate of compensation for the Lieutenant Governor. Specifically, you have asked whether the Lieutenant Governor is to be compensated at the rate of \$25.00 or \$44.00 per day and whether this is to be paid only during a legislative session or during the interim as well. The compensation to which you refer is the per diem which is drawn by the Lieutenant Governor. Art. 4 § 19 of the Idaho Constitution states:

The Lieutenant Governor shall receive the same per diem as may be provided by law for the Speaker of the House of Representatives, to be allowed only during the sessions of the legislature.

That section goes on to add, however,

the legislature may provide for payment of actual and necessary expenses to the . . . Lieutenant Governor . . .

Accordingly, Art. 4 § 19 allows for the payment of per diem during the session and necessary expenses throughout the year. Idaho Code § 67-809 states:

The Lieutenant Governor, while performing the duties of his office on a day to day basis, shall receive his actual and necessary expenses, as such are defined in Art. 4 § 19 Idaho Constitution. The Lieutenant Governor, while serving as President of the Senate, shall receive the same unvouchered expense allowances on a day to day basis as are provided the Speaker of the House of Representatives. The actual and necessary expenses of the Lieutenant Governor on a day to day basis are hereby expressly defined as being the same total daily amount paid during the first sixty days of a regular session as unvouchered expense allowances to the Lieutenant Governor while acting as President of the Senate, . . . (emphasis added)

Essentially, the above language indicates that during the interim the actual and necessary expenses paid to the Lieutenant Governor "while performing the duties of his office on a day to day basis" shall be the same as the per diem allowance paid to the Lieutenant Governor during the session. Accordingly, the Lieutenant Governor should be reimbursed for his expenses at the same rate out of session for each period during which he is "fulfilling the duties of his office on a day to day basis" as he is paid during the session.

Next you have asked whether the rate of compensation is \$25.00 or \$44.00 per day. Art. 4 § 19 ties the rate of expenses paid to the Lieutenant Governor to those paid to the Speaker of the House of Representatives. Art. 3 § 23 of the Idaho Constitution creates the Citizens Committee on Legislative Compensation to establish the salary and expenses of legislators for each legislature. As you are aware, the recommendations of the Citizens Committee presented to the legislature on October 29, 1982, were rejected by HCR 10 of the First Regular Session of the 47th Idaho Legislature. That resolution states:

The rates of compensation and expenses in effect during the 46th Idaho Legislature are continued in full force and effect.

Similarly, the rates recommended by the Citizens Committee in 1980 were rejected by S.C.R. 103 of the First Regular Session of the 46th Legislature. Accordingly, the rate of pay now effective is that recommended by the Citizens Committee in 1978. As embodied in S.C.R. 103, 1981 Sess. Laws, p. 753, that rate is as follows:

[there shall be allowed] as unvouchered expense allowances during any session:

a. To each member of the legislature and a Lieutenant Governor who maintains a second home in Ada County during any legislative session, the sum of \$44.00 per day for each calendar day during a regular session, or during an extraordinary session or an organizational session;

b. To each member of the legislature and a Lieutenant Governor who does not maintain a second home in Ada County during any legislation, the sum of \$25.00 per day for each calendar day during a regular session, or during an extraordinary session or an organizational session.

As the current Lieutenant Governor does not maintain a second home in Ada County during the legislative session, he is entitled to an unvouchered expense allowance of \$25.00 per day while the legislature is in session and during the interim as a necessary expense according to § 67-809 Idaho Code for each day he is "performing the duties of his office on a day to day basis."

It has been suggested that because Art. 4 § 19 states "the Lieutenant Governor shall receive the same per diem as may be provided by law for the Speaker of the House of Representatives . . ." he should be reimbursed at the sum of \$44.00 per day because the current Speaker of the House of Representatives maintains a second home in Ada County during the legislative session. This analysis is erroneous in that it assumes the Lieutenant Governor has a right to the same unvouchered expense allowance as the Speaker of the House. Close scrutiny of Art. 4 § 19, however, indicates that the Lieutenant Governor is allowed "the same per diem *as may be provided by law* for the Speaker of the House of Representatives." The law to which Art. 4 § 19 refers is Art. 3 § 23 as implemented by § 67-406(b) Idaho Code which requires a Citizens Committee on Legislative Compensation to issue a recommendation for legislative compensation which is effective unless reduced or rejected by the legislature. The recommendation which the Citizens Committee made quite specifically provides for an expense allowance for the Speaker of the House and the Lieutenant Governor based upon whether they require a second home in Ada County during the session. It is quite clear, therefore,

that the Speaker of the House and Lieutenant Governor need not receive the same unvouchered expense allowances. Rather, the Lieutenant Governor must receive an expense allowance *upon the same basis* as the Speaker of the House. As a distinction between expense allowances for legislators who must bear the cost of maintaining a second home during the legislative session is provided in the Citizens Committee's recommendation and is quite reasonable, the Lieutenant Governor is paid "the same per diem as may be provided by law for the Speaker of the House of Representatives . . ." if he receives \$25.00 per day. That the current Speaker of the House is reimbursed at a higher rate because he requires a second residence in Ada County during the session does not require the Lieutenant Governor to receive the higher rate if he does not have the additional expense of maintaining a second residence.

In summary, the rate of expenses to be allowed the Lieutenant Governor is \$25.00 per day. This is to be paid as an unvouchered expense allowance for each day that the legislature is in session and as his actual and necessary expenses for each day he works as Lieutenant Governor "on a day to day basis." If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
DIVISION CHIEF - LEGISLATIVE
ADMINISTRATIVE AFFAIRS

KRM/tal

February 3, 1984

Representative Lydia Edwards
House of Representatives
STATEHOUSE MAIL

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

Dear Representative Edwards:

You have asked for legal advice concerning a question related to an official opinion we just issued to Mr. John Rooney, Director of the Department of Law Enforcement. Specifically, you have asked whether motor vehicle fuel taxes and registration fees can be used totally to fund the state police division of the department of law enforcement. As you know, fuel taxes and registration fees are required by art. VII, § 17 of the Idaho State Constitution to be used only for certain highway related purposes. According to the analysis presented in Attorney General Opinion No. 84-3, the operation of the department of law enforcement may be funded by these fees *only to the extent the operations relate to the various highway purposes* specified in art. VII, § 17. For example, if 90% of the state police activity is related to highway safety, then only 90% of the state police funding may come from motor vehicle fuel taxes and registration fees.

I have not made an attempt to determine what portion of state police activity is related to highway and traffic safety. I would note, however, that according to opinion 84-3, and *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432 (1959), a court will presume that the use of highway fees is appropriate and relates only to the permissible purposes. In this regard, at least 10% of the state police funding comes from the alcohol safety action account which is in no way related to art. VII, § 17 and therefore is not limited in its uses by the provision of art. VII, § 17. See 1983 Sess. Laws, C. 271, § 2. Further, the main appropriation for the state police comes from the Idaho Law Enforcement Account. This account is found in § 49-1301 Idaho Code and consists of 1/3 of the money received from drivers licenses and chauffeurs licenses and 1/3 of motor vehicle registration fees. It should be noted, that only the vehicle registration fees are limited by the provisions of art. VII, § 17.

Accordingly, as substantial money is appropriated to the state police from sources other than those restricted by art. VII, § 17, and because *Rich v. Williams* indicates that a court is to presume the moneys limited by art. VII, § 17 are spent only on permissible purposes, unless it is shown affirmatively that the funds derived from art. VII, § 17 sources are expended on impermissible purposes the appropriation is valid. In other words, unless it can be shown that the state police activities unrelated to traffic safety are funded or subsidized by fuel taxes and registration fees, the appropriation will be deemed to be valid.

I have made no attempt to determine what portion of state police activity relates to highway uses and non-highway uses. Nor have I made any attempt to determine which percentage of the funding for the state police is derived from vehicle registration fees and fuel taxes. It is quite clear, however, that the state police may not be funded by fuel taxes or registration fees to any greater extent than their duties and activities relate to the enforcement of the traffic laws and highway safety.

If I can be of further assistance, please contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief-
Legislative/Administrative
Affairs

KRM/tal

February 14, 1984

Honorable Raymond G. Parks
Representative, District 27
House of Representatives
Statehouse Mail

Re: *Public Libraries*

Dear Representative Parks:

You have asked for our analysis concerning the powers and duties of a library board, particularly one which is operated by a school district.

Idaho Code § 33-2601 provides that

. . . the board of trustees of any school district in which is situated no incorporated town or village having a population in excess of 1,000 and in which no public library is maintained under any other provision of law, shall, . . . upon petition and after an election levy annually thereafter, upon the assessed value of taxable property in the school district, a tax not to exceed three mils for the purpose of establishing and maintaining such library and the procuring of suitable building or rooms therefor.

The board of trustees of any school district which establishes a public library under the provisions of this section shall perform the duties required of, and have the power and authority granted to, the council, commissioners, or board of trustees of any city or village under the provisions of law relating to library districts, and the treasurer of the school district shall serve as treasurer for said public library.

The board of trustees of the school district, serving as the board of trustees of the library, may contract for specified services within an existing library district or public library, and may submit to the school district electors of the district, at an election called and conducted as provided herein but without precedent petition, the question whether the public library established hereunder shall become part of an existing library district organized under the provisions of law. (emphasis added)

The foregoing section authorizes the establishment of a public library by a school district. Furthermore, the school district trustees are authorized to levy a tax to support the library, to procure suitable buildings or rooms and to serve as the board of trustees of the library. Therefore, in response to your first question, there appears to be no conflict in the law with the school board serving as the library board.

The statute provides that the board of trustees shall perform its duties under the provisions of law relating to library districts. Those provisions are found in chapter 27, title 33, Idaho Code. The powers and duties of the trustees under the library district law are found at Idaho Code § 33-2712. Among those powers are the usual ones attributed to special districts, i.e., the ability to make rules and regulations, provide for

suitable facilities, to purchase, lease or otherwise hold and own real property, to issue warrants, to pay necessary expenses, to invest idle funds, and generally "to exercise such other powers not inconsistent with law necessary for the effective use and management of the library."

The duties of the treasurer of the library district are set forth in Idaho Code § 33-2715 wherein it is stated that:

such person shall, on taking office, give bond to the library district, with sureties approved by the board of trustees, in the amount of \$1,000 . . . conditioned upon faithful performance of the duties of his office and *his accounting for all monies of the library district received by him or under his control. All monies raised for the library district by taxation or received by the district from all other sources shall be paid over to him and he shall disburse the funds in the district upon warrants drawn on by order of the board of trustees pursuant to vouchers approved by the board . . .* (emphasis added)

Thus, although the board and the treasurer of the library may be the same as the board and treasurer of the school district, they nonetheless have separate obligations under the library district law to manage the affairs of the library. For instance, the treasurer would be prohibited by his fiduciary obligations to the library to mingle funds of the library with those of the school district. Furthermore, the required accounting of all the library funds would certainly militate against any use of those funds for other than library purposes.

Formal agreements for the services rendered by one governmental entity to another or for the use of public facilities by one which is owned by another are always advisable. However, a thorough reading of the library district law provides no requirement that any such formal agreements be entered into between the school district and a library which it has created. Potential problems obviously would exist if the school district attempted to charge off overhead costs to the library without some form of written agreement detailing the nature and calculation of those costs. Without such a formal agreement the trustees of the library might incur some liability for failing to adequately account for the disbursement of the library funds. Any discussion of this, however, is merely speculative without some factual basis which would give rise to the suspicion that monies were not being handled properly. Suffice it to say, that trustees of any public entity have both a moral and legal obligation to assure that they fairly and adequately represent and protect the interests of the entity which they serve.

We have discovered several inconsistencies in the library law as it applies to school districts. For instance, Idaho Code § 33-2601 is found in title 33, chapter 26, entitled Public Libraries. That chapter deals with the establishment and operation of city libraries and was originally enacted in 1901. The present Idaho Code § 33-2601 was adopted in 1963 and is an amended version of the former § 33-2602 adopted in 1901. It was left in chapter 26 rather than placed in chapter 27 which contains the Library District Law. Thus, it could be argued that the legislature intended that libraries created by school district trustees should operate under the statutes governing city libraries. Further support for this position could be found in the fourth paragraph of section 33-2601 wherein it is stated that "the board of trustees . . . shall perform the duties required of, and have the power and authority granted to the council, commissioners, or board

of trustees of any city or village. . . .” Therefore, we could argue that school libraries were to be governed by the same provisions which govern city libraries, i.e. title 33, chapter 26. However, there is a glitch in all this. The remainder of the sentence setting forth the school district trustees’ responsibilities goes on to say that they shall carry them out “under the provisions of law relating to library districts. . . .” This language replaced that of the former § 33-2602 which had school districts operating under city library law. Thus, it appears to be the intent of the legislature that school districts are to be governed by library district law. However, this creates an inconsistency since library district law does not appear to contain any power and authority for city councils. Some correction of the statute is obviously in order.

Another inconsistency arises in § 33-2601 based on the preceding analysis. If the school board of trustees is to act in the same capacity as the city council, then they would not be able to serve as the board of trustees of the library. Idaho Code § 33-2602 provides that the city council shall appoint five library trustees to govern the library. Furthermore, if the library were to be operated in the same manner as a city library, Idaho Code § 33-2602 requires that any monies levied for the library fund “shall be kept by the treasurer separate and apart from other monies of the city or village and be used exclusively for the purchase of books, periodicals, necessary furniture and fixtures and whatever is required for the maintenance of such library and reading room. . . .” In addition, according to Idaho Code § 33-2604, the trustees of the library “. . . shall have the exclusive control of the expenditure of all monies collected for the library fund, and the supervision, care and custody of the room or buildings constructed [sic], leased or set apart for that purpose. . . .”

If the school district library were operated as a city library, there would have to be a separate board of trustees and a separate account for the library funds from which only the trustees could spend. On the other hand, if the school district library were operated according to the literal reading of § 33-2601 and the law governing library districts, then the school district trustees could also serve as the trustees of the library. However, normal accounting practices and fiduciary obligations of public officials would require that separate accounts be maintained between library funds and school district funds and, further, that an accounting be made of the expenditure of those funds. Although not stated in the law, good business practice would probably require that some agreement be made between the library and the school district for any charges levied against the library fund for the use of school district facilities.

While we render no official opinion as to the actual requirements of Idaho Code § 33-2601, we can say with certainty that it could stand some revision.

Sincerely,

Robie G. Russell
Deputy Attorney General
Chief, Local Government

RGR:ams

February 15, 1984

The Honorable Lawrence Knigge
Idaho House of Representatives
STATEHOUSE MAIL

Dear Representative Knigge:

This morning you asked for legal guidance concerning the ability of the senate to amend House Bill 475, known as the School Improvement Act of 1984. Specifically stated, your question is "this bill provided for a \$20.3 million increase for the public schools. It is possible for the senate to amend this legislation to add a tax increase to fund this amount?" As you know, art. III, § 14 of the Idaho Const. states:

Bills may originate in either house but may be amended or rejected in the other, except that *bills for raising revenue shall originate in the house of representatives.* (emphasis added)

At the outset, it is important to determine what House Bill 475 is and what it is not. Basically, the bill establishes a teacher excellence program by adding ch. 13 to title 33, Idaho Code. Further, it makes various alterations to title 33, ch. 5 dealing with contracts for public school teachers. Finally, it amends § 63-3029A to allow income tax credits for contributions to public schools, public libraries, and certain private elementary schools. House Bill 475 contains no provision for the raising of revenue. It is a bill relating to schools rather than a bill raising revenue.

Even though the strict requirements of art. III, § 14, when read literally would not be offended, because House Bill 475 did originate in the house, the purpose of art. III, § 14 would not be served. In *Dumas v. Brian*, 35 Idaho 557, 563, 207 P. 720 (1922), the court stated the purpose of art. III, § 14 to be:

Laws for raising revenue are an exercise of one of the highest prerogatives of government, and confer upon taxing officers authority to take from the subject his property by way of taxation for the public good, a burden to which he assents only because it being necessary in order to maintain the government, and the people have accordingly reserved the rights to determine this necessity by that body of the legislature which comes most directly from the people, the house of representatives.

If the senate were allowed by the terms of art. III, § 14 to attach revenue raising amendments to any non-revenue raising bill, such as House Bill 475 the protection and guarantee provided by art. III, § 14 effectively would be negated. If art. III, § 14 is read only to require that revenue measures which originate in the senate must be placed as amendments on house bills, rather than having an independent status of their own, art. III, § 14 would be of little effect.

This is not to say that the senate may not amend a revenue measure which has originated in the house. As the Idaho Supreme Court stated in *Worthen v. State*, 96 Idaho 175, 179, 525 P.2d 957 (1974):

To prohibit the senate from amending house originated revenue bills, would be an obstruction of the legislative process. Art. III, § 14 must be read to require that revenue bills originate in the house, and that the senate is permitted to amend such bills.

I have searched diligently in the time permitted since this question was posed this morning for a case from any other state or federal court which would shed light upon this question. I have been unable to find such a case, however, and therefore must rely upon the general principles I have set forth above, which lead me to conclude that House Bill 475 may not be amended in the senate to add a tax increase to fund the appropriation for public schools. If you have any further questions, I would be happy to discuss this matter with you.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Chief, Legislative/
Administrative Affairs

KRM/tg

February 22, 1984

The Honorable Terry Sverdsten
Idaho State Senator
Statehouse Mail

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

Dear Senator Sverdsten:

Our office is in receipt of your letter requesting legal advice on the authority of the Department of Fish and Game to enforce road closures initiated by public or private landowners, for wildlife management purposes or for other reasons.

Issues

As I understand your request, two issues are presented:

1. Does the Department of Fish and Game have authority to enter into cooperative road-closure agreements for wildlife management or other purposes?
2. If the Department has authority to enter into such agreements, does it have power to enforce them?

Conclusions

1. The Department of Fish and Game has authority to enter into cooperative road closure agreements but only for wildlife management purposes.
2. While the Department can enter into the cooperative road closure agreements, it has no power to enforce such closures.

Analysis

Initially it is important to note that there are many types of "roads" in this state. Our research indicates that the Department would not have the authority to close certain types of roads. The Department does not have the power, for example, to unilaterally close state highways. Idaho Code § 40-120 (19) vests that authority in the State Transportation Board. The authority to close county highways rests with boards of county commissioners, *see* Idaho Code §§ 40-1611 and 40-1614; and boards of good road commissioners, *see* Idaho Code § 40-1503A. Neither does the Department have authority to unilaterally close roads on publicly held lands (Forest Service, Bureau of Land Management, State Department of Parks and Recreation, for example), as that jurisdiction is vested in the controlling agency.

The Department *can* close roads under two circumstances: 1) where the roads are on property actually controlled by the Department; and 2) by cooperative agreement.

Idaho Code § 36-104(b)(9) provides that the Idaho Fish and Game Commission may:

Enter into cooperative agreements with state and federal agencies, municipalities, corporations, organized groups of landowners, associations, and individuals for the development of wildlife rearing, propagating, management, protection and demonstration projects.

But this authorizing language limits closures to wildlife management projects and does not include the power to enter into cooperative road closure agreements for other purposes.

While the Department has a limited power to enter into cooperative agreements for road closures, it has virtually no way to enforce such closures. The Department can issue regulations concerning some of its functions (seasons, restrictions and conditions upon hunting, trapping, and fishing), but it does not have authority to issue regulations in enforcement of cooperative road closures.

Without the authority to promulgate regulations to enforce cooperative closures, private road closures can only be enforced by the use of the criminal trespass statutes, with the private landowners as complainants. Closures on federal property present a different problem. Federal agencies such as the Forest Service and Bureau of Land Management have the power to enact their own regulations closing roads and making violations of the closure illegal. *See*, e.g. 16 U.S.C. § 551 which allows the Secretary of Agriculture to enact regulations concerning the national forests and providing that violations of such regulations shall be misdemeanors. However, state agencies, such as the Department of Fish and Game, have no power to enforce the federal regula-

tions. Other than Idaho Code § 36-1102 which makes it a state misdemeanor to violate federal regulations issued pursuant to the Federal Migratory Bird Treaty Act, there are no Idaho statutes making it a criminal offense to violate a federal regulation.

In conclusion, the Department can enter into cooperative road closure agreements with a wide variety of agencies, organizations, and individuals. However, the purpose for which it may enter into those agreements is severely restricted. Finally, even if it does succeed in closing a road by cooperative agreement, the Department has no way to enforce the closure. On private roads, the Department must rely on criminal trespass statutes and the private landowner. If the closure involves a federally controlled road, the state must rely on the appropriate federal agency to enforce the closure. This leaves the Department in the unfortunate situation of having a right, however limited, without a remedy.

If you desire, the Attorney General's Office would be happy to assist you in drafting legislation clarifying the authority of the Department of Fish and Game with respect to cooperative road closures. I hope this guideline has been of assistance. Please feel free to contact this office if we can be of further assistance.

Sincerely,

Rinda Ray Just
Deputy Attorney General

RRJ:ams
cc: Jerry Conley

February 27, 1984

Mr. Steve Swadley
Division of Insurance Management
Department of Administration
STATEHOUSE MAIL

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

Dear Mr. Swadley:

The Attorney General has asked me to respond to your letter of February 13, 1984, requesting legal guidance. You indicate in your letter that the state risk manager has encountered difficulty in investigating certain tort claims as a result of the reluctance of some agencies to release information. Apparently, this reluctance is rooted in confidentiality statutes, such as Idaho Code § 66-348, (which prohibits the Department of Health and Welfare from disclosing information regarding mental patients).

As you may know, the power and duties of your office relevant to risk management are statutorily delineated in Idaho Code § 65-5773. Subparagraph (d) of that section provides that you shall: “[a]dminister all such coverages on behalf of the insured, including making and settlement of loss claims arising thereunder.” The “insured” to which reference is made in the preceding quotation includes “all offices, departments, divisions, boards, commissions, institutions, agencies and operations of the government of the State of Idaho . . .” Idaho Code § 65-5773(a).

This broad statutory authorization arguably evidences a legislative intent that the risk manager is to be afforded access to all information necessary to the performance of his duties which include the “settlement of loss claims.” Without this right of access, the risk manager is obviously handicapped in fulfilling his statutory charge. Accordingly, it may be possible to argue that § 65-5773 represents a gloss on pre-existing confidentiality statutes.

In addition, a fairly persuasive argument can be made that the communication of otherwise confidential information to the risk manager for use in connection with the defense of a claim is not violative of a confidentiality requirement such as that found in § 66-348. The risk manager functions as the representative of the agency against which the claim is made; any transmittal of information to the risk manager is seemingly similar to legitimate “information sharing” among the agency’s internal staff.

Further, in a hypothetical such as that cited in your letter where the claimant is the individual to whom the otherwise confidential information pertains, it is likely that a strong argument can be constructed that the individual has implicitly consented to the release of this information. It is clear in this state that the “consent” of a person to the disclosure of confidential communications may be implied from his own conduct. When that conduct involves a certain degree of disclosure, the courts have held that fairness requires that the privilege of confidentiality ceases — whether the individual intended that result or not. See, *Skelton v. Spencer*, 98 Idaho 417, 565 P.2d 1374 (1977); and authorities cited therein. The nature of the conduct which constitutes a “consent” is gauged on a case by case basis.

However, you should be aware that the authorities are unclear as to whether the sharing of confidential information between government agencies, even in the context of the preparation of a defense to a claim, is lawful. See, e. g. Annot. “Confidentiality of Welfare Records” 54 A.L.R. 3d 768. In view of the fact that disclosure of certain information is sanctioned by criminal penalties, the reluctance of the agencies to reveal it is understandable. The existing state of the law would seemingly provide fertile ground for litigation on these issues and we are unable to conclusively advise that the agencies have no exposure in transmitting “confidential” information to the risk manager. It may well be that the courts would review each case on its individual facts.

It would seem that these concerns can most easily be resolved through legislation which clearly sets forth the right of all the various agencies to convey all information relevant to pending claims to the risk manager so that he may be fully advised of all pertinent facts and circumstances in making his evaluation of a claim. In view of the sensitivity of this kind of information, it may also be wise to include in any proposed statutory revision appropriate safeguards against unnecessary disclosure of this information to third parties.

Thank you for allowing our office the opportunity to comment on your inquiry. If you have any additional questions, please call at any time.

Sincerely,

P. MARK THOMPSON
Deputy Attorney General
Chief, Administrative Law
and Litigation Division

PMT/tg

February 29, 1984

The Honorable Christopher R. Hooper
Chairman, Health and Welfare Committee
Idaho House of Representatives
Statehouse Mail

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

Dear Representative Hooper:

You have asked whether the Idaho Department of Health and Welfare or its Idaho Designated Planning Agency has legal authority to promulgate rules and regulations governing health care activities subject to 1122 review. It is my understanding that you are principally concerned whether the state statutory authority or basis normally envisioned by the Idaho Administrative Procedure Act exists. Idaho Code §§ 67-5201 & 67-5218.

Even though the rules and regulations in question do not cite the state statutory authority upon which they are based, it appears that state as well as federal statutory authority exists. The pertinent Idaho provisions are Idaho Code §§ 56-201(o); 56-202; 56-203(a), (b), (g); 56-209b (Supp. 1983).

Idaho Code § 56-202 generally directs the Idaho Department of Health and Welfare to administer public assistance and social services and Idaho Code § 56-209b, as part of the program of public assistance, requires the department to award medical assistance. Idaho Code §§ 56-209b (Supp. 1983) and § 45-201(o) expressly tie the state medical assistance program to title XIX of the Social Security Act. At this point in analysis, the pertinent part of Idaho Code § 45-203 is particularly instructive:

The state department shall have the power to:

- (a) Enter into contracts and agreements with the federal government through its appropriate agency or instrumentality whereby the State of Idaho shall receive federal grants-in-aid or other benefits for public assistance or public

welfare purposes under any act or acts of congress heretofore or hereafter enacted.

(b) Cooperate with the federal government in carrying out the purposes of any federal acts pertaining to public assistance or welfare services, and in other matters of mutual concern.

It is relevant but not determinative to note that the power to contract and cooperate with the federal government concerning public assistance is not, in the context of medical assistance, limited to title XIX of the Social Security Act.

The last pertinent Idaho statute, Idaho Code § 56-202(b), delegates and grants to the department the responsibility and power of establishing not only the rules and regulations but also “such methods of administration *as may be necessary or proper to carry out the provisions of this act* [Title 56, ch. 2, Idaho Code].” (Emphasis added)

The pertinent federal provision covering 1122 reviews by designated planning agencies provides for agreements between the federal government and a state to implement the 1122 review program. The provision is found at Social Security Act § 1122, 42 U.S.C. § 1320a-1. Such an agreement has been made between the Secretary of the United States Department of Health and Human Services and the State of Idaho. Although § 1320a-1 is placed in a portion of the Social Security Act other than title XIX, congress intended 1122 reviews to be an integral part of title XIX programs. Section 1320a-1 provides that its purpose is to assure that federal funds appropriated for state use under title XIX are “not used to support unnecessary capital expenditures. . . of health care facilities which are reimbursed under [title XIX] . . .”

The test for determining the threshold question of whether rules and regulations have a statutory basis has been stated in various forms. Two variations seem particularly relevant to your inquiry. First is the rule that the validity of a rule or regulation will be sustained so long as a *reasonable relationship* exists between the rule and the enabling legislation. *Mourning v. Family Publication Service Inc.*, 411 U.S. 356 (1973); *Compton v. Tennessee Department of Public Welfare*, 532 F.2d 561 (6th Cir. 1976); *Maple Leaf, Inc. v. State*, 88 Wash.2d 276, 565 P.2d 1162 (1977). This is particularly so where the empowering provision of the statute, such as Idaho Code § 56-202, states simply that an agency may make such rules *as may be necessary to carry out the provisions of this act*. *Mourning v. Family Publication Service Inc.*, 411 U.S. 356 (1973). Secondly, the companion principle provides that it is not necessary that the legislative authority be set in express terms where the rule or regulation may be reasonably implied to carry out the purposes of the statutory scheme as a whole. *Longbridge Inc. Co. v. Moore*, 23 Ariz. App. 353, 533 P.2d 564 (1975). See, generally, *Tappen v. State*, 102 Idaho 807, 641 P.2d 994 (1982).

Applying these legal principles, it is likely that the 1122 review regulations reasonably relate to the purposes of title 56, ch. 2, Idaho Code. Idaho Code §§ 56-209b and 56-201(o) clearly indicate the dependent relationship between the state and federal (especially title XIX) medical assistance programs. Idaho Code § 56-203(a) and (b) give the department great latitude in interfacing with the federal government to insure compliance with the purposes of federal medical assistance legislation. 42 U.S.C. § 1320a-1, although not placed in title XIX, pertains to the purposes of the title as well

as federal medical assistance generally. This is not a case where the department was the creator of the concept of 1122 reviews by designated planning agencies. Consequently, legal authority — a statutory basis — *probably* exists for the regulations. A higher degree of certainty in the conclusion is precluded. The general nature of the Idaho statutes as well as placement and topic of 42 U.S.C. § 1320a-1 render the relationship between Idaho Code and regulations somewhat attenuated.

I hope this letter has answered your concerns. If you have further questions, please contact me.

Sincerely,

LARRY K. HARVEY
Chief Deputy Attorney General

LKH/tal

March 1, 1984

Honorable JoAn E. Wood
Representative, Dist. 20
Statehouse Mail

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

Dear Representative Wood:

Our office has received your letter requesting legal advice on the power of the director of the department of health & welfare, to enter onto private property for health & welfare, to enter onto private property for investigatory and inspection purposes.

ISSUE

Your precise question, as I understand it, is this:

Must the director of the department of health and welfare, or his designee, have consent or a warrant before entering upon private property in order to investigate or inspect pursuant to Idaho Code § 39-108?

CONCLUSION

Except in certain carefully defined circumstances, entry upon private property for purposes of investigation or inspection under Idaho Code § 39-108 requires consent or a warrant.

ANALYSIS

The Environmental Protection and Health Act of 1972, Idaho Code § 39-101 et seq., gives the director of the department of health and welfare broad powers to supervise

“the promotion and protection of the life, health, mental health and environment of the people” of Idaho. Idaho Code § 39-105(3). Among the enumerated powers of the director is the authority of the director or his designee to:

- a. Conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential health hazards, air contamination sources, water pollution sources, noise sources, and of solid waste disposal sites;
- b. Enter at all reasonable times upon any private or public property for the purpose of *inspecting or investigating* to ascertain possible violations of this act or rules, standards and regulations adopted and promulgated by the board. (emphasis added).

This specific grant of statutory authority would appear to allow warrantless entry when consent is denied. However, this statute must be examined in light of three United States Supreme Court decisions which limit warrantless entry onto private property for the purposes expressed in Idaho Code § 39-108.

Since 1967 the Court has ruled on three cases in which the situations were similar to that posed by your question. *See, Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930, 87 S. Ct. 1727 (1967); *See v. Seattle*, 387 U.S. 541, 18 L.Ed.2d 943, 87 S. Ct. 1737 (1967), and *Marshall v. Barlow's Inc.*, 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct 1816 (1978). Roland Camara had refused to allow building inspectors to inspect his residence without a warrant and, as a result, criminal charges were brought against him. While awaiting trial, Camara sought to prevent proceedings in the criminal court alleging that the San Francisco ordinance authorizing the inspection was unconstitutional. The Supreme Court held that under the Fourth Amendment, Camara had a constitutional right to insist that the inspectors obtain a warrant before searching his residence.

The Court's analysis began with the proposition that “except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonably [sic] unless it has been authorized by a valid search warrant.” *Camara*, 387 U.S. at 528, 18 L.Ed.2d at 935. While the Court recognized the necessity of this type of inspection to enforce minimum fire, housing and sanitation standards, it was of the view that requiring a warrant would not defeat the purposes of the inspections. Additionally, the Court expressed its concern that while a:

routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime . . . [i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. *Id.* at 530, 18 L.Ed. 2d 936.

The Court then noted that enforcement of regulatory laws often included the use of criminal process and, in fact, in *Camara's* case, mere refusal to permit inspection was a criminal offense.

The Court was careful to point out that its decision in *Camara* did not foreclose the use of prompt, warrantless inspection under exigent circumstances which have been

traditionally upheld (seizure of unwholesome foods, and health quarantines, for example).

See v. Seattle, which was decided the same day as *Camara*, extended the *Camara* holding to commercial buildings. In *See*, the defendant had been convicted in a Washington state court of refusing to allow a representative of the City of Seattle Fire Department to inspect his locked warehouse without first obtaining a warrant. His conviction was reversed by the United States Supreme Court, holding that the Fourth Amendment forbids warrantless inspections of commercial structures as well as of private residences. In *See*, the Court took care to make clear that the holding did:

not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as *licensing programs* which require inspections prior to operating a business or marketing a product.

See, supra at 545, 18 L.Ed.2d at 947 (emphasis added).

Finally, *Barlow, supra* was an action to obtain injunctive relief against a warrantless inspection of a business premises pursuant to the Occupation Safety and Health Act of 1970 (OSHA). That act empowers agents of the secretary of labor to search the work area of facilities within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. The Court held that the particular OSHA section authorizing warrantless inspections violated the Fourth Amendment. The Court also set forth the standards to be used by the courts in issuing warrants under these circumstances.

The Court in *Barlow* held that probable cause in the criminal sense was not required to obtain a warrant. That standard would have required that before a warrant could be issued, the person seeking the warrant would have to have probable cause to believe that conditions violative of the applicable statute, code, or regulation existed on the premises. This would present obvious obstacles to the administrative searches at issue here and in *Camara, See* and *Barlow*.

For purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]". (citing *Camara*, 387 U.S. at 538).

Barlow, supra at 320, 56 L.Ed.2d at 316. *Camara* explained that the "reasonable administrative standards" would vary with the program being enforced but could be based on "the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area." *Camara, supra* at 538, 18 L.Ed.2d at 941.

In order to answer your particular question, all three of the discussed cases need to be considered. If the Idaho statute is examined in a manner similar to the analysis used by the U.S. Supreme Court, the first premise is that except for certain classes of cases, a search of private property, whether a residence or a commercial building, without consent, is unreasonable unless authorized by a warrant. Inspections will require consent or warrant except in certain situations. One exception is the traditional

exception for emergencies. Another exception would evidently exist for pervasively regulated businesses such as those involving liquor or firearms. *Barlow, supra*. This is similar to the exception expressed in *See* that would apply to businesses operating under permits or licenses, acceptance of which evidences consent to reasonable warrantless inspections.

Investigatory searches such as those authorized by Idaho Code § 39-108 were not specifically dealt with by the Court in *Camara*, *See* and *Barlow*. As a result, it cannot be assumed that such entries will be handled by the courts in the same manner as inspections. Depending upon the circumstances, entries for investigatory purposes could be "more hostile" intrusions than are mere inspections. In such circumstances "reasonable legislative or administrative Standards" alone may not be sufficient to obtain a warrant when consent is denied.

In conclusion, the answer to your question varies depending on the purpose of the entry, whether for investigation or inspection; the type of premises, whether residence or commercial building; the type of business involved, whether pervasively controlled, or operating under a permit or license evidencing consent to reasonable searches; and the reason for the entry, whether to avert an immediate threat to the public health and welfare, or merely to ensure compliance with regulations. Whatever the situation, the caveat is that warrantless intrusions are the *exception* to the rule, and that generally, absent consent, warrants will be required.

While the three cases discussed above appear to make Idaho Code § 39-108 meaningless, the statute is still important in one crucial respect. The statute gives the director of the department of health and welfare or his agent the power to seek a warrant in those cases where consent to inspect has been refused. Without that particular section, the director would lack statutory authority to seek a warrant should consent to enter a premises be denied.

I hope this guideline has been of some help. If we can be of further assistance, do not hesitate to contact this office.

Sincerely,

RINDA RAY JUST
Deputy Attorney General

RRJ/tal

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 5, 1984

Senator Reed Budge
Senate
Statehouse Mail

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

Dear Senator Budge:

You have asked for an interpretation of § 49-132, Idaho Code, as it would be amended by H.B. 561. Generally, this section deals with penalties to be assessed against trucks which are operated above their declared maximum gross weight. The pertinent portion of § 49-132, Idaho Code, states:

Any person who shall operate or cause, permit, or suffer to be operated upon any highway of this state, any vehicle with a maximum gross weight in excess of the maximum gross weight for which the same has been registered under the provisions of this chapter shall be deemed to have set a new maximum gross weight and shall, in addition to any penalties otherwise provided in this section, be required to pay the additional fees as the new maximum gross weight; . . .

Specifically, I understand your question to be: "What is the effect of the provision which requires individuals who operate above their declared maximum gross weight to pay additional fees according to a new maximum gross weight?"

Your question can be answered without addressing the very involved and exceedingly complex determination of what is an allowable gross weight for a particular vehicle according to §§ 49-901 and 49-901A, Idaho Code. The provisions of § 49-132 in question, provide that a vehicle which operates over its maximum gross weight is deemed to have set a new maximum gross weight. The term "maximum gross weight" is defined in Idaho Code § 49-101 (f) as:

The scale weight of a vehicle, equipped for operation, to which shall be added the maximum load to be carried thereon as declared by the owner in making application for registration.

The maximum gross weight of any vehicle (within limits imposed by statute) is determined by the owner of the vehicle, but may not be less than the weight of the vehicle equipped for operation and may not be more than allowed by §§ 49-901 or 49-901A, Idaho Code. Accordingly, if an individual operates a vehicle in excess of its registered maximum gross weight but less than the total allowable gross weight provided by §§ 49-901 or 49-901A, that person "shall be deemed to set a new maximum gross weight" and must pay the additional fees provided in § 49-127, Idaho Code, for the new maximum gross weight. If, however, the vehicle's registered maximum gross weight is as high as permitted by §§ 49-901 or 49-901A, the individual is precluded from obtaining a new maximum gross weight and paying fees therefor. If this were not the case,

the load limits of §§ 49-901 and 49-901A would be defeated by § 49-132 which would provide an independent means of obtaining a higher maximum gross weight.

Although there apparently is nothing which directly prohibits the declaration of a maximum gross weight in excess of the allowable load limits of §§ 49-901 or 49-901A, a court is required, in so far as it is reasonable, to construe two statutes together in harmony. See *Magnison v. Idaho State Tax Commission*, 97 Idaho 917, 920, 556 P.2d 1197 (1976) and *Sterns v. Graves*, 61 Idaho 232, 242, 99 P.2d 955 (1940). Similarly, in construing two statutes, the courts consider the effects of alternative constructions of a statute. See *State ex rel. Evans v. Click*, 102 Idaho 443, 448, 631 P.2d 615 (1981) and *Higginson v. Westergard*, 100 Idaho 687, 691, 604 P.2d 51 (1979). Finally, courts generally avoid constructions of statutes which produce harsh or absurd results. See *Gavica v. Hanson*, 101 Idaho 58, 60, 608 P.2d 861 (1980).

Because § 49-127 imposes a "registration fee for operating each motor vehicle, trailer, or semi-trailer upon the highways of the State of Idaho . . ." depending on the type of vehicle and its weight, the purpose of § 49-127 would not be furthered by requiring payment of a registration fee in excess of the maximum gross weight for which a particular vehicle may be registered. Further, it would be a harsh or absurd result to require a vehicle operator to pay higher fees on every load simply because one load is overweight, without allowing him the opportunity to carry the load for which he will continue to pay the applicable fees. It's my conclusion, therefore, that a court most probably would read §§ 49-901 and 49-901A to place a limit upon the maximum gross weight of a particular vehicle.

Accordingly, § 49-132 should not be read to require a vehicle which is registered at its maximum gross weight allowable by §§ 49-901 and 49-901A to declare a higher gross weight and pay higher fees associated therewith. The provision for declaration of a higher gross weight and payment of fees accordingly, should be limited to vehicles with a registered maximum gross weight lower than the maximum allowable gross weight, which operate above their registered maximum gross weight but less than their maximum allowable weight.

I hope that this has answered your questions satisfactorily. If you have further concerns, please contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief/Legislative
Administrative Affairs

KRM/tal

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 15, 1985

Senator Walt Yarbrough
Senate
STATEHOUSE MAIL

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

Dear Senator Yarbrough:

You have asked whether H.B. 570 would be constitutional or whether it would be pre-empted by provisions of federal law. My conclusion is that the bill itself and the conduct it authorizes would be constitutional if enacted.

H.B. 570 amends § 23-1033, Idaho Code, to allow certain transactions between wholesalers and retailers of beer. Specifically, the bill would allow wholesalers to provide labor and assistance to retailers to design a schematic and stock the shelves of a retailer's beer section. Currently, it is unclear whether the section permits such assistance. A Federal Administrative Law Judge with the Bureau of Alcohol, Tobacco and Firearms in 1983 determined that Idaho Code § 23-1033 did not permit such assistance.

A response to your question must begin with an analysis of 27 U.S.C. § 205 which is a portion of the Federal Alcohol Administration Act, enacted in 1935. That section states in part that:

It shall be unlawful for any . . . wholesaler of . . . malt beverages . . . to induce through any of the following means, any retailer, engaged in the sale of . . . malt beverages, to purchase any such products from such person to the exclusion in whole or in part of . . . malt beverages sold or offered for sale by other persons in inter-state or foreign commerce. . . if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in inter-state or foreign commerce; . . . 3. By furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money services, or other *thing of value* . . . (emphasis added)

Apparently there is significant financial advantage both to the wholesaler and to a retailer if the wholesaler provides schematics and labor to set and reset displays on shelves. The Administrative Law Judge from BATF in 1983 determined that such activities were "things of value" which in fact constituted inducements to "prevent, deter, hinder, or restrict other persons from selling" their own competing products. The judge found that the determination of where particular products were to be placed on the shelf (i.e. the schematic) had very significant effect upon the sales of those items. In this matter, if one wholesaler controls where all products are placed (not just its own products) the real effect apparently is to hinder the sales of other products. This in fact was the finding of the Administrative Law Judge.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

It can be seen, therefore, that the activities permitted by the amendment to H.B. 570 are prohibited by federal law. Accordingly, if the previously quoted provision were the only provision of federal law relevant here, the amendment to § 23-1033 embodied in H.B. 570 would be unconstitutional. 27 U.S.C. 205, however, goes on in what has become known as the "Penultimate Clause" to state:

In the case of malt beverages, the provisions of subsections (a) (b) (c) (d) [relevant here] of *this section shall apply* to transactions between a retailer or trade buyer in any state and a brewer, importer, or wholesaler of malt beverages outside such State *only to the extent that the law of such State imposes similar requirements* with respect to similar transactions between a retailer or trade buyer in such state and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be. (emphasis added)

The effect of this clause is to adopt what amounts to a "reverse pre-emption doctrine." In normal circumstances, if federal and state law are inconsistent the supremacy clause of the U.S. Constitution causes the federal statute to be effective and the state statute to be ineffective. The "Penultimate Clause," however, causes just the reverse to be true in this circumstance. Essentially it means that federal law dealing with transactions between beer wholesalers and retailers is effective only if state law is consistent. If state law is inconsistent, however, federal law will defer to state law.

There can be no question that the amendment to § 23-1033, Idaho Code, contained in H.B. 570 is inconsistent and dissimilar with federal law, thereby causing state law to control and federal law to be inapplicable in this respect in Idaho. A reading of 27 U.S.C. § 205 in this manner is supported by *Seagrams v. Hostetter*, 384 U.S. 35 (1966). Further, the State of Florida enacted legislation which was inconsistent with federal law in this regard and was found, therefore, to supersede federal law in *Castlewood v. Simon*, 596 F.2d 638 5th Cir. (1979). See also *United States v. Texas*, 695 F.2d 136 5th Cir. (1983).

If H.B. 570 becomes law, the bill would be constitutional on its face. Although it is subject to being applied unconstitutionally, i.e. in violation of the antitrust laws of this state and of the United States, etc., the bill itself is not invalid. Should it be passed, the activities enumerated in the amendment may be performed by a beer wholesaler without violating either state or federal law.

I hope this has answered your concerns. If you have further questions please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief/Legislative
Administrative Affairs

KRM/tal

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 16, 1984

Scott B. McDonald, Director
State of Idaho
Department of Employment
317 Main Street
Boise, Idaho 83735-0001

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL
AND IS PROVIDED SOLELY FOR YOUR LEGAL GUIDANCE

Dear Mr. McDonald:

Your letter requests our advice on the following issue: if a tax-supported agency or unit of the state of Idaho or the United States wants to negotiate with the department of employment for the sale or exchange of the department's Blackfoot property, would Idaho Const. art. IX, § 8, prohibit the sale or exchange for less than its appraised price?

CONCLUSION:

The negotiated sale or exchange of state owned property acquired from the general government to a tax-supported agency or unit of the state of Idaho or the United States probably may not be for less than its appraised value.

ANALYSIS

The management and disposition of state lands is governed by both constitutional and statutory provisions. Because any applicable constitutional provisions will be controlling, those provisions will be discussed first.

The Idaho Constitution established a state board of land commissioners (Idaho Const. art. IX, § 7) and charged them with the duty "to provide for the location, protection, sale or rental of all lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government." Idaho Const. art. IX, § 8. This section also provides that "no state lands shall be sold for less than the appraised price," and grants to the legislature the "power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof." Idaho Const. art. IX, § 8.

Clearly, if the Blackfoot property falls within the limitations imposed by art. IX, § 8, a sale or exchange of the property for less than its appraised price would be unconstitutional. A review of the history of art. IX, § 8 is helpful in determining its applicability to the Blackfoot property.

As originally adopted, § 8 applied only to lands "heretofore, or which may hereafter be granted to the state by the general government," set a minimum price per acre on the sale of school lands, and provided a maximum number of school sections which could be sold annually. The section also directed that lands granted for specific pur-

poses (public schools, land grant universities, etc.) be managed in accordance with the terms of the grants. As evidenced by the discussions during the constitutional convention, the provision setting a minimum price per acre on the sale of school lands was intended to address § 8 of the Idaho Admission Bill. That provision provided that the lands included in grants made for university purposes could not be sold for less than \$10 an acre.

In 1935, Idaho Const. art. IX, § 8 was amended to give the legislature “power to authorize the state board of land commissioners to exchange granted lands of the state for other lands under agreement with the United States.” This amendment broadened the options for dealing with lands granted by the federal government. After 1935, those lands could be exchanged, as well as sold. While the section was amended again in 1941, 1951, and 1982, only the 1982 changes are pertinent to the discussion here. Those changes were proposed at S.L. 1982, P. 935, H.J.R. No. 18 and ratified at the November 2, 1982, general election. Three particular changes are relevant to this analysis.

First, the type of land to which the section applied was changed to include lands *acquired* by the state from the general government. Thus the section now applies to “all the lands heretofore, or which may hereafter be granted to *or acquired* by the state by or from the general government.”

Second, the proviso setting a minimum price for the sale of school lands was replaced with much broader language addressing all state lands: “provided, that no state lands shall be sold for less than the appraised price.”

The third change expanded the entities with which the state could exchange lands but placed a limitation on the exchange. These changes granted to the legislature the “power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an *equal value basis* for other lands under agreement with the United States, *local units of government, corporations, companies, individuals, or combinations thereof.*”

While the department of employment is a state agency, it is financed exclusively with federal monies. Thus, anything purchased by the department is essentially state property purchased with federal funds. One possible interpretation of art. IX, § 8 is that it does not apply to the Blackfoot property because of the manner in which that property was obtained. This interpretation would postulate that art. IX, § 8 is concerned only with endowment or trust lands, and since the Blackfoot property was not granted in trust, it is outside the requirements of the section. Especially following the 1982 amendments to the constitution, this interpretation is unpersuasive. The provision as originally adopted applied to all state lands which were obtained by grant from the federal government, but included special provisions for two types of granted land — school lands and lands granted for particular purposes, such as endowment and university land grants. One of the effects of the 1982 amendments is to make applicable to all state lands some of the restrictions which originally applied only to school lands.

Prior to 1982, provisions setting a minimum sale price on state lands applied only to *school* lands. The 1982 amendments changed the language to provide “that *no* state lands shall be sold for less than the appraised price.” This provision is not limited to school lands, granted lands, or endowment lands. It includes all state lands.

In another change, the word *acquired* was added to the section. The term, as used, is very broad. It is not modified in any way as it is in some similar constitutional provisions from other states ("acquired by gift, grant or devise"). Utah Const. art. XX, § 1. Montana Const. art. X, § 11. The legislative history of this particular change does not shed any light on the reasons for the change. However, it appears to be a reflection of the reality that the state can obtain lands from the general government in a manner other than by direct grant. In this instance, the Blackfoot property falls into the broad category of lands acquired "by or from the general government" because of the manner in which it was purchased.

Once it has been determined that this particular property must be dealt with under the constraints imposed by art. IX, § 8, it is clear that the property cannot be sold or exchanged for less than its appraised value. Again, the 1982 amendments provide strong support for this interpretation.

Before 1982, the provisions allowing the exchange of state land limited exchanges to those made between the United States and the state. There was no value constraint. In 1982 the words "On an equal value basis" were included along with an expansion of the list of entities with which the state could exchange. The legislative history of the 1982 amendments sheds no light on the reasons for these three major changes. But all the changes are consistent with an attempt to get full value in dealings involving state lands, however obtained from the general government and however and to whomever they are disposed.

Idaho Code § 58-332 sets forth the manner in which the state board of land commissioners may dispose of surplus state land. It provides that if surplus state property "is suitable for use by any tax-supported agency or unit of the state of Idaho or the United States other than the state of Idaho or its agencies," the state board of land commissioners "May, by negotiated sale or exchange, transfer or exchange such property with such tax-supported agency or unit; provided, however, that such negotiated sales, transfers, or exchanges shall be for adequate and valuable consideration." This provision can be interpreted broadly to include lands that would not be covered under the constitutional provision previously discussed. For example, if state lands were acquired from non-federal sources, IX, § 8 would be inapplicable.

Another interpretation is that the phrase "adequate and valuable consideration" in the statute means "not less than the appraised price." This approach makes § 58-332 identical in effect but broader in scope than art. IX, § 8. Whichever interpretation is used, Idaho Code § 58-332 remains consistent with the constitutional provision.

In summary, it is likely that a court would find that a disposition of the Blackfoot property must meet the requirements of Idaho Const. art. IX, § 8 and Idaho Code § 58-332. Under those provisions, any sale or exchange must not be for less than the appraised price.

Sincerely,

PATRICK J. KOLE
Deputy Attorney General
Chief, Natural Resources Division

PJK:ams

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 19, 1984

The Honorable Don C. Loveland
Idaho House of Representatives
STATEHOUSE MAIL

Dear Representative Loveland:

This is in response to your question whether the state auditor has authority to pay the employer's share of social security of junior college districts.

Section 63-3638(d), Idaho Code, appropriates from the sales tax account to the social security trust account "an amount equal to the sum required to be certified by the state auditor to the state tax commission pursuant to § 59-1115, Idaho Code."

Section 59-1115, Idaho Code, provides that the board of trustees of "each class of school district" shall certify to the state auditor the amount of money required to pay the employer's share of social security tax for the ensuing calendar year. The state auditor, in turn, certifies the total to the state tax commission.

The act does not define the phrase "each class of school district." Although an argument could be made that a junior college district is a class of school district, in my opinion the better reading of the statute is that a school district is a school district as defined in § 33-305, Idaho Code. That section does not include junior college districts within the definition of school districts.

According to the state auditor's office, at the time the sales tax was enacted and these appropriation provisions were adopted, the legislature intended that junior college districts be included in the sales tax appropriation for social security payments. Accordingly, § 59-1115, Idaho Code, has been administratively interpreted since then in an effort to give effect to this legislative intent, and social security payments for junior colleges have been made. Since courts do attempt to give effect to legislative intent, this is not an unreasonable reading of the statute. *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).

However, in my opinion, a judicial construction of the statute would more likely result in the conclusion that junior college districts are not school districts since "school districts" are defined in § 33-305, Idaho Code, and that definition does not include junior college districts.

Accordingly, we would recommend that the statute be amended to specifically provide for social security payments for junior college districts assuming that this is, in fact, the legislative intent.

If you have any questions regarding this letter, please call.

Sincerely,

DAVID G. HIGH
Deputy Attorney General
Chief, Business Affairs
and State Finance Division

DGH/tg

March 19, 1984

The Honorable Hilde Kellog
State Representative, District 2
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL
AND IS PROVIDED SOLELY FOR YOUR LEGAL GUIDANCE

Dear Representative Kellog:

We have received your request for guidance with regard to Idaho Code § 18-7701 *et seq.*, Idaho's Motion Picture Fair Bidding Act. Your question, as I understand it is whether the act is constitutional.

CONCLUSION:

Idaho Motion Picture Fair Bidding Act, Idaho Code § 18-7701 *et seq.* would be likely to withstand challenges under the First and Fourteenth Amendments to the United States Constitution (U.S. Const. amend. I and XIV); the Supremacy Clause, (U.S. Const. art. VI, cl. 2); the Commerce Clause (U.S. Const. art I, § 8, cl. 3); and Idaho Const. art. IX, § 8.

ANALYSIS:

The Motion Picture Fair Bidding Act, Idaho Code § 18-7701 *et seq.*, (hereafter referred to as act or Idaho act), is a statute which regulates the licensing of motion pictures to theaters. As such, it circumscribes the relationship between distributors of motion pictures and the owners of theaters who show them. The primary focus of the act is to prohibit "blind bidding." Blind bidding is the industry practice of requiring theater owners to bid for a motion picture without having had an opportunity to view the film. Distributors often invite owners to bid on the opportunity to run a movie long before the film has been completed, and frequently only on the basis of promotional brochures, plot summaries, and the names of those in starring roles, all of which are subject to change before the completion of the film. Blind bidding has been viewed as one result of the unequal bargaining position of distributors and exhibitors. As of 1981, nineteen states, including Idaho, had passed statutes similar to the Idaho act, evidently in an attempt to equalize bargaining power between distributors and exhibitors and to increase competition. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 659 (6th Cir. 1981).

The Idaho act prohibits blind bidding, requires bid invitations to include information concerning the trade screening of the motion picture that is the subject of the invitation, prohibits advance payment by exhibitors as security for the license agreement, and prohibits minimum fee guarantees where the license agreement provides for fees based in whole or in part on attendance or box office receipts.

While the Idaho courts have not had the opportunity to review the act, similar statutes in Utah, Ohio, and Pennsylvania have withstood constitutional attack. An examination

of those cases provides the main support for the conclusion that the Idaho act, too, is constitutional.

Of the three acts which have been reviewed by the courts, the Pennsylvania act is by far the most restrictive. In addition to provisions similar to the Idaho act, Pennsylvania's act prohibits exclusive first runs in excess of forty-two (42) days, provides extensive bidding procedures to be used if a distributor wishes to license a film by competitive bidding, and gives exhibitors a private right of action to enforce the act.

The Pennsylvania act was challenged by numerous major distributors of motion pictures in *Associated Film Distributors Corporation v. Thornburgh*, 520 F.Supp. 971 (E.D. Pa. 1981). The distributors alleged that the Pennsylvania act violated the supremacy clause, U.S. Const. art. VI, cl. 2; the commerce clause, U.S. Const. art. I, § 8, cl. 3; the First, Fifth, and Fourteenth Amendments to the United States Constitution; and a provision of the Pennsylvania Constitution. These issues were before the court on the distributor's motion for summary judgment. The court granted the summary judgment, opining that the Pennsylvania act, on its face, was violative of the First Amendment, and because it interfered with the federal copyright laws, the supremacy clause as well. Basing its decision on these grounds, the court declined to reach the remaining issues. On appeal by the exhibitors, the Third Circuit reversed the district court and remanded the matter for trial. *Associated Film Distribution Corporation v. Thornburgh*, 683 F.2d 808 (3rd Cir. 1982). Thus, while the Pennsylvania statute has yet to be upheld on its merits, the appellate court has ruled that at least facially it is not violative of the First Amendment or the supremacy clause.

In reversing and remanding the Pennsylvania case, the Third Circuit relied heavily on *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, affirmed in part, remanded, 679 F.2d 656 (D.C. Ohio, 1980). *Allied Artists* was a challenge by distributors to the constitutionality of Ohio's anti-blind bidding act. The distributors alleged that the Ohio act violated the due process clause of the Fourteenth Amendment, the First Amendment, the commerce clause, and the supremacy clause (because of its effect on federal copyright and antitrust laws). The district court upheld the constitutionality of the act against all challenges. On appeal, the Sixth Circuit upheld the district court on the due process, First Amendment, and supremacy clause challenges. The appeals court remanded the commerce clause issue for further consideration.

The Ohio statute is similar to the Idaho act. In one respect, concerning advance payment, the Ohio act is less stringent than the Idaho act, allowing such payments within 14 days of the exhibitor's first exhibition of the picture. But, like the Pennsylvania act, Ohio's act also establishes bidding procedures — a feature not included in the Idaho provision. With the exception of these two variances, the Ohio and Idaho statutes have the same practical effect. As discussed previously, all challenges, with the exception of the commerce clause challenge, were found to be without merit.

In its consideration of the commerce clause challenge, the appellate court asked the district court to re-examine the issue under the rule set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 (6th Cir. 1982). That rule is as follows:

Where the [challenged state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. at 142. The reason for the remand, the Sixth Circuit indicated, was that it could not discern from the record before it whether a legitimate local purpose for the statute existed, and if so, the nature and extent of the burden imposed by the price restrictions. The court stated that a perceived imbalance in bargaining power between distributors and exhibitors was not a legitimate local purpose sufficient for the imposition of a price restriction.

Addressing the commerce clause issue in *Warner Bros., Inc. v. Wilkinson*, 533 F.Supp. 105 (D. Utah 1981), Judge Jenkins determined that the Utah act's pricing controls were not unconstitutional. The Utah provision, like Idaho's, prohibits a guaranteed minimum payment to the distributor where the license agreement bases payment on a percentage of box office receipts. Judge Jenkins determined that the Utah provision was intended to promote the economic interests of the state by preserving and encouraging competition, preventing economic concentration and monopoly. He further found that the Utah act presented only minimal burdens on interstate commerce so that the local benefits far outweighed the minimal burden on interstate commerce. It is likely that an Idaho court would reach a similar conclusion on the commerce clause issue because of the similarity in the pricing provisions between the Idaho and Utah statutes. It should be noted that Utah's act did not prohibit advance payments as did the Idaho and Ohio provisions. However, the rationale presented in the Utah case is also persuasive on the advance payment provisions.

In summary, the Idaho Motion Picture Fair Bidding Act is likely to withstand federal constitutional attack. Federal courts have upheld similar statutes in Utah, Ohio, and Pennsylvania.

In addition to meeting federal constitutional requirements, the Idaho act must also meet the requirements of the Idaho constitution. Idaho Const. art. XI, § 18 could be interpreted to be applicable. That provision mandates:

That no incorporated company or any association of persons or stock company, in the state of Idaho, shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchises.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

Such an interpretation is unpersuasive. Idaho Code § 18-7702 *et seq.* does not require nor encourage exhibitors to combine to fix prices. The act is a criminal statute which is designed to regulate the relationship between exhibitors and distributors of motion pictures. Its effect is to encourage competition in the industry, not curtail it.

Idaho Const. art. XI, § 18 is similar in purpose to federal antitrust legislation. Both the Utah and Ohio statutes were alleged to violate federal antitrust laws and in both cases, such arguments were firmly rejected. *Allied Artists Picture Corp. v. Rhodes, supra*, *Warner Bros., Inc. v. Wilkinson, supra*.

Because the Idaho act is designed to encourage competition and discourage monopoly, does not encourage combinations of exhibitors for purposes of price fixing, and because similar statutes have been upheld against like challenges, it is likely that a challenge to the Motion Picture Fair Bidding Act based on Idaho Const. art. XI, § 18 would fail. Similar statutes have also withstood federal constitutional attack, and the expected result would be the same for Idaho's statute.

I hope this guideline has addressed your concerns with regard to Idaho Code § 18-7701 *et seq.* If this office can be of further assistance, do not hesitate to contact us.

Sincerely,

Rinda Ray Just
Deputy Attorney General

RRJ: ams

March 21, 1984

Mr. Charles A. Smyser
City Attorney
City of Caldwell
City Hall
Caldwell, ID 83605

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

Dear Mr. Smyser:

You have asked for an opinion regarding who, as between a city and the county in which it is located, bears the cost of housing prisoners charged with driving while under the influence (DUI), and other criminal traffic offenses, when arrested by city officers. The question arises due to recent legislation moving DUI and related offenses from Title 49 dealing with motor vehicles to title 18, Idaho's Penal Code.

For reasons elaborated below, I am of the opinion that until the legislature clearly expresses a different intent, cities probably continue to be liable for costs of housing

prisoners which city officials have charged with driving without privileges (DWP), driving while under the influence of intoxicants, and related motor vehicle offenses now found in title 18.

In Opinion No. 84-4, dated February 10, 1984, the attorney general in part concluded that counties bear the cost of housing prisoners who have violated general state penal statutes, regardless of whether the county, or a city within county jurisdiction, has arrested and charged the offender. However, it was also concluded that cities are liable to any county for costs of housing, within the county's jail, prisoners charged by city policemen with violating city ordinances or state motor vehicle laws. This conclusion was based mainly upon the legislative intent expressed in Idaho Code § 20-605 and companion statutes and, to a lesser extent, upon an apparent fairness of the statutes which balance the costs of confinement of prisoners against provisions awarding 90 percent of fines and forfeitures to cities in such cases. Attorney General Opinion 84-4, however, could not address the question posed here for the legislative change was enacted after the date of that opinion.

Aside from Idaho Code § 50-302A, which does not bear directly upon the issue at hand, the only statute which speaks to a city's obligation to pay jail costs for prisoners charged by its officers is Idaho Code § 20-605, entitled "Costs of Confinement." Therefore, Idaho Code § 20-605 must, for the purpose of this analysis, be subjected to close scrutiny; and that scrutiny must focus upon the meaning of the words "motor vehicle laws of this state." Presented in their context, these words direct that:

In case a person confined or detained was initially arrested by a city police officer for violation of the *motor vehicle laws of this state* or for a violation of a city ordinance, the cost of such confinement or detention shall be a charge against such city by the county wherein the order of confinement was entered. (Emphasis added).

Idaho Code § 20-605

These words were abundantly clear when the state's motor vehicle provisions, including driving under the influence and driving without privileges, were found in title 49, Idaho Code. The matter is less clear since on 1 March 1984, the legislature moved certain specified motor vehicle laws from title 49 to the criminal code. Did this change have any impact upon a city's liability to pay for its prisoners charged with motor vehicle violations?

Essentially, an answer to this question can only be discerned through a construction which attempts to ascertain the legislature's intent expressed in § 20-605, Idaho Code, and the new statute § 18-8001, et seq., Idaho Code.

The universal rule of statutory construction is that "a statute must be construed in light of its intent and purpose." *Jorstad v. City of Lewiston*, 93 Idaho 122, 125, 456 P.2d 776 (1969); *In re Gem State Academy Bakery Service, Inc.*, 83 Idaho 160, 359 P.2d 511 (1961). One should then "strive to adopt that construction of a statute which best effectuates the legislative purpose." *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212 (1967). Legislative intent may be ascertained by tracing the history of the legislation in question. *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission*, 80 Idaho 206, 327, P.2d 766 (1958).

Applying these principles to the question at hand it clearly appears from Idaho Code § 20-605 that the legislature intended for cities to be responsible for the costs of housing prisoners charged by its officers with violations of *state motor vehicle laws*. The law probably reflects a purpose of balancing the costs of enforcing the laws against the benefits to the city received in the form of fines and forfeitures. See, Idaho Code § 29-4705. The language of Idaho Code §§ 20-605 and 19-4705(c) seems to represent a policy statement by the legislature that cities have the primary interest in the prosecution of motor vehicle violations occurring on their streets and enforcement of city ordinances. The language of Idaho Code §§ 20-605 and 19-4705(c) does not express so significant an interest on the part of the county in enforcement of these provisions. Driving under the influence (former Idaho Code § 49-1102), and driving without privileges (former Idaho Code § 49-337), were some of the more serious motor vehicle violations enumerated in the state's motor vehicle code. Changing their location in the law books to the criminal code did not and could not alter the fact that they punished *motor vehicle* offenses as referred to in Idaho Code §§ 20-605 and 19-4705(c). In fact, their inclusion in the penal code was under a new chapter 80, entitled "Motor Vehicles." Thus, technically, substantively and by nomenclature these violations continue to be "state motor vehicle violations."

Nothing found in the definitions of ch. 5, title 49, leads to a contrary conclusion. A search for legislative intent to treat these offenses differently by their inclusion in the criminal code is also unfruitful for there was no statement of policy in this regard accompanying the enactment of ch. 80, title 18. A report of the joint subcommittee on DUI, under the date of February 22, 1984, offers no additional illumination. It simply says that this most visible change in the DUI law, moving it from title 49 to title 18 of Idaho Code, "reflects legislative intent that driving while under the influence of alcohol, drugs, or any other intoxicating substances is a serious crime and should be included with other serious crimes rather than with traffic and highway laws." Senate Journal Of The Idaho Legislature, Second Regular Session, Forty-seventh Legislature, February 27, 1984.

Idaho Code § 20-605 does not say that cities have to pay for their prisoners charged with "non serious" crimes, "highway law violations," "traffic offenses" or "motor vehicle offenses found in title 49, Idaho Code." Rather it speaks of *state motor vehicle law* violations. This clearly means violations of laws of state-wide effect; state statute's dealing with the operation of motor vehicles. Such state motor vehicle offenses are now found in two places: ch. 80, title 18, and title 49.

Intermixed throughout the motor vehicle code are a miscellany of chapters sanctioning motor vehicle violations as either infractions or misdemeanors. The infraction penalties apply to chs. 6, 7, and 8 of title 49; title 49 also retains misdemeanor penalties in chs. 9, 10, 11, 15, 17, 18, 22 and 23. Establishment of lesser penalties for infractions did not alter their character as motor vehicle offenses or alter the allocation of fine money under Idaho Code § 19-4705. See Idaho Code § 49-3410. Analogously, the removal of the DUI, and DWP sections to the criminal code has not affected their status as motor vehicle offenses. It has not changed the penalties prescribed for their violation, nor allocation of fines and forfeitures, nor allocation of costs of housing prisoners. Absent a clear legislative intent to treat these offenses differently as to allocation of costs between city and county jurisdictions, the explicit language of Idaho Code

§ 20-605 should control and cities are probably responsible for the cost of housing prisoners charged by their officers with violations of any state motor vehicle violations.

Sincerely,

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

DMH/tg

March 26, 1984

The Honorable Reed W. Budge
Idaho State Senator
STATEHOUSE MAIL

Dear Senator Budge:

This is in response to your question regarding the permissible uses of maintenance and operation levies of school districts. Specifically, you have asked if school districts which receive authorization for a supplemental levy pursuant to § 33-802, Idaho Code, may accumulate unused portions of the supplemental levy from year to year to fund the eventual building of school buildings.

In my opinion school districts may not carry over unused maintenance and operation funds to succeeding fiscal years to create a fund to build school buildings except to the extent that budgeted depreciation is transferred to the school plant facilities reserve fund as prescribed by § 33-901, Idaho Code.

School districts commonly utilize three types of levies. These include a maintenance and operation levy used to fund operating budgets, a plant and facilities levy used to accumulate funds for future school building programs, and a long-term bond levy. The budget limitation of § 63-2220, Idaho Code, limits the "ad valorem portion of the *operating budget*." Thus, the limitation applies to the maintenance and operation levy of school districts. The maintenance and operation levy may be increased beyond the limitations of § 63-2220, Idaho Code, upon approval by a simple majority of the electors voting pursuant to § 33-802, Idaho Code. In particular, § 33-802(3) provides in pertinent part:

No levy in excess of the levy permitted by paragraph 2 shall be made *for the purposes of paragraph 2* of this section by a non-charter school district unless such a supplemental levy in a specified amount be first authorized through an election held pursuant to sections 33-401 — 33-406, Idaho Code, and approved by a majority of the district electors voting in such election, which supplemental levy shall be exempt from the limitation imposed by section 63-923(1), Idaho Code, and from the provisions of section 63-2220, Idaho Code.

The “purposes of paragraph 2” referred to include levies:

as shall be necessary to pay all other lawful expense of maintaining and operating the schools of the district and for the payment of tuition and transportation.

Thus, the override election held pursuant to § 33-802, Idaho Code, authorizes an additional levy for expenses of maintenance and operation of the school district. The maintenance and operation budget may include a budget item for depreciation of existing facilities. Assuming the item is included in the maintenance and operation budget, and is appropriated to the school plant facilities reserve fund, it may be so transferred pursuant to § 33-901, Idaho Code. That section provides in pertinent part:

The board of trustees of any school district may create and establish a school plant facilities reserve fund by resolution adopted at any regular or special meeting of the board. All moneys for said fund accruing from taxes levied under section 33-804, Idaho Code, together with interest accruing from the investment of any monies in the fund *and any moneys allowed for depreciation of school plant facilities as are appropriated from the general fund of the district, shall be credited by the treasurer to the school plant facilities reserve fund.* (Emphasis added)

Additional maintenance and operation funds beyond depreciation budgeted and appropriated cannot be transferred to the school plant facilities reserve fund. However, § 33-804, Idaho Code, provides a mechanism to impose levies beyond depreciation to accumulate funds in a school plant facility reserve fund to purchase facilities such as buildings in future years. That section permits levies for that purpose upon approval by a two-thirds majority of electors voting on the question.

In my opinion, any surplus funds remaining from the maintenance and operation levy after any appropriated transfer for depreciation should be treated as an item of income in the following year’s budget, and should be taken into account in determining the levy necessary for the succeeding year. Otherwise, it would appear that the surplus funds would constitute a reserve fund exceeding the limits allowed by § 33-801A, Idaho Code. That section permits school districts to establish a general fund contingency reserve not exceeding 2½ percent of the total general fund budget or the value of one support unit whichever is greater, but not exceeding \$100,000. The section goes on to provide:

The balance of said fund shall not be accumulated beyond the budgeted fiscal year. If any money remains in the contingency reserve, it shall be treated as an item of income in the following year’s budget.

Since the maintenance and operation levy provides funding for the general fund of the school district, any reserve resulting from surplus should be treated as an item of income in the budgeting process, and reserves in the general fund in succeeding years should not be established exceeding the limits provided in § 33-801A, Idaho Code.

In summary, while school districts may budget maintenance and operating funds for depreciation and appropriate such amounts to the school plant facilities reserve fund, school districts should not carry over additional unused maintenance and operation funds

to succeeding fiscal years to create a fund to build school facilities. A surplus resulting from the maintenance and operation levy should be treated as an item of income in determining the levy necessary for the succeeding year.

If you have any questions regarding this letter, please call.

Sincerely,

DAVID G. HIGH
Deputy Attorney General
Chief, Business Affairs
and State Finance Division

DGH/tg

March 27, 1984

Ms. Susan E. Swanberg
Deputy Prosecuting Attorney
Kootenai County
P.O. Box 1829
Coeur d'Alene, ID 83814

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

Re: Lease/Purchase - New Jail

Dear Ms. Swanberg:

You have asked whether a proposed "structured lease - financing arrangement" would be an "ordinary and necessary expense" authorized by general laws and thus exempt from the restrictions of art. VIII, § 3 of the Idaho Constitution. You have not asked whether the proposed financing method will result in an "indebtedness" or "liability" under art. VIII, § 3, Idaho Constitution and thus we do not reach that question. The "structured lease financing arrangement" would be used to finance a new Kootenai County jail, to be placed under county property.

Short Answer

You have enclosed your own answer and analysis of whether the plan you propose constitutes an "ordinary and necessary expense" under art. VIII, § 3 of the Idaho Constitution. You conclude that it does.

We cannot fully agree with you. The recent case of *Asson v. City of Burley and Bohle v. City of Rupert*, 83 ISCR 1371, 670 P.2d 839 (1983) causes us to doubt your conclusion. Even though there is considerable Idaho authority which would tend to support your arguments, we would suggest that you structure your proposal in a manner similar

to that used in *Swensen v. Building, Inc.*, 93 Idaho 466, 463 P.2d 932 (1970), and that you obtain a declaratory judgment before carrying out any such plan.

Factual Background

You indicated in your correspondence that as a result of *Leedes v. Watson*, 360 F.2d 674 (9th Cir. 1980), and agreements made by the county with the federal district court relating to that case, no prisoners are being lodged in the Kootenai County Jail for any extended period of time. Prisoners are presently being kept in the Shoshone County Jail and are only confined in the Kootenai County Jail for a day or so while involved in court hearings in Coeur d'Alene. You also indicated that three county bond issues proposing to finance a new jail have failed to gain voter approval in Kootenai County. In order to remedy this problem, the county is investigating the possibility of formulating a "lease-purchase" plan to acquire a new jail.

Your letter proposes a financing plan as follows:

1. The financing would include the issuance of "Certificates" vis-a-vis Bonds, fully registered without coupons in the denominations of \$5,000 and any whole multiple of \$5,000 not to exceed the total amount of Certificates maturing on a single Certificate payment date.
2. The security covenant would provide that neither the payment of base rentals by the County under the Lease or any payments under the Certificates would give rise to a general obligation or other indebtedness of the County, within the meaning of any constitutional or statutory debt limitation, or a mandatory charge or requirement against the County in any ensuing budget year beyond the current budget.
3. The County would have the right to unilaterally terminate the Lease on an annual basis by not appropriating sufficient funds for the ensuing year's payment. The obligation of the County to pay base rentals under the Lease would be limited to those County funds which were specifically budgeted and appropriated annually by the Commissioners for such purpose.
4. The Lease would terminate upon the earliest of any of a number of events: a) the expiration of the original term or any renewal term of the lease where an event of nonappropriation occurs, b) the County purchases the project, c) an event of default and termination of the Lease agreement by the Trustee, or, d) provision for termination due to damage, destruction or condemnation.
5. Title to the project (excluding personal property purchased with County funds) would be retained in the name of the Trustee until conveyed or liquidated pursuant to the Trust Indenture.
6. The County would be required to maintain the facility and purchase insurance against property damage liability.

Your letter does not indicate who the trustee will be, a public or private entity. We assume the latter.

Analysis

There have been two recent decisions from the Idaho Supreme Court construing art. VIII, § 3 of the Idaho Constitution. Both of these cases deal, to some extent, with the question of whether an expense was "ordinary and necessary" and thus outside the prohibitions of art. VIII, § 3. The first is *Coeur d'Alene Lake Shore Owners and Taxpayers, Inc., et al. v. Kootenai County, et al.*, 104 Idaho 590, 661 P.2d 756 (1983). It held that a county could hire an independent, private appraiser to carry out a three-year appraisal project and that such a project was an ordinary and necessary expense authorized by law. In this case the law required reappraisal which had been mandated by the tax commission and the state supreme court in a previous case.

If the case law stopped there, we would not hesitate in advising you that your proposal for financing would in all likelihood be outside the restrictions of art. VIII, § 3 as defined in *Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970); *Swensen v. Buildings, Inc.*, 93 Idaho 466, 463 P.2d 932 (1970); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); and *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975)). However, the most recent case on the subject, *Asson v. City of Burley and Bohle v. City of Rupert*, 83 ISCR 1371, 670 P.2d 839 (1983), appears to restate Idaho law in this area in a manner different than one might have expected. The case apparently is an attempt by the supreme court to pull back from previous cases and thus to "tighten up" the meaning of "ordinary and necessary expense" within art. VIII, § 3, Idaho Constitution.

The *Asson* case compares many of the "ordinary and necessary" cases decided by the Idaho Supreme Court throughout the years, and separates them into two groups. The first group contains those cases in which repair, partial replacement, reconditioning, or restructuring of existing facilities took place. The court states that in these cases the expenditure was "ordinary and necessary" and thus exempt from art. VIII, § 3.

The second group of cases concerns those where new building construction or purchases of a new facility took place. The court states that such cases require compliance with art. VIII, § 3 since they are not cases of "ordinary and necessary" expense.

The court then goes on to inquire if agreeing to help pay for the construction of the WPPSS nuclear power plants is similar in any way to cases in the first category relating to repair, reconditioning or refurbishing. The court concludes that the word "ordinary" cannot be stretched to cover the financing of the WPPSS nuclear plants since they were entirely new facilities.

The court had a hard time with two cases, *Jones v. Power County*, 27 Idaho 656, 150 Pac. 92 (1921), which allowed the construction of a new jail in a newly created county as an ordinary and necessary expense and *Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 649 (1970), which allowed the construction of a new airport to replace an outmoded one.

The court devoted substantial space to fitting the *Peterson* case into the category of repair and replacement. It explains the case in light of the "obsolescence and unsoundness of the 20 year old facility" which was to be replaced. The court goes on to state

that this condition “places it (*Peterson*) within the repair and maintenance line of case authority . . .”

Jones v. Power County, supra, held that a new jail structure was an ordinary and necessary expense, authorized by law, and not subject to Article VIII, Section 3. However, the court carefully stated that such a decision did not authorize the county to run into debt for construction of an unnecessarily expensive jail, that the law contemplated that business sense and good judgment would be used in such matters, and that no more money would be expended for a jail than was absolutely necessary for housing and detention of county prisoners.

Thus, if your proposal were for the extension, alteration, or repair of existing structures, there would be little hesitation on our part in opining that the proposal is an ordinary and necessary expense. However, the *Asson* case seems to stand for the proposition that completely new construction must follow the requirements of art. VIII, § 3. Moreover, it leads us to believe that the present supreme court will not support an entirely new structure as an “ordinary and necessary expense.”

There are some other Idaho cases that we wish to call to your attention: *Reynolds Construction Company v. County of Twin Falls*, 92 Idaho 61, 437 P.2d 14 (1968); and *Swensen v. Buildings, Inc., supra*.

The first of these, *Reynolds Construction Company*, was a case where the county commissioners declared an emergency and, with day labor and without bids, built a new annex for the existing courthouse. Since the annex for the courthouse was completed when the supreme court heard argument, the whole matter was a fait accompli. There was little that could be done by the court after the building had been built. However, the court took the county commissioners to task and declared that the commissioners should have advertised and bid the structure according to the requirements of Idaho Code §§ 31-4001 et seq. The case mentions art. VIII, § 3 of the Idaho Constitution but does not discuss the “ordinary and necessary” clause. However, *Asson, supra*, intimates that *Reynolds* was not an ordinary and necessary expense and that the county commissioners should have followed the provisions of art. VIII, § 3.

The second case, *Swensen v. Buildings, supra*, was decided just a few months before *Peterson, supra*. There, Ada County had purchased a new site for the county fairgrounds. The old structures were dilapidated and ancient. The proposal was to sell the property to Buildings, Inc., have them build the race track, the grandstands, barns, and other facilities and lease these back to the county for 20 years, at which time the county could purchase the property. The supreme court’s discussion avoided art. VIII, § 3 and instead, centered upon Idaho Code, §§ 31-4003 and 31-1001 and whether the proposed lease to the county should be advertised and bid. The court concluded that the county must, of necessity, comply with chapter 40 of title 31 and chapter 10 of title 31, Idaho Code, in regard to sale and lease. For this reason the supreme court did not deal with the constitutional matters. The case was remanded for further proceedings after which the county published and let bids. In July of that year *Hanson v. Kootenai County Board of Commissioners*, 93 Idaho 655, 471 P.2d 42 was handed down and *Pocatello v. Peterson* was decided in September. Thus, no further action was taken in *Swensen* and it was dismissed for want of prosecution.

To some extent, *Swensen v. Buildings, Inc.* appears to give tacit approval to the construction of buildings for the public by private parties and a subsequent lease back. However, the supreme court stated that it was not going to rule on the constitutional issues because the sections relating to advertising and bid procedure disposed of the matter.

An important point to be drawn from *Reynolds* and *Swensen* is that with any lease arrangements or any possibility of sale of property to a lessor, compliance must be had with the appropriate advertising, bidding, and sales statutes, such as Idaho Code §§ 31-4001 et seq., 31-1001, et seq. and 31-808.

Your case may be stronger than *Swensen* was. There the county was just moving from old fairground premises to new fairground premises, a situation similar to *Peter-son*. Your circumstances are more forceful. The county officers are required by law to arrest and detain prisoners. However, a federal court decision holds that existing jail facilities are inadequate, unsafe, and unsanitary. Therefore, the county officers are unable to carry out their lawful duties.

Because of the holding in *Asson*, we would suggest that you pattern your leasing arrangements after those outlined in *Swensen v. Buildings, Inc.*, and that you carefully follow the applicable statutes relating to sale of property, and/or advertising and bidding in regard to any lease to the county or construction. Much of the documentation used for financing in that case is probably available from the Ada County Prosecutor's office.

We are uncertain exactly how the scheme you detail will operate. It might be better to issue and register warrants rather than the proposed "certificates or bonds" which you have set forth in item 1 of your plan. We presume from what you say in item 5 of your plan that the property would be sold to a trustee. We would also suggest that when you have obtained a contractor, and have gone through the necessary preliminary steps, it would be an excellent idea to go to court and obtain a declaratory judgment as to the validity of your proposal before the structure is built, since the *Asson* case does cast considerable doubt as to building a new structure in such situations.

Sincerely,

Robie G. Russell
Chief, Local Government

Warren Felton
Deputy Attorney General
Local Government Division

WF:ams

April 5, 1984

Honorable Wes Trounsen
Senator, District 23
Route 2, Box 108
Wendell, ID 83355

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

Dear Senator Trounsen:

Your request for legal guidance on the acquisition of impounded animals for use in scientific experiments has been forwarded to me for response. As I understand it, your question is, "Does Idaho Code § 18-2113 provide authority for procuring impounded animals for use in scientific experiments?"

Idaho Code § 18-2101 et seq. defines and enumerates acts which constitute cruelty to animals. Cruelty to animals is punishable as a criminal offense, with some offenses carrying maximum penalties of 3 years in the state prison and a \$500 fine. The only effect of Idaho Code § 18-2113 is to exempt certain conduct from prosecution under the cruelty to animals provisions:

No part of this chapter shall be construed as interfering with any of the laws of this state known as the game laws or any law for or against the destruction of certain birds, nor must this chapter be construed as interfering with the right to destroy any venomous reptile, or animal known as dangerous to life, limb, or property, or to interfere with the right to kill all animals used for food or *properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college, or university of this state.*

Idaho Code § 18-2113 (emphasis added). Clearly this section makes no provision for procuring animals for such purposes, it merely provides that certain activities will not be criminal.

Other than the previously mentioned criminal provisions, Idaho has no state laws which regulate the handling of animals impounded at a shelter. Idaho Code § 50-319 gives to cities the power to regulate the running at large of domestic animals and "to provide for the erection of all needful pens and pounds within or without the city limits; and to appoint and compensate keepers thereof, and to establish and enforce rules governing the same." Presumably a county would also have such authority under its police power, though as a practical matter most shelters in Idaho are operated by cities. Because cities have the power to set up and regulate shelters, disposition of animals would be a matter of local policy. Thus, some cities may allow impounded animals to be used for legal scientific research, while others may not.

In conclusion, Idaho Code § 18-2113 does not provide for the procuring of animals from animal shelters for experimentation, nor does it prohibit such practice. Further, there appear to be no other statutes which would authorize or prohibit the practice.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

The power to operate animal shelters rests with the cities, and their policies regarding disposition of impounded animals are controlling on this question.

I hope this information is of assistance to you. If this office can be of further help, do not hesitate to contact us.

Sincerely,

RINDA RAY JUST
Deputy Attorney General

RRJ/tal

April 11, 1984

The Honorable Terry Sverdsten
Senator
Rt. 1, Box 51
Cataldo, ID 83810

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

Re: State Scaling Law Inquiry

Dear Senator Sverdsten:

You have asked for our guidance concerning the following question: May forest products which are removed from Idaho but which are not scaled in Idaho be subject to the provisions of § 38-1202(c), Idaho Code?

Conclusion

Forest products removed in Idaho but scaled in another state are not subject to § 38-1202(c), Idaho Code.

Analysis

The 1979 Idaho legislature passed two bills that significantly modified the Idaho log scaling law. Your question concerns § 38-1202(c) which, as amended, provides:

Forest Products Measure. For the purpose of payment for logging or hauling logged forest products only, forest products shall be measured by gross weight, or by gross volume converted to gross decimal "C". Measurement may be determined by sampling process.

The problem posed by your question arises where trees are harvested in Idaho but are scaled in a neighboring state. Payment is then often made in a manner different than

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by gross volume measurement. Typically this occurs in northeastern Idaho, where forest products are, out of economic necessity, processed in Montana.

As you know, the state's scaling law is administered by the board of scaling practices. Following the 1979 session, the board reviewed and provided guidelines for the interpretation of § 38-1202(c), Idaho Code. These "guidelines" have not been promulgated nor adopted according to the administrative procedure act but do constitute the board's interpretation of the statute. As such the guidelines are entitled to some deference and can be used as an aid in analyzing the statute in question.

In this matter, the board's interpretation is found in guideline 13. After reviewing the statute, the board concluded that timber which is removed from Idaho but which is not scaled in this state is not subject to the Idaho scaling law. The board based their interpretation on the commerce clause of the United States Constitution, see U.S. Const. art. I, § 8, cl. 3. In essence, the board concluded that the scaling law could only be given intrastate application. After reviewing this matter, our opinion is that a court would most likely agree with the determination made by the board.

I am enclosing for your review a copy of the guidelines issued by the board. Should you have any further questions concerning this matter, please feel free to contact this office.

Very truly yours,

Patrick J. Kole
Deputy Attorney General
Chief, Natural Resources Division

PJK:ams
Enclosure

May 1, 1984

Mr. George J. Pelletier, Jr.
Administrator
Idaho Division of Vocational Rehabilitation
STATEHOUSE MAIL

Re: End-Stage Renal Program/Residency Requirement

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

Dear Mr. Pelletier:

The attorney general has asked me to respond to your letter of April 26, 1984, in which you inquire whether a legal alien who has resided in Idaho for an extended period of time and who is suffering from chronic end-stage renal failure is eligible for

assistance under the program which your agency administers pursuant to Idaho Code §§ 33-2307 and 33-2308. You indicate that this applicant has been living with her daughter in Idaho for 7 years; the daughter is a U.S. citizen who has resided in this state for 11 years.

As you know, the above-referenced statutory provisions empower the board of vocational education to establish a program for administering funds allocated to assist individuals suffering from chronic kidney ailments who are financially unable to obtain necessary treatment themselves. The legislature has delegated to the board responsibility for the promulgation of rules for determining eligibility for the program; the statutes contain no eligibility standards.

Attached to your letter was a memorandum, designated 80-12, which you advise is the product of rulemaking by the division of vocational rehabilitation and which states, in relevant part:

To be eligible for services in the State of Idaho End-Stage Renal Program, individuals having renal failure must have resided in the State of Idaho for twelve (12) consecutive months; or they, their spouse, parent or guardian must show proof of employment in the State of Idaho before moving to the state; or be an exceptional case to be approved by the agency.

The question posed, as we understand it, is whether the present applicant, a non-citizen, has "resided" in this state as required by the rule.

* * * *

BLACK'S Law Dictionary defines residence as follows:

A factual place of abode. Living in a particular locality (citations omitted). It requires only bodily presence as an inhabitant of a place (citation omitted). As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and in the country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with an intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile (citations omitted).

BLACK'S Law Dictionary Revised 4th Ed., p. 1473.

Applying the dictionary definition of the term residence, it would appear that the individual at issue is a resident of Idaho since she maintains a bodily presence here; she has "resided" in this state for a period in excess of 12 consecutive months and, accordingly, she is eligible for the program. The conclusion resulting from this simple analysis is, we believe, mandated by the fundamental constitutional doctrine of equal protection of the laws and other related concepts of constitutional dimension.

For purposes of our analysis, we have assumed that the only factor upon which a denial of assistance in this case may be based is the applicant's status as an alien, i.e.

assistance under the program which your agency administers pursuant to Idaho Code §§ 33-2307 and 33-2308. You indicate that this applicant has been living with her daughter in Idaho for 7 years; the daughter is a U.S. citizen who has resided in this state for 11 years.

As you know, the above-referenced statutory provisions empower the board of vocational education to establish a program for administering funds allocated to assist individuals suffering from chronic kidney ailments who are financially unable to obtain necessary treatment themselves. The legislature has delegated to the board responsibility for the promulgation of rules for determining eligibility for the program; the statutes contain no eligibility standards.

Attached to your letter was a memorandum, designated 80-12, which you advise is the product of rulemaking by the division of vocational rehabilitation and which states, in relevant part:

To be eligible for services in the State of Idaho End-Stage Renal Program, individuals having renal failure must have resided in the State of Idaho for twelve (12) consecutive months; or they, their spouse, parent or guardian must show proof of employment in the State of Idaho before moving to the state; or be an exceptional case to be approved by the agency.

The question posed, as we understand it, is whether the present applicant, a non-citizen, has "resided" in this state as required by the rule.

* * * *

BLACK'S Law Dictionary defines residence as follows:

A factual place of abode. Living in a particular locality (citations omitted). It requires only bodily presence as an inhabitant of a place (citation omitted). As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and in the country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with an intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile (citations omitted).

BLACK'S Law Dictionary Revised 4th Ed., p. 1473.

Applying the dictionary definition of the term residence, it would appear that the individual at issue is a resident of Idaho since she maintains a bodily presence here; she has "resided" in this state for a period in excess of 12 consecutive months and, accordingly, she is eligible for the program. The conclusion resulting from this simple analysis is, we believe, mandated by the fundamental constitutional doctrine of equal protection of the laws and other related concepts of constitutional dimension.

For purposes of our analysis, we have assumed that the only factor upon which a denial of assistance in this case may be based is the applicant's status as an alien, i.e.

if the applicant was not a foreign citizen, she would be eligible for assistance. Denial of assistance would, therefore, unquestionably constitute disparate treatment by the state based exclusively on the applicant's alienage.

In *Graham v. Richards*, 403 U.S. 365 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), the Supreme Court held that state laws denying welfare benefits solely on the basis of alienage were unconstitutional. Eight members of the Court expressed the view that a state statute which denies welfare benefits to resident aliens is impermissible under the equal protection clause of the fourteenth amendment which encompasses aliens as well as citizens residing in the state. Further, all of the Justices shared the view that, since aliens lawfully within the United States have a right to enter and abide in any state with legal privileges equal to those of U.S. citizens, the statutes at issue, which would make indigent and disabled aliens unable to live where they could not obtain necessary public assistance, were also unconstitutional because they interfered with over-riding national policies in the area of immigration and naturalization which had been constitutionally entrusted to the federal government.

Applying an analysis similar to that adopted by the Supreme Court in *Graham*, it appears that any attempt to disqualify the present applicant solely upon her lack of citizenship would be constitutionally infirm. Accordingly, regardless of any definitional subtleties which may lie in attempting to determine whether a legal alien is a "resident" of Idaho, it is our belief that your agency cannot lawfully promulgate a regulation which discriminates against non-citizens exclusively on the basis of their alienage. Therefore, it would appear that the present applicant, if otherwise eligible, must be treated like any other individual who has resided in Idaho for twelve consecutive months. In this context, disparate treatment of a non-citizen will not pass constitutional scrutiny.

* * * *

In addition to the issue addressed above, the twelve-month residency requirement raises other questions. There have been a number of contemporary decisions in which the right to travel has been invoked in connection with the equal protection clause to invalidate residency requirements in contexts which, at least superficially, appear analogous to the renal care program. For example, in *Shapiro v. Thompson*, 394, U.S. 618, 89 S. Ct 1322, 22 L.Ed 2nd 600 (1969), the Supreme Court held that durational residency requirements for welfare benefits penalize the exercise of the right to travel and, consequently, violate equal protection. Also, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed 2d 306 (1974), an Arizona statute conditioning county-paid, non-emergency hospitalization or medical care for indigents on one year's residence in the county was found to be in violation of equal protection. *Memorial Hospital v. Maricopa County* may be an exceedingly important precedent in analyzing the validity of the residency requirement which you have adopted.

It is conceivable that the existence of alternative programs which do not require a period of residency may distinguish the present program from that involved in the Maricopa County case. In Idaho, an argument may be advanced that inter-state migrants are not denied access to renal care by virtue of your residency rule in that they can obtain similar treatment and care at public expense under other programs; thus, the right of inter-state travel is not adversely impacted by the existence of your rule. If, however, there is any disparity in the treatment and care received under alternative programs, it is likely that the residency limitation would be found to run afoul of equal

protection. We do not believe that we presently have sufficient information to engage in a more comprehensive analysis of this question. However, we thought it important to bring the issue to your attention.

Thank you for allowing us an opportunity to comment on your inquiry. If you have any questions or would like to discuss these matters further, please call at any time.

Yours truly,

P. MARK THOMPSON
Deputy Attorney General
Chief, Administrative Law
and Litigation Division

PMT/tg

May 25, 1984

Mr. A. I. Murphy
Director
Department of Corrections
STATEHOUSE MAIL

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

Dear Director Murphy:

You have asked for guidance as to the date on which the provisions of Idaho Code § 20-225 become effective. The 1984 legislature passed S.B. 1224 without declaration of emergency. Therefore, pursuant to Idaho Const. art. III, § 22 and Idaho Code § 67-510, the new legislation does not take effect until the 1st of July, 1984.

Idaho Code § 20-225 requires all persons under state probation or parole supervision to pay into a dedicated account in the state treasury up to \$35.00 per month in order to help defray the cost of probation or parole supervision. (See, Statement of Purpose, RS 9701-C1). Failure to make any payments is grounds for revocation of probation or parole as the case may be except where one of two conditions might be present to excuse nonpayment. Those conditions are irrelevant here.

The question you pose is not so much a question of the date on which the act becomes effective but of which probationers or parolees the act will apply to when it takes effect on the 1st of July, 1984. You have indicated that it was the intent of the drafters, and presumably of the legislature, to require everyone under supervision on 1 July, 1984, to begin paying cost of supervision. Others apparently feel that the legislation only applies to those placed on probation or parole after 1 July, 1984. Unlike the usual cases of statutory construction where the initial goal is to determine and give effect to the legislative intent, this case raises a constitutional issue from the outset: assuming that

the legislature's intent was to apply the statute to all those already on probation or parole on the 1st of July, 1984, does such an application violate constitutional prohibitions against ex post facto laws? Reduced to its essence the issue is whether application of Idaho Code § 20-225 retrospectively to convicted persons placed on probation or parole prior to 1 July, 1984, is ex post facto. Succinctly, the answer is that it probably is.

The fiat of the United States Constitution is clear: "No state shall . . . pass any . . . ex post facto law." U.S. Const., art. I, § 10. Of similar clarity is our own state constitutional provision: "No . . . ex post facto law . . . shall ever be passed." Idaho Const., art. I, § 16.

Analysis begins with definition of the term "ex post facto" and must commence with the seminal case, *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). In *Calder* the United States Supreme Court, speaking through Justice Chase, offered a first impression definition that an ex post facto law is one which is restrospective and fits into one of four categories:

1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, *supra*, at 389.

Although *Calder v. Bull* has been good law since it was handed down, there have arisen cases challenging the boundaries of the four categories. Almost a century later, the Supreme Court said that *Calder v. Bull* did not undertake "to define by way of exclusion, all the cases to which the constitutional provision would be applicable." *Kring v. Missouri*, 167 U.S. 228, 27 L.Ed. 508, 2 S.Ct. 443 (1882).

Chief Justice Marshall's definition of an ex post facto law broadened category three of the *Calder* dicta. He said that an ex post facto law may be one "which renders an act punishable *in a manner in which* it was not punishable when it was committed." *Fletcher v. Peck*, Mass. 6 Cranch 87, 138 L.Ed.162 (1810). (Emphasis added).

Subsequent cases dealing with the ex post facto clause have adhered to these early cases and have also broadened the prohibition against increased punishment. Many cases have cited the language of *Beazell v. Ohio*: "Any statute which . . . *makes more burdensome* the punishment for a crime after its commission, . . . is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169, 70 L.Ed. 216, 217 (1925). (emphasis added).

Probation and parole are part of the punishment phase of criminal proceedings contemplated by category three of the *Calder* definition. *Weaver v. Graham*, *infra*. While

it is beyond cavil that a change in the sentencing laws adversely affecting an inmate's eligibility for probation or parole will be ex post facto if applied retrospectively to the inmate, Idaho Code § 20-225 does not have such a substantial and dramatic impact. No cases have been found applying ex post facto prohibitions to less substantive matters, such as the provisions of Idaho Code § 20-225. In *Rooney v. North Dakota*, 196 U.S. 494, 49 L.Ed. 494, 25 S.Ct. 264 (1905), the United States Supreme Court held that a law enacted after the defendant was convicted of murder, which law changed the location and duration of close confinement conditions after the death penalty is imposed upon an inmate, did not violate the ex post facto clause because it did not alter the existing situation to the *material disadvantage* of the criminal. Using this case as a yardstick, Idaho Code § 20-225 can probably be applied to inmates who committed crimes before the new law goes into effect. Whether it can be applied to those already placed on parole or probation, however, raises concerns about the arbitrariness of governmental action, which is related to the ex post facto issue.

Pardon, parole and probation are, of course, not matters of privilege or right. They are matters of grace and clemency. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *Malloroy v. State*, 91 Idaho 914, 435 P.2d 254 (1967). "A parole is an act of grace and can be withheld or revoked, if granted, without depriving a prisoner of any legal rights." *State of Minnesota ex rel. Koalska v. Swenson*, 66 N.W. 2d 337, 341 (Minn. 1954). But once the sovereign sets out the conditions which are to govern a convicted person's parole or probation, and the convict has accepted and is abiding by the conditions, it is unseemly for the government to seek to alter or add to the conditions. A reviewing court would probably rule that the government is estopped from altering the probationer's or parolee's conditions in this fashion.

Writing for the majority in *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981), Justice Thurgood Marshall rejected the suggestion that an ex post facto law had to impair some "vested right." The Court decided that to be ex post facto, a penal law must merely be retrospective and "it must disadvantage the offender affected by it." (See also *Kring v. Missouri*, *supra*.) Even more significant than this liberalization of the meaning of the ex post facto clause, the Court also gave a reason for the rule: "Critical to the relief under the ex post facto clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint." *Weaver v. Graham*, *supra*, at 24. (emphasis added).

This language from *Weaver v. Graham*, the Supreme Court's most recent interpretation of the ex post facto clause, appears to broaden the focus beyond substantive changes in the law after the commission of a crime, to include changes in rules, regulations and procedural laws applied retroactively to the disadvantage of an inmate. While criminals have very little say in the conditions attached to their release, any changes in the law affecting their release should be applied prospectively. *Roman v. State*, 570 P.2d 1235 (Ala. 1977). The teaching of *Weaver* is that the government should give advance notice, deal with fairness and refrain from using arbitrarily its powers to punish or disadvantage offenders retroactively.

The cost of supervision required by Idaho Code § 20-225 should be applied prospectively from 1 July, 1984.

Sincerely,

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

JTJ/tg

June 5, 1984

The Honorable Kermit V. Kiebert
Minority Leader
Idaho State Senate
Box 187
Hope, ID 83836

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

Dear Senator Kiebert:

You have asked for legal advice concerning the constitutionality of the use tax exemption granted to INEL contractors by Idaho Code § 63-3615(b). Specifically, you are concerned that the statute may violate art. III, § 19 of the Idaho Constitution which prohibits special legislation in certain areas. It is my opinion that this statute is not special legislation in violation of the constitution.

Art. III, § 19 of the Idaho Constitution states that:

The legislature shall not pass local or special laws in any of the following enumerated cases. . . .

This section goes on to specifically enumerate 32 categories. "Art. III, § 19 has been interpreted as a prohibition upon legislative powers as to all matters enumerated in said section and prohibits the enactment of local and special laws only on the subjects therein enumerated. Under this provision of our constitution, the legislature is master of its own discretion in passing special laws on subjects not prohibited by the constitution." *Baxter v. City of Lewiston*, 11 Idaho 393, 398, 83 P. 234, 235 (1905); *State ex rel. Idaho State Park Board v. City of Boise*, 95 Idaho 380, 382, 509 P.2d 1301 (1973). The legislature may pass special legislation on any subject matter it wishes as long as that subject matter does not fall within one of the 32 expressly prohibited categories. The use tax exemption granted in Idaho Code § 63-3615(b) probably does not fall within one of these 32 prohibited categories. There are only two categories that may relate at all:

- 1) *Exempting property from taxation.* Although this section does deal specifically with exemptions, it does so in relation to property taxation and not use taxation. A use tax is an excise tax and not a property tax and thus not subject to constitutional limitations respecting property taxes. See, *Boise Bowling*

Center v. State, 93 Idaho 3567, 401 P.2d 262 (1969). Therefore, Idaho Code § 63-3615(b) does not fall within this category.

- 2) *For the assessment and collection of taxes*: The wording of the statute makes it clear that collection of taxes is not involved. Assessment has been defined as "a value placed upon *property* for the purpose of taxation" *Powell v. Chapman*, 260 S.C. 516, 197 S.E. 2d 287, 289 (1973). Furthermore, as "assessment" is an integral part of the taxation process leading to the composition of taxes, *exempt* property is *not* assessed," *Grosvenor v. Supervisor of Assessments of Montgomery County*, 271 Md. 232, 315 A.2d 758, 761 (1974). Finally, in Nevada, a constitutional provision similar to Idaho's prohibiting enactment of local or special laws for the "assessment and collection of taxes" was construed to merely prohibit special legislation regulating those acts which assessors and collectors of taxes generally perform in the assessment and collection of taxes. *Cauble v. Beemer*, 64 Nev. 77, 177 P.2d 677, 682, 683 (1974). It should not inhibit the legislature from passing special legislation authorizing a special tax exemption for a particular purpose. *Cauble* at 683.

Taken with the legal maxim that statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of validity, *State Park Board* at 382, the definitions above point toward a judicial finding that the "assessment and collection of taxes" subdivision of art. III, § 19, does not apply to Idaho Code § 63-3615(b) either.

Because this statute does not appear to fall within any of the 32 enumerated sections of art. III, § 19 of the Idaho Constitution, this statute is not unconstitutional special legislation.

Any analysis of a statute as special legislation is incomplete without determining whether the statute violates the equal protection clause of the 14th amendment. Statutorily created classifications of a specific group (i.e. INEL contractors) do not offend the constitution simply because they result in some inequalities. See, *School District No. 25 v. State Tax Commission*, 101 Idaho 283, 612 P.2d 126 (1980). As to classifications with respect to tax matters, the Idaho Legislature possesses plenary power. *Id.* at 286. This plenary power extends to the granting of tax exemptions. *Evans v. Idaho State Tax Commission*, 95 Idaho 54, 501 P.2d 1054 (1972). The Idaho Supreme Court has thus only required the following two step equal protection analysis of the Idaho Sales Tax Act of which Idaho Code § 63-3615(b) is a part:

- 1) Does the statute reflect *any reasonably conceivable* public purpose? It would probably be an easy matter for the court to find that giving a use tax exemption to INEL contractors serves the "public purpose" of promoting the research, development and testing of nuclear energy.
- 2) Is the classification reasonably related to this purpose? The test for purposes of determining the validity of legislative classifications is merely whether *any state of facts* reasonably can be conceived that would sustain the classification. *Bits, Inc. v. City of Seattle*, 86 Wash.2d 396, 544 P.2d 1242 (1976). Under an analysis similar to that above, the court most probably would con-

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

ceive of "any state of facts" that would sustain this classification of INEL contractors.

The plenary power of the legislature in the area of taxation coupled with the extreme judicial deference shown by the courts in these areas leads to the conclusion that Idaho Code § 63-3615(b) would probably survive judicial scrutiny under the equal protection clause of the 14th Amendment.

I hope this has answered your concerns. If you have further questions please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief-Legislative/
Administrative Affairs

JEFFREY THOMSON
Legal Intern

KRM/tal

June 19, 1984

Charles D. McQuillen
Executive Director
State Board of Education
STATEHOUSE MAIL

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

RE: Promulgation of Rules for Administration of
Professional Studies Program

Dear Mr. McQuillen:

You have asked for legal advice concerning the promulgation of rules for administration of the professional studies program set forth in § 33-3720, Idaho Code. Your concern, briefly, is whether the Idaho State Board of Education must promulgate rules to administer the program or whether it may decline to adopt further rules after its initial rules on the subject have been rejected by the legislature pursuant to § 67-5218, Idaho Code.

In the normal context, the state board would have no alternative but to adopt further rules. Because of the method in which § 33-3720, Idaho Code, was drafted, however, it is my conclusion that the state board of education does have authority to refuse to promulgate further rules if it so chooses.

Section 33-3720(2), Idaho Code, states:

The State Board of Education is hereby authorized to enter into loan agreements with qualified recipients to participate in qualified programs, which agreements shall include provisions for repayment of the loan on terms agreed to by the Board and the qualified recipients; such repayment agreements may include provisions for decreasing or delaying or forgiving the repayment obligation in relationship to the recipient's course of study or agreement to return to Idaho to practice professionally. . . .

Section 33-3720(4) states:

The State Board of Education is hereby authorized to adopt all necessary rules, subject to the provisions of ch. 52, title 67, Idaho Code, for the administration of the professional studies programs.

The professional studies program (WAMI, WICHI, WOI, etc.) has been operated for a number of years without loan agreements. Instead, the state board of education has made payments to the various institutions or entities on behalf of participating students. When it enacted section 33-3720, Idaho Code, in 1983 (1983 Sess. Laws, ch. 182) the legislature allowed the state board to implement the professional studies program with loan agreements rather than grants. It is important to note, however, that the legislature did not require the program to be administered exclusively by loan agreements. Significant to the demonstration of legislative intent is the first sentence in subsection (2) that the state board is "authorized to enter into loan agreements." The statute does not require it but, rather, allows the board to enter into such agreement.

"Authorize" is defined by Black's Law Dictionary as "To empower; to give a right or authority to act. . . . to clothe with authority, warrant, or legal power. . . . to permit a thing to be done in the future." Although there is authority to the effect that "authorize" implies a mandatory duty, such is not the plain meaning of the word and is clearly not the majority rule. See, e.g. *Hotel Casey Company v. Ross*, 343 P.A. 573, 23 A.2d 737. The great weight of authority is to the contrary, that a person or entity authorized to do an act, in the exercise of discretion may refuse to do the act. See, e.g., *Creek Nation v. United States*, 318 U.S. 629-643 (Ct. Cl. 1942); and *McLaughlin v. Niagara Falls Board of Education*, 38 Misc.2d 143, 237 N.W.S.2d 761.

Accordingly, the board need not enter into loan agreements to operate the professional studies program if it chooses not to. Rather, the program can be operated as in the past, by direct grants to the participating institutions.

If the board of education chooses to operate the program by means of loan agreements, however, it must adopt appropriate rules and regulations. Because the statute does not set forth with specificity the type of loan terms or the requirement of repayment or forgiveness for those who return to Idaho to practice their profession, these requirements must be fleshed out by regulation so that fair notice and opportunity to comment upon the procedures of the state board and requirements of loan agreements may be provided to all.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

In summary, the state board of education need not promulgate rules or regulations to continue the operation of the professional studies program if it chooses not to utilize the mechanism of loan agreements. The board may continue to operate each program as it has in the past, without the use of loan agreements. If the board chooses to enter into loan agreements for the operation of the program, it must adopt appropriate rules and regulations to implement the loan agreement portion of the program.

I hope that this has answered your questions satisfactorily. If you have further comments or concerns, please contact me.

Sincerely,

KENNETH R. McCLURE
Acting Chief Deputy

KRM/tal

June 26, 1984

Pete T. Cenarrusa
Secretary of State
STATEHOUSE MAIL

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

Dear Mr. Cenarrusa:

We have received your request for legal guidance concerning the application of a legal resident alien for a commission as a notary public. As you know, Idaho Code § 51-104(2) specifically requires all notaries public to be citizens of the United States.

The United States Supreme Court last month in *Bernal v. Fainter*, 52 USLW 4669 (1984), found a comparable provision of Texas law (Tex. Civ. Stat. Ann., Art. 5949(2) Vernon) to be unconstitutional. The court subjected the Texas statute to "strict scrutiny" which means that a state statute must "further a compelling state interest by the least restrictive means practically available." 52 USLW at 4672. The United States Supreme Court found the Texas statute deficient in this regard and therefore declared it to be unconstitutional as a violation of a legal resident alien's right to equal protection of the law. In so doing, the court held the "political function exception" to the normal application of strict scrutiny to statutes which make classifications based upon alienage to be inapplicable, stating:

What distinguishes [notaries public] from those to which the political function exception is properly applied, is that the latter are either invested with policy making responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Neither of these characteristics pertain to the function performed by Texas notaries. *Id.*

As the Idaho statute barring resident aliens from becoming notaries public has an identical effect to that provision of the Texas statute which was found to be unconstitutional by the United States Supreme Court, that portion of the Idaho statute similarly is unconstitutional. Accordingly, resident aliens should be given commissions as notaries public if they are otherwise qualified, notwithstanding the provisions of Idaho Code § 51-104(2).

If I can provide further information, please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief/Legislative
Administrative Affairs

KRM/tal

June 26, 1984

The Honorable James F. Stoicheff
615 Lakeview
Sandpoint, Idaho 83864

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

Re: Priest Lake Exchange

Dear Representative Stoicheff:

The State Board of Land Commissioners has directed this office to respond to the second point contained in your letter dated May 20, 1984. In point number two, you question the legal authority of the land board to enter into a land exchange with a private corporation such as Diamond International, without legislative authorization. It is our conclusion that the land board may enter into an exchange of the nature proposed with Diamond International under existing constitutional, statutory, and precedential authority.

Our discussion of this matter begins, as it must, with art. IX, § 8 of the Idaho Constitution, as amended. That section provides in part that:

The legislature shall have the power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

The Idaho legislature has enacted a number of statutes directly regulating and authorizing land exchanges. For example, Idaho Code § 58-138 allows the land board to exchange state lands for similar lands of equal value. To the same effect is Idaho Code § 58-133 which provides for the selection and acquisition in any manner of state forest lands. This broad language would probably impliedly authorize acquisitions through exchanges.

As noted previously, Idaho Code § 58-138 is the clearest articulation of legislative authorization for land board exchanges. That section, initially enacted in 1963, allowed the land board to exchange "state lands" for similar lands of equal value owned by the United States. The language was amended in 1979 to allow exchanges with private parties:

The state board of land commissioners may at its discretion, when in the state's best interest, exchange, and do all things necessary to exchange, any of the state lands now or hereafter held and owned by this state for similar lands of equal value public or private, so as to consolidate state lands or aid the state in the control and management or use of state lands. Provided further the state board of land commissioners may, in its discretion, hereafter grant and receive less than fee simple title, and grant or allow such reservations, restrictions, easements or such other impairment to title as may be in the state's best interest. No exchanges shall be made involving leased lands except upon the written agreement of the lessee. Subject to the approval of the state board of land commissioners, the first lease on lands acquired through land exchange and in lieu selections shall be offered to the present user, lessee, or permittee of the land, provided that the present user agrees in writing to enter into a contractual management program through which the resource values of the land may be enhanced or improved for the purpose of increasing the income to the endowed institutions.

Although Idaho Code § 58-138 was enacted and amended prior to the 1982 amendment of art. IX, § 8 of the Idaho Constitution, the language of the statute and the constitution is completely harmonious. It is our understanding that the drafters of the constitutional amendment were cognizant of the statutory language; thus every attempt was made to integrate the language of the two provisions. The limitations upon the land board's statutory authority to enter into the proposed exchange would probably be that the purpose of the exchange would have to be to consolidate or aid the state in the control, management or use of state lands.

The pronouncements of the Idaho Supreme Court in this area provide a separate and independent base upon which this exchange could be consummated. The court has held that the duties of the land board set forth in art. IX, § 8 of the Idaho Constitution are self-executing. In *Allen v. Smylie*, 92 Idaho 846, 252 P.2d 343 (1969) the Idaho Supreme Court stated that:

the constitutional duty of the board is self-executing. Therefore, if the legislature has not specified the procedure the board may adopt appropriate procedures to carry out its constitutional duties.

92 Idaho at 852. The plain implication of this language is that the board can proceed to exchange state land if the legislature fails to specify the technical process by which exchanges are to proceed. Taken together, the case law, statutes, and constitution all point toward the land board's duty to manage state lands in order to secure the best long-term financial return to the state. If an exchange of land would appear to further this goal, the courts would permit the exchange to proceed, absent a clear abuse of discretion.

In determining the appropriate standard for reviewing land board determinations, the court has generally deferred to the skill and expertise of the board. Because many of the matters which come before the land board require it to exercise discretion as a businessman and as a trustee, the courts have long indicated hesitancy to interfere

with the decisions of the land board. For example, in *Balderson v. Brady*, 17 Idaho 567, 107 P. 493 (1910), the court stated:

In many of the matters coming before the board in reference to state lands, they must exercise their judgment and discretion, and it is a well settled principle of law that in such cases the courts will not attempt to control or supervise the discretion vested in the officers of a coordinate branch of the government.

17 Idaho at 575. Absent an abuse of discretion, which has not occurred here, the board's power to act in this area is quite clear.

In summary, it is our conclusion that the land board is empowered to use its discretion and exchange state lands for public or private lands. It must be noted, however, that no decision has been made concerning this particular exchange by the members of the land board. If there is anything further we can provide, please do not hesitate to contact us.

Very truly yours,

PATRICK J. KOLE
Deputy Attorney General
Chief, Natural Resources Division

PJK:ams

August 7, 1984

The Honorable C.A. "Skip" Smyser
Senator, District 11
Route 1
Parma, ID 83660

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

Dear Senator Smyser:

Your recent letter asked us to address several questions concerning the legality and propriety of the mailing of the Sportsman's Coalition brochure by the department of fish and game.

CONCLUSION

The distribution of the Sportsman's Coalition brochure appears to be violative of the public purpose principle developed under art. VIII, §§ 3 and 4 and art. XII, § 4 of the Idaho Constitution. In essence, that doctrine provides that a state entity cannot engage or aid in activities that have primarily a private purpose, as opposed to a public purpose.

STATUTORY ANALYSIS

Under the fish and game code, Idaho Code § 36-101 *et seq.*, there are no clear prohibitions against the distribution of brochures printed by private groups, with or without

compensation for distribution costs. Neither can such prohibitions be found in Idaho Code title 67, which governs the procedures and operations of state agencies and departments generally.

The fish and game commission is authorized to administer the state's policy affecting the "preservation, protection, and perpetuation of Idaho's wildlife." I.C. § 36-103(b). That policy is characterized as flexible and, presumably, the department's own studies and proposals on wilderness designation were made pursuant to this policy.

Among the powers of the commission specified in I.C. § 36-104(b) (9) is the authority to:

Enter into cooperative agreements with state and federal agencies, municipalities, corporations, organized groups of landowners, associations and individuals for the development of wildlife rearing, propagating, management, protection and demonstration projects.

Arguably, the coordination of fish and game department mailings with the Sportsman's Coalition could fit under the above-mentioned authorization, although the subsection seems to envision more specific wildlife projects rather than the dissemination of jointly held views on the incidental protection of wildlife through land designations.

The duties and powers of the director of the fish and game department enumerated in I.C. § 36-106(e) suggest a certain amount of discretion is to be afforded to the director in managing the department's activities. In fact, I.C. § 59-1012 seems to encourage the department to disseminate information to "promote the ethical use and conservation of fish and wildlife resources" and to "encourage citizen participation in department programs." A broad interpretation of § 59-1012 suggests that the department can charge fees for the distribution of this information if it so chooses, provided the distribution otherwise is proper.

The expenses of the fish and game department for such distributions are not paid from tax revenue but, rather, come from the fish and game account which is made up of the moneys collected for hunting, fishing and trapping licenses, tags and permits or from any source connected with the administration of the fish and game code. I.C. § 36-107(a).

Although there is no statutory prohibition against the distribution of private materials by the fish and game department, like all state agencies the department is ultimately subject to the limitations imposed by the state constitution. Those limitations more clearly suggest that such distributions are improper.

CONSTITUTIONAL ANALYSIS

Article VIII, §§ 3 and 4 and art. XII, § 4 of the Idaho Constitution prohibit municipalities and municipal corporations from extending credit to or contracting indebtedness with private entities, yet, they have come to reflect a broader principle that state government entities are limited to functions which are public in character and not for the benefit of private interests. *Village of Moyie Springs v. Aurora Manufacturing Co.*, 82 Idaho 337, 346, 353 P.2d 767, 773 (1960). Another provision consistent with this principle is art. VIII, § 2 prohibiting the loan of the state credit in aid of any individual, association, municipality or corporation.

This public purpose principle was first articulated in the broad terms in which it is now known in *Moyie Springs*. Since then, however, the court has upheld government

action affecting a private purpose more often than it has invoked this public purpose principle to strike down government action. *See, Hanson v. City of Idaho Falls*, 92 Idaho 512, 515-6, 446 P.2d 634, 637-8 (1968); *Hansen v. Kootenai County Board of County Commissioners*, 93 Idaho 655, 661, 471 P.2d 42, 48 (1970); *Boise Redevelopment Agency v. Yick Kong Corporation*, 94 Idaho 876, 499 P.2d 575 (1972)

The court in *Yick Kong* gave the most elaborate rationale for the principle to date, stating that:

The purpose of such a prohibition is clear. *Favored status should not be given any private enterprise or individual in the application of public funds.* The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayer. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution.

Yick Kong, at 883-4, 449 P.2d at 582-3 (emphasis added). This language has come to represent the public purpose principle in subsequent cases. It is quoted verbatim by the court in *Idaho Falls Consolidated Hospitals v. Bingham County Board of County Commissioners*, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982), and in *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authorities (IHFA)*, 96 Idaho 498, 510, 531 P.2d 588, 600 (1975).

In *Yick Kong*, and the two subsequent cases mentioned above, *Idaho Falls Consolidated Hospitals* and *IHFA*, the court ultimately found the evils sought to be prevented by the constitutional provisions did not exist. In *Yick Kong*, the court pointed out that even if a use provides a private benefit that does not mean it is not a public use. *Yick Kong* at 880, 499 P.2d at 579. In 1982, even though the court found the principle inapplicable, it reiterated that “no entity created by the state can engage in activities that do not have *primarily* a public rather than a private purpose, nor can it finance or aid any such activities.” *Idaho Falls Consolidated Hospitals*, 102 Idaho at 839, 642, P.2d at 554.

The court has also clarified that the application of the public purpose principle was not limited to cities:

Article 3 of the Constitution of Idaho does not specifically mention a requirement of a public purpose for legislation authorizing a state-created public entity to expend funds. However, in the case of *Village of Moyie Springs v. Aurora Manufacturing Co.*, this Court declared that “municipal corporations. . . are limited to functions and purposes which are. . . public in character as distinguished from those which are private in character and engaged in for private profit. . . .” If this rule is a restriction upon the cities’ powers, it must be so because it is also a restriction upon the state’s power, for the cities are not singled out for unique treatment in this regard by statute or constitutional provision. Therefore, *this restriction must be inherent throughout state government and must be a fundamental limitation upon the power of the state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity.*

I.H.F.A., 96 Idaho at 502, 531 P.2d at 592 (emphasis added).

Recently, the Idaho Supreme Court invoked this principle to strike down an agreement between several Idaho cities and Washington Public Power Supply System (WPPSS) which obligated the cities to pay for some of the nuclear power plants being constructed. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983). Although the court relied more on the specific language of art. VIII, § 3 than the broader public purpose principle, Justice Bakes in his dissent elaborated on the principle. He noted that numerous Idaho cases have interpreted several constitutional provisions "as prohibitions upon the lending of credit in aid of private associations or corporations." *Id.* at 445-6, 670 P.2d at 852-3.

In the present case, it appears that the public purpose principle is applicable and may be invoked to prevent the fish and game department from distributing brochures promoting private organizations or causes such as the Sportsman's Coalition.

The Coalition benefited by the department's actions directly, by being relieved of mailing expenses and being provided a mailing list, and indirectly, through the promotion of their membership drive. Although there was no cost to the department, this distribution clearly bestowed a financial benefit on a private organization. The financial aspect of the public purpose principle appears to be very important. The constitutional provisions, art. VIII, §§ 2,3 and 4, all refer to financial indebtedness. The court in *IHFA* and *Idaho Falls Consolidated Hospitals*, however, spoke of financing or *aiding* private entities, which may suggest the principle could be extended beyond the financial context.

Of course, if there is *primarily* a public purpose to the department's actions, the incidental private benefits would not render the mailings improper under this principle. Here, although it may be somewhat related to the department's responsibility to administer the state's policy of "preservation, protection and perpetuation of Idaho's wildlife," I.C. § 36-103(b), the public purpose is tenuous, and probably insufficient to justify the department's action.

In summary, although the public purpose principle derived from specific constitutional limitations has never been applied by an Idaho court to a situation like the present one, the reasoning behind it is applicable and would suggest that the department's activities were improper. If you have any further questions or if we may clarify this response, please feel free to call upon us.

Sincerely,

JIM HANSEN
Legal Intern

KENNETH R. McCLURE
Acting Chief Deputy Attorney
General

KRM/JH/tal
cc: Bill Dillon

August 15, 1984

Representative Ray Infanger
Route 1, Box 174
Salmon, ID 83467

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

Dear Ray:

You have asked whether the issuance of controlled hunt permits by the department of fish and game constitutes an illegal lottery. For the reasons I state below I have determined that it does.

According to Idaho Code § 36-104(b)(5), the department of fish and game is authorized to:

. . . hold a public drawing giving to *license holders*, under the wildlife laws of this state, the privilege of *drawing by lot* for a controlled hunt permit. . .

This provides that anyone who has a hunting license may participate in a drawing for controlled hunt permits. According to Idaho Code § 36-406, a resident must pay six dollars for a hunting license. Idaho Code § 36-407 states that a non-resident must pay seventy-five dollars for a hunting license. Accordingly, anyone who wishes to participate in the drawing for controlled hunt permits first must pay either six or seventy-five dollars, depending upon his or her state of residence.

As you are aware, the Idaho Constitution, art. III, § 20, prohibits the legislature from authorizing any lottery "for any purpose." A lottery is defined by Idaho Code § 18-4901 as follows:

A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property. . . upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. (emphasis added)

The Idaho Supreme Court considered these two sections in *State v. City of Garden City*, 74 Idaho 513, 265 P.2d 328 (1958). The court stated that the definition found in § 18-4901:

. . . conforms to that of the common law which has defined a lottery as a species of gaming, wherein prizes are distributed by chance among persons paying a consideration for the chance to win; . . . To constitute a lottery, as distinguished from other methods or forms of gambling, it is generally held there are three essential elements, namely, chance, consideration and prize. When these three elements are present, the scheme is a lottery. 74 Idaho at 520. (emphasis added)

Accordingly, if the method of distribution of controlled hunt permits embodies the payment of consideration for a chance to win a prize, it is a prohibited lottery and the statute which authorizes it is unconstitutional.

There is no question but that successful applicants for a controlled hunt license are chosen by chance. The statute clearly states that successful applicants will be chosen by lot. The second element of a lottery, that of consideration, is also present. It was concluded in Attorney General Opinion #52-75 that the consideration to which the statute refers is that of valuable consideration. The purchase of a hunting license as a precondition to entering the controlled hunt drawing required by Idaho Code §§ 36-104(b) (5), 406, and 407 (either six dollars or seventy-five dollars) clearly is valuable consideration. In order to be eligible for a controlled hunt permit drawing, each applicant *must* have purchased a license before the drawing is conducted. If the applicant does not possess a hunting license, and therefore has not paid the license fee, he is not eligible for the controlled hunt drawing. As stated in "Applicability of Lottery Statutes to Certain Contests in Merchandise Sales Promotions" (FCC 69-611), which was adopted by Attorney General Opinion #52-75:

Clearly consideration is present when the contestant is required to pay money or give something of value for the chance to win a prize.

That opinion goes on to state:

In order to eliminate the element of consideration, non-purchasing and purchasing contestants must be accorded an approximately equal opportunity in the number of chances to be obtained; otherwise the scheme amounts to a lottery. *Id.*

Although the applicant must not pay money for the sole purpose of exercising his privilege to enter the controlled permit drawing, nevertheless, the requirement that the individual purchase of hunting license as a condition precedent to his eligibility for the drawing constitutes valuable consideration.

Finally, the statutory scheme for distribution of controlled hunt permits also results in a prize for those individuals who are selected. In construing Idaho Code § 18-4901, the Idaho Supreme Court has used the commonlaw elements of a lottery which indicate that a prize is an item of greater value than the consideration given for the chance to win it. See, *State v. Garden City*, and *Oneida County Fair Board v. Smiley*, 86 Idaho 341, P.2d 374 (1963). Although the value of a controlled hunt permit cannot be established with any degree of certainty, it should be apparent that the relatively rare and limited opportunity to hunt big game such as mountain goats or bighorn sheep, easily exceeds the cost of a hunting license.

In summary, the method of distributing controlled hunt permits embodied in Idaho Code § 36-104(b) (5) constitutes an impermissible lottery. An individual who wishes to obtain a controlled hunt permit must pay consideration (the cost of a hunting license) for the opportunity to take a chance (in the drawing) on winning a prize (a controlled hunt permit). This is the type of lottery which art. III, § 20 of the Idaho Constitution prohibits. As such, corrective legislation should be enacted to change the method of distributing permits or to remove the requirement that an applicant be a holder of a

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

valid hunting license. If the statute were changed to permit an individual to purchase a hunting license after he has been selected as a recipient of a controlled hunt permit the element of consideration would be absent from the statutory scheme, therefore, causing the method of distribution not to be a prohibited lottery.

If I can assist you with the drafting of legislation or if you have further questions which I may clarify for you please feel free to contact me.

Sincerely,

KENNETH R. McCLURE
Deputy Attorney General
Division Chief/Legislative
Administrative Affairs

KRM/tal

October 30, 1984

Mr. Gary Gould
Director
Department of Labor
STATEHOUSE MAIL

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

Dear Mr. Gould:

Your letter of September 6, 1984, requests guidance on the question of whether the department of labor and industrial services may perform the functions set out in § 44-107, Idaho Code, relative to determination of bargaining representatives for public sector employees.

The case of *Local Union 283, Int. Bro. of Elec. Wkrs. v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967), compels a conclusion that the Idaho Department of Labor and Industrial Services has no jurisdiction to determine representation questions in the public sector. That case originated as a mandamus proceeding wherein an employee organization sought to compel the commissioner of labor to certify a bargaining representative for public sector employees. The Idaho Supreme Court, in resolving that question, addressed the broader jurisdictional question of "whether the provisions of § 44-107, Idaho Code, relating to the State Commissioner of Labor's duties in the determination of employee representation, apply to persons engaged in public employment."

The court found that the language of Idaho Code § 44-107 was "ambiguous" and "general" but applied traditional canons of statutory interpretation and held that:

The use of general language in a statute is sufficient to indicate a legislative intent that the government should fall within the statutory coverage. . . . A

judicial rule of statutory construction, whereby broad language in a statute is construed to govern the conduct of the state and its political subdivision, would undoubtedly result in dire consequences. Therefore, in order to maintain the operations of state and local government on an efficient, unimpaired basis, this court will not interpret broad language in a statute "to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

91 Idaho at 447-448 (citations omitted). The court concluded that the duties of the commissioner of the department of labor do not extend to questions of representation of public employment.

It is also significant to note that *Robison* was cited in the case of *School District #351, Oneida City v. Oneida Educational Association*, 98 Idaho 486, 489, 567 P.2d 830, 833 (1977), for the proposition that the "general statutes dealing with labor controversies and duties of public officials thereunder are 'insufficient to indicate a legislative intent that the government should fall within the statutory coverage. Legislative acts are normally directed to activities in the private sector of society and effect a modification, limitation or extension of the private individual's rights and duties.'"

In sum, the Idaho Supreme Court, in both the *Robison* and *Oneida* cases, has held that Idaho Code § 44-107 is not applicable to public sector employment. As such, the department of labor and industrial services is precluded from determining bargaining representatives in public sector employment.

Yours truly,

P. MARK THOMPSON
Deputy Attorney General
Chief, Administrative Law
and Litigation Division

PMT/tg

November 6, 1984

Stanley F. Hamilton, Director
Idaho Department of Lands
Statehouse Mail

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

Re: Title to Beds of Snake and Blackfoot Rivers

Dear Director Hamilton:

You have requested an opinion as to the following issues, paraphrased:

1. Whether the State of Idaho owns the beds of waterways that were navigable in fact at the time of the statehood;

2. Whether the Blackfoot River is a navigable stream for the purpose of state title; and,

3. Whether the state owns the beds of the Snake and Blackfoot Rivers where those rivers form the northern boundary of the Fort Hall Indian Reservation, particularly in light of assertions by the Shoshone-Bannock Tribes to such ownership.

I. *Conclusions.*

1. The state owns beds of waterways that were navigable at the time of statehood, unless Congress conveyed the beds to another entity before statehood.

2. Determining the navigability of the Blackfoot River requires examination of the river's history and physical characteristics. While such a factual determination is beyond the scope of this guideline, the tests by which a court would judge the river's navigability for title purposes are discussed.

3. The state would own the beds of the subject stretches of the Snake and Blackfoot Rivers if the rivers were found to have been navigable at the time of statehood and if the Fort Bridger Treaty was found to have extinguished, before statehood, whatever "aboriginal title" could be claimed by the Shoshone-Bannock. The Fort Bridger Treaty is ambiguous regarding the extent to which it extinguished any aboriginal title or independently granted title to the riverbeds. The effect given the treaty probably would be determined by the Shoshone-Bannock's historic use of the rivers and circumstances contemporary to the treaty. These are factual inquiries beyond the scope of this guideline.

II. *Discussion.*

A. *State title to beds of navigable waters.*

Generally, title to beds of navigable waters vests in the state upon statehood. *Montana v. United States*, 450 U.S. 554, 551 (1981); *Shively v. Bowlby*, 152 U.S. 1, 27 (1894). This principle is known as the Equal Footing Doctrine. Upon admission to the Union, new states succeeded to rights of sovereignty on an equal footing with established states, including title to beds of navigable waters. *Oregon, ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 370 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). This title was recognized and confirmed in the Submerged Land Act. 43 U.S.C. § 1301 et seq.¹

State title is to beds and banks located below the ordinary high water mark. See *Packer v. Bird*, 137 U.S. 661, 672 (1891). This boundary might be affected by avulsion, accretion, or other changes in the course of a waterway occurring after statehood. And, of course, state title may be transferred by grants or other disposals of submerged lands subsequent to statehood. The effect of such occurrences is not considered in this guideline.

¹The act excepted from such recognition lands held by the United States for the benefit of any Indian tribe. 43 U.S.C. § 1313(b).

State title via the Equal Footing Doctrine also may be affected or defeated if the United States conveyed the beds prior to statehood in order to perform an international obligation, improve the waterway for commerce, or carry out some other public purpose. *Montana*, supra, at 551-552; *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Thus, determination of state title to the bed of a particular waterway requires examination of any federal action regarding the waterway before statehood. If the federal government did not convey the bed before statehood, title is in the state. *Montana*, supra at 552.

B. Navigability of the Blackfoot River.

A prerequisite to application of the Equal Footing Doctrine is that the waterway in question was navigable in fact at the time of statehood. *United States v. Utah*, 283 U.S. 64, 75 (1931).² The Snake River has been found to have been navigable at the time of statehood. *Scott v. Lattig*, 227 U.S. 229, 239 (1913); see *Lattig v. Scott*, 17 Idaho 506, 107 P. 47 (1910); see also *Northern Pacific Ry. Co. v. Hirzel*, 19 Idaho 438, 161 P. 854 (1916). The navigability of the Blackfoot River, the specific question for this guideline, has not been judicially determined. As will be shown below, finding the Blackfoot River to be navigable would require factual investigation and conclusions regarding the river's history and physical characteristics. Such an evidentiary determination cannot be made in this guideline. This guideline instead outlines the indicia of navigability approved by the courts.

Navigability for purposes of title is governed by federal law. *Utah v. United States*, 403 U.S. 9, 10 (1971). Federal law is that a waterway is navigable if, at the time of statehood and in its ordinary condition, it was used or susceptible of being used as a highway for customary modes of commerce. *United States v. Utah*, supra at 76; *Holt State Bank*, supra at 56.

Although statehood is the critical date for determining navigability, the "susceptibility" standard allows a finding of navigability to be based on uses of a river made subsequent to statehood. *United States v. Utah*, supra at 82. And, in addition to actual uses, navigability may be based on demonstration of possible uses. *Id.* at 82 and 83 n.2.³ Thus, any lack of evidence as to uses of the Blackfoot River at the time of statehood would not be dispositive. Conversely, if evidence does exist of uses at the time of statehood, it would be immaterial if the Blackfoot River is not currently used for commerce or has not been so used for several years. See Johnson and Austin, *Recreational Rights and Title to Beds of Western Lakes and Streams*, 7 Nat. Res. J. 1, 16 (Jan. 1967).⁴

²If the waterway was not navigable, adjacent landowners would own to the center or thread of the lakebed or riverbed, *Oklahoma v. Texas*, 358 U.S. 574, 595 (1922); *United States v. Ladley*, 42 F.2d 474 (D. Idaho 1930).

³The susceptibility test is not applied by courts to find navigability for title when a river is capable of commercial use only due to man-made improvements. The river's natural or ordinary condition is controlling. Compare *United States vs. Appalachian Power Electric Co.*, 311 U.S. 377, 407 (1940) [man-made improvements may make river navigable for purposes of Commerce Clause jurisdiction.]

⁴Compare *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980), cert. denied 450 U.S. 914 [in determining navigability for purpose of admiralty jurisdiction, *present* capability of waters to sustain commercial shipping is controlling.]

Courts have construed broadly the requirement that a river be “susceptible” of commercial use in its natural state. Impediments such as sandbars, falls, or rapids hindering transportation in particular stretches do not necessarily render a river non-navigable. *United States v. Utah*, supra at 76, 86; *Economy Light & Power v. United States*, 256 U.S. 113, 122 (1921). Similarly, low water due to drought does not necessarily make a river non-navigable. *Holt State Bank*, supra at 57; but see *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 699 (1899) [river not navigable if capable of floating logs only during “exceptional” high flows]; accord, *Puget Sound Power & Light v. FERC*, 644 F.2d 785, 788 (9th Cir. 1981).

Courts also have identified a broad variety of “customary modes” of commerce. Rowboats, flatboats, steamboats, motorboats, and barges have been recognized, as well as vessels used in connection with prospecting, surveying, mining, exploring, transporting of passengers, and transporting of livestock. See *United States v. Utah*, supra at 82; *Utah v. United States*, supra at 11. Canoe travel may be an admissible mode of commerce. *North Dakota, ex rel. Board of University and School Lands v. Andrus*, 671 F.2d 271, 277, 278 (8th Cir. 1982); but cf., *United States v. Oregon*, 295 U.S. 1, 20-23 (1934) [lake not navigable where canoes often required to be dragged or pulled over shallows]. The floating of timber is indicative of commercial use. See *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 411 (1940); *Oregon v. Riverfront Protection Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982). Private recreational boating, although not commercial in itself, is admissible to show a river susceptible to commercial use. *United States v. Utah*, supra at 92; *Connecticut Light and Power Co. v. FPC*, 557 F.2d 349, 357 (2nd Cir. 1977).

In sum, “the legal standards on navigability are liberal.” *North Dakota v. Andrus*, supra at 278⁵, but each river’s navigability must stand on its own facts. *United States v. Utah*, supra at 86.

C. Title to Beds of Snake and Blackfoot Rivers.

If the Blackfoot River would be found to have been navigable at the time of statehood, July 3, 1890, as has been the Snake River, title to both rivers’ beds would be in the state via the Equal Footing Doctrine. However, the state would not hold title if the United States conveyed the beds to another entity before statehood. This exception to the Equal Footing Doctrine is relevant here because the Shoshone-Bannock Tribes assert ownership to the rivers’ beds bordering the Fort Hall Reservation based on the Fort Bridger Treaty and “historical bases” predating statehood.

Sources of the Shoshone-Bannock’s claim to ownership might include “aboriginal title” in addition to the Fort Bridger Treaty itself. The treaty, while providing possible independent basis of ownership, also may have extinguished or restricted any aboriginal title. Thus, in analyzing whether title to the beds was conveyed to, or reserved by,

⁵An even less restrictive test is used for determining navigability to establish public rights, regardless of title to the beds, to use a river for boating, swimming, fishing, hunting, and other recreational purposes. See *Southern Idaho Fish and Game Ass’n v. Picabo Livestock, Inc.*, 96 Idaho 360, 362-363 (1974); *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448, 451 (1971).

the Shoshone-Bannock, it is necessary to examine the existence and scope of any aboriginal title as well as the effect of the Fort Bridger Treaty.

1. *Aboriginal Title.*

Aboriginal title, or “original Indian title,” or “Indian title,” is derived from the historic possession of lands by an Indian tribe. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *State v. Coffee*, 97 Idaho 905, 908, 556 P.2d 1185 (1976). It is a right of exclusive occupancy and use which exists even though underlying fee simple was held by the sovereign, usually the United States, and then conveyed to another entity. *Johnson*, supra at 574; *United States, ex rel. Hualpai Indians v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941); *Buttz v. North Pacific R.R.*, 119 U.S. 55, 66 (1886). However, aboriginal title may be extinguished by Congress. *Hualpai*, supra at 347; *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983). Congressional intent to extinguish aboriginal title must be clear and specific. See, *Hualpai*, supra at 354; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 276 n. 7 (1955); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 489. Establishment of a reservation does not in itself extinguish aboriginal title absent congressional intention that it do so. *Hualpai*, supra at 353-354; *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975); *Gila River Pima-Maricopa Commission v. United States*, 494 F.2d 1386 (Ct. Cl. 1974), cert. denied 419 U.S. 1021.

To prove the aboriginal possession necessary to support aboriginal title, the Shoshone-Bannock would have to show actual, continuous, and exclusive possession of the lands in question. *Hualpai*, supra at 345; *Tlingit and Haida Indians v. United States*, 389 F.2d 778, 785-786 (Ct. Cl. 1968). Lands used seasonally for recurrent hunting or similar purposes are subject to aboriginal title. *Confederated Tribes of Warm Springs Reservation v. United States*, 177 Ct. Cl. 184, 194 (1966). Exclusive possession may be shown where two tribes jointly and amicably occupy the land to the exclusion of other tribal groups. *Strong v. United States*, 518 F.2d 556, 561 (Ct. Cl. 1975), cert. denied, 423 U.S. 1015.

While extensive historical research has not been undertaken for this guideline, a 1962 decision by the Indian Claims Commission examines Indian occupancy of southeast Idaho prior to statehood and concludes that a predecessor tribal group to the Shoshone-Bannock held aboriginal title to the area including the subject stretches of the Snake and Blackfoot Rivers. See 11 Indian Cl. Comm’n 387 (Oct. 16, 1962). The tribal group known as the Mixed Band of Bannocks and Shoshones preferred “the area along the Snake River Valley and the Portneuf and Blackfoot Rivers in Idaho.” *Id.* at 439; see also P. Rassier, *Indian Water Rights; A Study of the Historical and Legal Factors Affecting the Water Rights of Indians of the State of Idaho* (Idaho Dept. of Water Resources, 1978) at 33-34. The Shoshones and Bannocks intermarried and hunted together in the same region. 11 Indian Cl. Comm’n at 399.

These Indians in the spring would move down the right bank of the Snake River and camp at the heads of the Boise and Payette Rivers where they obtained deer, elk, bear, and beaver; later they would journey further downstream to trade with the Lower Nez Perce; then they would move along the tributary streams on the left bank of the Snake River and camp at the rise of the Portneuf and Blackfoot Rivers in the buffalo range.

Id. at 392. The commission found the Shoshone Tribe to possess aboriginal title to the area in question. 11 Indian Cl. Comm'n at 444-445.

The commission also found the tribe to have ceded aboriginal title under the Fort Bridger Treaty of 1868. Id. at 444-445. Article 2 of the treaty guaranteed the tribe a reservation and provided that the tribe:

[w]ill and do hereby *relinquish* all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Treaty with the Eastern Band Shoshone-Bannock of July 3, 1968, 15 Stat. 673, 2 Kappler 1020, 1021 (emphasis added). This wording expresses a clear and specific intent to extinguish aboriginal title outside the boundaries of the reservation guaranteed the tribe. Whether the Shoshone-Bannock reserved aboriginal title to beds of the Snake and Blackfoot Rivers thus depends on the boundary description of the reservation ultimately established for them.⁶

2. *Fort Bridger Treaty.*

The Fort Hall Reservation was established pursuant to the Fort Bridger Treaty and two related executive orders. The treaty established the Wind River Reservation in Wyoming for the Eastern Band Shoshone and promised a reservation in Idaho to the Bannocks, without actually establishing the location of the latter. Article 2 of the treaty stated, in part:

It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put on a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" [sic] countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein . . . as herein provided for the Shoshone Reservation.

2 Kappler 1020. This provision had the effect of making the general provisions of the treaty applicable to the Bannocks' future reservation, including the provision in Article 2 that all Indian title outside the reservation would be relinquished. Rassier, *supra* at 38.

The reservation for the Bannocks was not actually located until issuance of the Executive Order of July 30, 1869, which stated in part:

[W]ithin the limits of the tract reserved by executive order of June 14, 1867, for the Indians of southern Idaho, will be designated a reservation provided

⁶Any such title held by Shoshone-Bannock as a tribe would not be affected by subsequent allotments to individual members of the tribes. See *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942); *State v. McConville*, 65 Idaho 46, 50, 139 P.2d 485 (1943).

for the Bannocks, by the second article of the treaty with said tribe of 3rd July, 1868.

1 Kappler 839. The Executive Order of June 14, 1867, referenced by the 1869 order had been negotiated prior to the Fort Bridger Treaty and set forth boundaries of a reservation for the Boise and Bruneau Bands of Shoshones. The reservation thus became occupied by both the Bannocks and these Shoshones. By a later agreement, the Shoshone, Bannock, and Sheepeater Indians of the Lemhi Valley Indian Reservation also were settled upon the Fort Hall Reservation. Agreement of May 14, 1880, 25 Stat. 687, 1 Kappler 314. None of the agreements differentiates between the rights and privileges granted to the Bannocks under Article 2 of the Fort Bridger Treaty and the rights and privileges of these other tribal groups settled upon the same reservation. Rassier, *supra* at 41-42.⁷

The boundary description of the Fort Hall Reservation as set forth in the 1867 Executive Order and incorporated by reference into the Fort Bridger Treaty, reads:

Commencing on the south bank of Snake River at the junction of the Port Neuf River with said Snake River; then south 25 miles to the summit of the mountains dividing the waters of Bear River from those of Snake River; thence easterly along the summit of said range of mountains 70 miles to a point where Sublette Road crosses said divide; thence north about 50 miles to *Blackfoot River; thence down said stream to its junction with Snake River; thence down Snake River* to the place of beginning, embracing about 1,800,000 acres, and comprehending Fort Hall on the Snake River within its limits.

1 Kappler at 836 (emphasis added).

The descriptions “down Snake River” and “down said stream” (Blackfoot River) do not make clear whether the reservation boundary was intended to include the beds and banks below the high water mark of the Snake and Blackfoot Rivers.

In interpreting Indian treaties containing similar ambiguity, the courts have applied conflicting presumptions and canons of construction. One line of authority is that any ambiguities in treaty wording must be resolved in favor of the Indians. *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1937); *United States v. Adair*, *supra* at 1413, with the probable understanding of the Indians controlling. *Choctaw Nation v. Oklahoma*, 377 U.S. 620, 623 (1970); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Treaties are to be viewed as a grant of rights and land from the Indians to the United States — that is, unless certain rights or lands

⁷There might be question as to the type of property interest that may be granted to Indians by executive orders. Compare *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1941) [executive cannot grant compensable property interest to Indians] with *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 n.10 (1953), cert. denied, _____ U.S. _____, 104 S. Ct. 1324 [“an executive order may convey title to land to an Indian Tribe as effectively as any other conveyance from the United States”]. This should not be an issue here since the executive orders establishing the Fort Hall Reservation were incorporated by reference into the Fort Bridger Treaty and the treaty was ratified by Congress. Cf., *Ute Indians v. United States*, 330 U.S. 169, 176 (1946).

were expressly ceded to the United States, they remained with the Indians. *United States v. Winans*, 198 U.S. 371, 381 (1905); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979).

Court decisions applying these canons in favor of Indians required explicit exclusion of riverbeds forming the boundary of a reservation if title to the beds was not intended to remain in the Indians. *Choctaw Nation*, *supra* at 624; see also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) As pointed out in *Choctaw Nation*:

The state argues that the treaty terms 'up the Arkansas' and 'down the Arkansas' should be read to mean 'along the bank of the Arkansas River'. However, the United States was competent to say the 'north side' or 'bank' of the Arkansas River when that was what it meant . . .

397 U.S. at 631.

The Supreme Court decision of *Montana v. United States*, 450 U.S. 554 (1981), represents a contrary line of authority by requiring express inclusion of a riverbed intended to remain in Indian title. See also *Holt State Bank*, *supra* at 35. The Court stated in *Montana*:

[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency'. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain', or was rendered 'in clear and especial words', or 'unless the claim confirmed in words embraces the land under the waters of the stream'.

450 U.S. at 552 (citations omitted). Thus, the presumption against conveyance of riverbeds prior to statehood is given preference over presumptions in favor of Indians. The presumption against conveyance can be overcome only if the treaty makes express reference to the riverbed. 450 U.S. at 554. The treaty in *Montana* made no reference to the river in question or to its bed. Nor did the treaty indicate a "public exigency" justifying conveyance of the riverbed since "at the time of the treaty the Crows were a nomadic tribe dependent chiefly upon buffalo, and fishing was not important to their diet or way of life." 450 U.S. at 556.

As the latest Supreme Court pronouncement on the issue, the *Montana* decision would appear to have ended argument as to the appropriate presumptions to apply in construing treaties involving tribal interests in navigable waters. *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir. 1983), cert. denied, U.S. _____, 104 S. Ct. 423. But the Court's reasoning has engendered perplexity, see *United States v. Washington*, 694 F.2d 188, 189 (9th Cir. 1982), cert. denied, _____ U.S. _____, 103 S. Ct. 3536 ["the exact limits of the *Montana* holding are not clear"] *United States v. Aranson*, *supra* at 664 n.7 ["The debate concerning the logic of the *Montana* decision undoubtedly will continue for some time"], and criticism. See F. Cohen, *supra* at 503-504; Barsh

and Henderson, *Contrary Jurisprudence; Tribal Interest in Navigable Waterways Before and After Montana v. United States*, 56 Wash. L. Rev. 627 (1981).

More important, the *Montana* decision did not consider the fact that the subject reservation probably was within aboriginal territory for which aboriginal title had never been extinguished. The Court's requirement of explicit inclusion of riverbeds would not be consistent with the principle that reservations carved out of aboriginal lands are grants of land from the Indians to the United States for which explicit reservation is not required. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979); *United States v. Winans*, supra at 381. Total reliance on *Montana* to argue that the presumption against conveyance is applicable might not be warranted in the face of any claim to aboriginal title.⁸

Since the Court did not consider aboriginal title in *Montana*, the impact of its decision on such claims is difficult to gauge. This discussion more constructively may be confined to analysis of how the Fort Bridger Treaty and its incorporated boundary description would be construed under the specific holding of *Montana*. That holding has been modified by the Ninth Circuit Court of Appeals. As stated in *United States v. Aranson*:

Montana permits a court to infer congressional intent to convey the bed beneath navigable waters if the Indians can prove they depended heavily on the particular body of water.

696 F.2d at 666. The Indian dependency usually relied upon by the Ninth Circuit to infer intent to convey is fishing.

[W]here a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1258 (9th Cir. 1983), cert. denied, ____ U.S. ____, 104 S. Ct. 1324; see *United States v. Washington*, supra at 189; *Confederated Salish and Kootenai Tribes, etc. v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), cert. denied, 459 U.S. 977; cf. *United States v. Aranson*, supra at 666. This was the dependency or exigency the Supreme Court specifically found did not exist at the time of the treaty in *Montana*.

The Supreme Court has declined to review the Ninth Circuit decisions, even where the treaties interpreted in the decisions arguably did not possess the explicit wording

⁸Some decisions have relied on aboriginal use to supply an intent to overcome the presumption against conveyance of riverbeds, see *United States v. Stotts*, 49 F.2d 619, 620-621 (D. Wash. 1930); *United States v. Romaine*, 255 F. 253, 260 (9th Cir. 1919), or simply have held that the presumption against conveyance of riverbeds does not apply to aboriginal lands. See *United States v. Pend Oreille Co. PUD #1*, No. C-80-116-RMB (D. E.Wash., Order on Motion for Summary Judgment, May 25, 1984).

to convey riverbeds required by *Montana*. See *Namen v. Confederated Salish and Kootenai Tribes*, 459 U.S. 977, 979 (J. Rehnquist dissent to denial of cert.). It thus may be predicted that, in the Ninth Circuit, a tribe could prove ownership of riverbed by showing either explicit treaty wording including the riverbed within a reservation, or, in the face of ambiguity, a historical dependence on the river's fishery or some other public exigency.

Turning again to the boundary description of the Fort Hall Reservation as established by the Fort Bridger Treaty and related executive orders, an ambiguity exists which, but for the recent Ninth Circuit holdings, arguably would defeat the Shoshone-Bannock's claim to ownership of the beds of the Snake and Blackfoot Rivers. The wording "down Snake River" and "down said stream" (Blackfoot River) parallels the treaty wording ("down the Arkansas") held to reserve beds to the Indians in *Choctaw Nation*. On the other hand, the treaty description's point of beginning being the "south bank of the Snake River," to which point the boundary is ultimately returned (down Snake River to the place of beginning") without mention of crossing the Snake River, could be read to exclude the bed of the Snake River below the south bank's high water mark. In light of such possible conflicting interpretations, the Shoshone-Bannock probably would have to show some public exigency or prove that they were dependent on the fishery of the Snake and Blackfoot Rivers in order for the Fort Bridger Treaty to be construed in their favor.

As mentioned above, extensive historical research has not been undertaken for this guideline and, at any rate, could not substitute for a factual record produced by an evidentiary proceeding. The readily available references to Shoshone-Bannock uses of the Snake and Blackfoot Rivers are inconclusive. The 1962 report of the Indian Claims Commission has already been mentioned. While the commission's findings are clear that the Shoshones and Bannocks occupied the area, 11 Indian Cl. Comm'n at 392, 404, 439, its findings are not so clear as to the tribes' specific uses of the Snake and Blackfoot Rivers. The commission states generally that "the economy of the Shoshone Tribe was based mainly on hunting, gathering, fishing, and trading," *Id.* at 404, but then distinguishes the means of subsistence of the different tribal groups. The Lemhi Shoshone who frequented the Salmon and Lemhi Rivers were definitely dependent on fishing. *Id.* at 406. The "Shoshokoes" mainly subsisted on roots and fish. *Id.* at 393. The Shoshone who occupied southeastern Idaho, however, appeared to have been nomadic, following the buffalo. *Id.* at 391 and 393. This lifestyle would have been similar to that of the Crows who were found not to have title to riverbed in *Montana*.

The Fort Bridger Treaty offers some insight into the purposes of the Fort Hall Reservation and congressional intent in establishing the reservation. Article 8 of the treaty evinces the intention that the reservation be established so that the Indians could practice agriculture. 2 Kappler 1002; see also *Rassier*, *supra* at 39. Article 4 guaranteed the Indians "the right to hunt on unoccupied lands of the United States so long as game may be found thereon." 2 Kappler 1021. Finally, Article 1 indicates that peace between white settlers and the Indians was another purpose of the treaty. 2 Kappler 1020; see also 11 Indian Cl. Comm'n 394-395.

No mention is made of fishing in the treaty. The Idaho case of *State v. Tinno*, 94 Idaho 759 497 P.2d 1386 (1972), did construe the treaty as including off-reservation fishing rights. In doing so, the court found fishing to have been "part of the economic

way of life of these Indians since earliest times.” 94 Idaho at 763. It must be kept in mind, though, that *Tinno* addressed Indian fishing rights on the Yankee Fork of the Salmon River. This river appears to have been part of the aboriginal domain of the Lemhi-Shoshone, found to be fish-dependent by the Indian Claims Commission, not of the buffalo-hunting Shoshones and Bannocks originally settled on the Fort Hall Reservation. *Tinno* thus did not address the aboriginal uses of the Snake and Blackfoot Rivers. Also, *Tinno* was a case involving off-reservation *rights*, not reservation *title*. It stands for fishing, on the Salmon River, being necessary to the treaty’s purpose. It arguably does not stand for there having been a dependence on fishing in the Snake and Blackfoot rivers sufficient to vest title in the tribes. See, *Klamath Indian Tribe v. Oregon Dept. of Fish and Wildlife*, 729 F.2d 609, 612 (9th Cir. 1984); *Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983). Nonetheless, language elsewhere in *Tinno*, 94 Idaho at 762, 766-767, as well as allusions to fishing throughout the 1962 report of the Indian Claims Commission, raises the possibility that fishing in the Snake and Blackfoot Rivers might have been part of the subsistence of the Shoshones and Bannocks.

Further factual investigation is warranted, and indeed required, to conclusively determine the nature and scope of aboriginal use. Such facts, as well as those regarding any other public exigency existing at the time of the Fort Bridger Treaty, probably would be dispositive in a court’s determination of title to the beds of the Snake and Blackfoot Rivers.

Sincerely,

Kurt Burkholder
Deputy Attorney General
Natural Resources Division

November 28, 1984

Stanley F. Hamilton
Director, Department of Lands
State of Idaho
Statehouse Mail

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

Dear Mr. Hamilton:

Your request for legal guidance on loaning money from the ten percent fund has been forwarded to me for response.

QUESTIONS PRESENTED:

I. Under Idaho Code § 58-140, can the department of lands loan funds from the normal school and agricultural college ten percent forest improvement fund to the nor-

mal school and agricultural college ten percent range improvement fund to cover the cost of reseeding range land burned in a fire?

2. Under Idaho Code § 58-140, can the department of lands loan ten percent range improvement funds from one endowment to another?

CONCLUSIONS:

Monies from the ten percent fund must be expended for capital improvements upon the same endowment land grant from which the monies were derived.

1. Therefore, the department cannot borrow ten percent funds from the normal school and agricultural college timber account to reseed normal and agricultural college endowment range lands.

2. For the same reason, monies from the ten percent fund cannot be loaned from one endowment to another. It would be improper, for example, to borrow money from the range improvement fund of the public school endowment to improve the range in the normal school or agricultural college endowment.

ANALYSIS:

Before proceeding with the analysis of your question, a brief review of the factual context in which it arose may be helpful. In August, 1984, a wildfire burned approximately 9,000 acres of state rangeland near Mountain Home. Part of the burned range land was normal school endowment land, and part was agricultural college endowment land. In order to protect these endowment lands from further damage from erosion and to chance the income potential of these lands, they should be reseeded.

Idaho Code § 58-140 established a fund for making capital improvements of the type needed here, and normally would be the source of funds for the reseeding project. However, the balance in the normal school range land improvement fund was inadequate to reseed the normal school endowment land and the balance in the agricultural college range land improvement fund was inadequate to reseed the agricultural college endowment land. The department's efforts to reseed these endowment lands have led to the questions presented here.

Idaho Code § 58-140 was enacted in 1969 to provide a mechanism for making capital expenditures to maintain and enhance the value of state endowment lands. Idaho Code § 58-140 provides in pertinent part:

A reasonable amount not to exceed ten per centum (10%) of the moneys received from the sale of standing timber, from grazing leases and from recreation site leases shall constitute a special account, which is hereby created to be used for maintenance, management and protection of state owned timber lands, grazing lands and recreation site lands: provided, that any moneys constituting part of such account received from a sale of standing timber or from leases of lands which are a part of any endowment land grant shall be used only for the maintenance, management and protection of lands of the same endowment grant. Provided further, that all such funds collected from timber

sales shall be expended solely for the purpose of management, protection and reforestation of state lands. All such funds collected from recreation site leases shall be expended for the maintenance, protection and improvement of both new lease sites, and existing recreation areas situate on state lands. All such funds collected from grazing leases shall be expended for the maintenance, management and protection of state owned grazing lands . . .

The state board of land commissioners is hereby authorized to establish rules and regulations fixing a percentage of the amount received from each sale of standing timber and from each grazing and recreation site lease, not to exceed ten per centum (10%) of the total, which shall constitute the special account herein created. The account shall be deposited with the state treasurer, who shall keep a record thereof which shall show separately moneys received from each category of endowment lands. All moneys deposited in the account are hereby appropriated continually to the state board of land commissioners for the purposes hereinabove enumerated . . .

By its terms the statute makes clear that money earned must be reinvested on the same endowment land grant. Thus it would be improper to invest revenue from the normal school ten percent *timber* account on *range* lands. This same restriction would prohibit the application of ten percent funds from the public school endowment to normal school or agricultural college endowment lands. The fact that the funds would be loaned does not resolve the problem because according to the terms of the statute, reinvestment upon the same lands is the *only* acceptable use of the ten percent funds.

Attorney General Opinion No. 81-14 discussed in detail the legislative intent and purpose of Idaho Code § 58-140. The analysis undertaken in that opinion is applicable to this question and will not be reviewed here. A copy of Attorney General Opinion No. 81-14 is attached for your convenience.

In summary, Idaho Code § 58-140, which created the ten percent fund, was intended as a source of funds for capital reinvestment upon the same land grant which generated the monies. The application of monies earned on timber lands to range lands would violate the clear language of the statute.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Rinda Ray Just
Deputy Attorney General
Division of Natural Resources

RRJ/cjm

November 30, 1984

The Honorable Lyman Gene Winchester
Representative, District 14
Route 1
Kuna, Idaho 83634

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

Dear Representative Winchester:

You have asked for our advice on the following questions concerning areas of city impact:

1. May a city or county unilaterally withdraw from an area of city impact agreement which has been properly entered into pursuant to the requirements of Idaho Code § 67-6526?
2. What procedures should be followed in renegotiating an area of city impact agreement?

Short Answer

1. A local government may not unilaterally withdraw from an area of city impact agreement for the reasons that (a) state law requires such agreements, and (2) state law provides the only methods for changing those agreements. The procedures outlined in Idaho Code § 67-6526(d) do not authorize or contemplate unilateral withdrawal.
2. The sole methods of renegotiation as set forth in Idaho Code § 67-6526(b) and (d) are mutual agreement between the parties or district court action.

Discussion

Your questions ask whether an area of city impact agreement may be unilaterally abandoned and, if not, what procedures must be followed to renegotiate an existing agreement.

Although the questions are easily answered by reference to the appropriate statute, we believe a brief discussion of the constitutional and statutory authority and obligations of local governments would be helpful in putting our response in perspective.

The powers of local governments are derived either from the constitution or state statutes. In Idaho, constitutional authority comes from article 12, § 2, which states that:

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* its charter or with *the general laws*. (Emphasis added.)

The adoption of zoning ordinances is considered to be an exercise of the police power. *Dawson Enterprises, Inc., v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977). However, as the constitutional language indicates, local zoning (police) regulations cannot conflict with general state law. Furthermore, where general state law establishes the procedures for adopting zoning regulations, those procedures are mandatory. *Citizens for Better Gov't v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973).

Zoning authority for cities and counties is provided for in the Local Planning Act of 1975, chapter 65, title 67, Idaho Code. It is a "general law" of the state which requires that:

Every city and county *shall* exercise the powers conferred by this chapter. (Emphasis added.)

Idaho Code § 67-6503. As we stated in Attorney General Opinion No. 81-18:

The language of the Local Planning Act is mandatory and requires compliance with its provisions by all units of local government.

See also Dawson Enterprises, Inc., v. Blaine County, supra.

One of the provisions of the Local Planning Act, Idaho Code § 67-6526, requires the adoption of area of city impact agreements and sets forth the procedures for so doing. Subsection (a) states in part that:

The governing board of each county and each city therein shall, *** adopt by ordinance *** a map identifying an area of city impact within the unincorporated area of the county . . .

Once the area of city impact has been adopted, § 67-6576(d) provides the methods for renegotiation. It indicates that:

Areas of city impact, *** shall remain fixed until both governing boards *agree to renegotiate. In the event the city and county cannot agree, the judicial review process of subsection (b) shall apply.* (Emphasis added.)

Subsection (b) provides in part that:

*** the city or county may seek a declaratory judgment from the district court identifying the area of city impact, and plan and ordinance requirements . . .

A review of the Local Planning Act and other pertinent statutes reveals no other methods of dealing with unsatisfactory area of city impact agreements.

Thus, it is our opinion that since the requirements of the Local Planning Act, including area of city impact agreements, are mandatory, and since the act provides alternative methods of renegotiation and no others, such requirements are the sole methods of modifying area of city impact agreements.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

Additionally, unilateral withdrawal would be inappropriate since, under the requirements of the act, every city and county must have an area of city impact agreement in place. Renegotiation satisfies that requirement, while withdrawal does not.

Although specific procedures are established for reaching agreement in the first instance, no such procedures appear to be required for renegotiation. Thus, it can be assumed that the governing boards may proceed in any reasonable manner agreeable to both. Should disagreement prevail, either party is free to seek judicial intervention pursuant to Idaho Code § 67-6576(d).

The question you asked regarding the ability of present local government bodies to bind their corporations in the future deals with questions of contract, not state-required zoning ordinances. Since the state has complete authority to require such agreements under the police power, no question of contract or binding of future bodies arises. Thus, we have not discussed that issue.

In summary, area of city impact agreements are mandatory and may only be altered by the two methods provided for in the Local Planning Act. Unilateral withdrawal would be inappropriate. Renegotiation may follow any procedures agreeable to both parties.

If you have further questions please contact us.

Sincerely,

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

RGR:cjm

December 3, 1984

Gary Spackman
Deputy County Attorney for Caribou County
P.O. Box 797
Soda Springs, ID 83276

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

Dear Mr. Spackman:

You have asked whether an accident report completed by the sheriff's department may be discovered by an insurance company without the consent of either insured party.

An accident report completed by the sheriff's department is a public record and, pursuant to Idaho Code § 59-1011, any citizen may examine it and obtain a copy of it for reasonable copying fees.

ANALYSIS

An insurance company has filed a writ of mandate against the Sheriff of Caribou County for release of an accident report completed by the sheriff's department. Counsel for both parties have agreed to submit the matter to the attorney general's office for an opinion.

The question of release of documents by public agencies has been discussed at length by the Idaho Supreme Court in the recent case of *Dalton v. Idaho Dairy Products Commission*, 84 ISCR 1229 (1984). The court in that case provided a broad mandate for public access to public records, based upon several statutes:

I.C. § 9-301 states that "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." I.C. § 69-1009 states that "The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state." I.C. § 59-1011 states the following:

"It shall be the duty of the state and county officers respectively charged with furnishing books and stationery for public use, to furnish suitable books for the purpose to such officers; *and such books shall be subject to examination by any citizen at any reasonable time*, and such citizen shall be entitled to take memoranda from the same without charge being imposed; provided, if any person or persons desire certified copies of such account, the officer or person in charge of said books shall be entitled to demand and receive fees for the same, as for copies of other public records in his control." 84 ISCR 1231-32. (Emphasis in original.)

In the *Dalton* case, the Idaho Supreme Court did not face a sympathetic situation. The plaintiff was an individual entrepreneur seeking disclosure of a list of dairy farmers in possession of the Idaho Dairy Products Commission to aid him in a direct mail advertising campaign. The Dairy Commission argued that the list was confidential, that disclosure was not mandatory because the Commission was not required to keep the records in question, and that disclosure would tend to interfere with the Commission's ability to carry out its duties and would subject the dairy farmers to harassment and solicitation.

The Idaho Supreme Court rejected all these arguments and found simply that the Idaho disclosure statutes quoted above "do not contain exemption of any kind." 84 ISCR 1232.

The court defined "public record" variously as "writings coming into the hands of public officers in connection with their official functions;" "data collected in the course of carrying on the business of government;" and any writing which constitutes a "convenient, appropriate or customary method of discharging the duties of the office" by public officials.

Under this broad definition, it is clear that a sheriff's department accident report is a "public record." Moreover, as the court noted in the *Dalton* case, the Idaho disclosure

statute extends not only to "public records" but also to "all other matters in the office of any officer." Idaho Code § 59-1009. Thus, even if the accident report were not a "public record," it would still be subject to disclosure to any interested citizen.

In short, the Idaho Supreme Court in the *Dalton* case has given a very expansive reading to the Idaho disclosure statutes. The court has expressly refused to carve out exceptions to those statutes that might parallel exceptions found in the federal Freedom of Information Act or in similar acts of neighboring states.

In particular, the court rejected the argument that records may be kept confidential so long as the agency is not *required* to keep such records. Moreover, the court refused to apply the "balancing test" adopted by sister states. Attorney General Opinion No. 77-52 was based on those two rationales and therefore must be overruled. Instead, the court indicated that it would continue to enforce the Idaho statutes strictly "until such time as the legislature deems it proper to include exceptions." No exceptions were found applicable in the *Dalton* case and none are applicable in this case.

A more difficult question would be posed in the case of on-going investigation of potentially criminal conduct. This opinion does not reach that question.

It follows that any citizen may inspect an accident report completed by the sheriff's department and may obtain a copy of it for reasonable copying fees.

Sincerely,

JOHN J. McMAHON
Chief Deputy

JJM/lh

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A state agency may not sell or exchange state owned property acquired from the federal government for less than its appraised value.	3-16-84	129
Board of Scaling Practices — Forest products removed in Idaho but scaled in another state are not subject to Idaho scaling laws.	4-11-84	147
Board of Land Commissioners — Board is authorized to exchange land with private corporation for similar lands of equal value when it is in the state's best interest to do so.	6-26-84	159

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State owns beds of waterways navigable at time of statehood unless Congress had conveyed rights to another entity prior to such time.	11-6-84	168
Moneys from "ten percent fund" must be expended for improvements on same endowment land grant from which they derived and on no other.	11-28-84	178
LAW ENFORCEMENT		
State police operations may not be funded by fuel taxes or motor vehicle registration fees to any greater extent than such operations relate directly to enforcement of highway safety and traffic laws.	2-3-84	109
Sheriff's department accident report is "public record" subject to disclosure to and copying by any interested citizen.	12-3-84	183
LEGISLATURE, IDAHO STATE		
All bills to raise revenue must originate in the house of representatives pursuant to Idaho Constitution art. III, § 14. The senate may amend a revenue raising measure originating in the house but may not attach a revenue raising amendment to a non-revenue bill.	2-15-84	114
LIBRARIES		
School district trustees are authorized to establish a public library, to serve as trustees and to levy taxes therefor. ...	2-14-84	111
LIEUTENANT GOVERNOR		
Both during legislative sessions and in the interim is entitled to unvouchered per diem expense allowance equal to that provided by law to the speaker of the house of representatives.	1-17-84	107
MEDICAL ASSISTANCE		
Idaho Department of Health and Welfare through its designated planning agency has authority to promulgate rules and regulations governing agreements with federal government in administering cooperative medical assistance programs.	2-29-84	119
MOTION PICTURE FAIR BIDDING ACT		
Act under Idaho Code § 18-7701 does not violate U.S. Constitution, federal monopoly laws or any Idaho constitutional or statutory provisions.	3-19-84	132
MOTOR VEHICLE LAWS		
Motor vehicle registration fees and fuel taxes may not be used to fund state police operations to any greater degree than they relate directly to enforcement of highway safety and traffic laws.	2-3-84	109

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Cities are liable for costs of housing prisoners arrested by city police officers for motor vehicle offenses in Idaho Code title 18.	3-21-84	136
NOTARY PUBLIC		
Legal resident aliens have constitutional right to become notaries public: Idaho Code § 51-104(2) which requires Idaho citizenship for notaries public is unconstitutional.	6-26-84	158
RISK MANAGEMENT, BUREAU OF		
Without further legislative guidance it is unclear whether state agencies are exempt from provisions of Idaho Code § 66-348 and therefore free to release necessary information to the risk manager to defend against tort claims.	2-27-84	117
SCHOOLS		
School district trustees are authorized to establish a public library, and to act as trustees and levy taxes therefor. Care should be taken to maintain total separation between school district and library funds.	2-14-84	111
Junior college districts may not have social security employer's share paid by state auditor as they are not a "school district" for purposes of Idaho Code § 59-1115.	3-19-84	132
School districts may not carry over unused operation and maintenance funds to succeeding fiscal years to create a fund for construction of school buildings unless the surplus as an allowance for depreciation of school plant facilities is transferred to the school plant facilities reserve fund as required by Idaho Code § 33-901.	3-26-84	139
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Sheriff's department accident reports are "public record" subject to disclosure to and copying by any interested citizen.	12-3-84	183
SOCIAL SECURITY		
Social security employer's share may not be paid by state auditor on behalf of junior college districts since they are not "school districts" for purposes of Idaho Code § 59-1115.	3-19-85	132
TAXATION, DEPARTMENT OF REVENUE AND		
Use tax exemption for INEL contractors under Idaho Code § 63-3615(b) does not violate Idaho Constitution art. III, § 19, or the equal protection clause of the U.S. Constitution. ...	6-5-84	154
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State of Idaho owns beds of Snake and Blackfoot rivers if rivers		

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TRUCKING		
Vehicle operating over its registered maximum gross weight (MGW) is deemed to have set a new MGW and is required to pay additional fees as well as any applicable penalties; new MGW cannot, however, exceed the total allowable gross weight provided for in Idaho Code §§ 49-901 and 49-901A.	3-5-84	125
VOCATIONAL REHABILITATION		
Legal alien who suffers from chronic end-state renal failure is eligible for assistance under Idaho Code § 33-2307; the state may not condition benefits for such a program on citizenship or unreasonable residency requirements.	5-1-84	148
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State of Idaho owns beds of waterways navigable at time of statehood unless Congress conveyed beds to another entity before statehood. Therefor, the state owns the beds of the Snake and Blackfoot rivers if they were navigable at time of statehood and if the Fort bridger Treaty extinguished before statehood any aboriginal title claimed by the Shoshone-Bannock Tribes. .	11-6-84	168

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