

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS  
AND  
SELECTED INFORMAL  
GUIDELINES**

FOR THE YEAR

**1986**

**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**

This volume contains the official opinions issued by the Office of the Attorney General during calendar year 1986. Also included are some of the more significant informal guidelines issued by the office during the year. Publication is made pursuant to I.C. § 67-1401(6).

The opinions and guidelines compiled in this volume are designed to provide legal guidance to all governmental entities, as well as the general public. They represent many long hours of research by a dedicated staff and I believe them to be of high quality. Each year we strive to make this publication more useful to its readers and to make our work product more readily available.

In 1985 the opinions were made available on the Lexis and Westlaw Automated Research Systems. During the 1987 legislative session legislation was approved requiring formal attorney general opinions issued after January 1, 1983, to be referenced in future publications of the Idaho Code. Since the opinions do have some precedential value and since they play a large part in shaping administrative policy and legislative action, it is appropriate that lawyers and jurists have better access to them through the code annotations.

We strive to make this publication a valuable research and reference tool. Comments of our users are encouraged and are always more than welcome.

**JIM JONES  
ATTORNEY GENERAL**

## OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1986

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John J. McMahon — Chief Deputy  
Patrick J. Kole — Legislative Affairs  
P. Mark Thompson — Civil Litigation  
Lynn E. Thomas — Solicitor General  
Kim Klohe — Business Manager  
Lois Hurless — Office Administrator  
Tresha Griffiths — Executive Secretary

### DIVISION CHIEFS

Michael DeAngelo — Health & Welfare  
D. Marc Haws — Criminal Law  
David G. High — Business Regulations & Finance  
Daniel G. Chadwick — Intergovernmental Affairs (Acting)  
Clive J. Strong — Natural Resources

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Ken Arment	Stephen Goddard	John Ruebelmann
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James Baird	Jeanne Goodenough	Steven Schuster
David Barber	Patti Guerin	Mike Sheeley
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Ron Coston	Deborah Kristal	Thomas Swinehart
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Curt Fransen	Steven Parry	Tim Wilson
Robert Gates	Shad Priest	Scott Wolfley
Michael Gilmore	Phillip Rassier	Scott Woodbury

### INVESTIGATIVE SERVICE

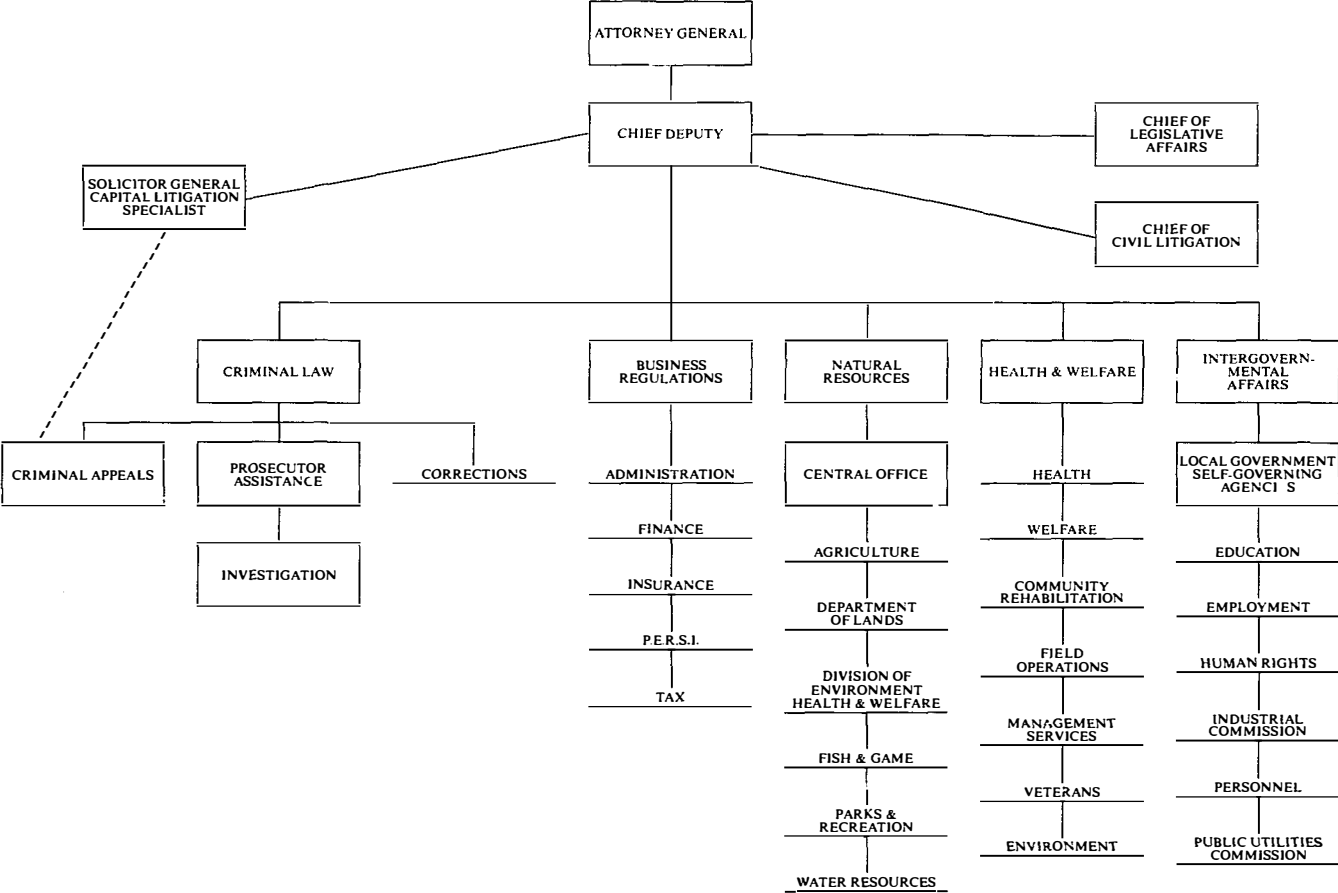
Russell T. Reneau — Chief Investigator  
Allan J. Ceriale      Richard T. LeGall      Garry Carr

### NON-LEGAL PERSONNEL

Jeanne Baldner	Deborah Lancaster	Jackie Shelton
Kriss Bivens	Paula Lund	Ruth Swan
Karen Bolian	Elsie O'Leary	Pam Warren
Kathy Bonham	Sigrid Obenchain	Stephanie Wible
Marilyn Freeman	Sandra D. Rich	Deborah Williams



ORGANIZATION CHART – Office of the Attorney General



OFFICIAL OPINIONS  
OF  
THE ATTORNEY GENERAL  
FOR 1986



Jim Jones  
Attorney General  
State of Idaho



**ATTORNEY GENERAL OPINION NO. 86-1**

TO: Mrs. Delores Crow  
Idaho State Representative  
203 11th Avenue South Extension  
Nampa, Idaho 83651

Per request for Attorney General's Opinion.

**QUESTION PRESENTED:**

Is it constitutionally permissible to restrict the use of the word "accountant" and other labels or titles to individuals who have been certified and licensed by the Idaho State Board of Accountancy, as required by Idaho Code § 54-201, et seq.?

**CONCLUSION:**

Yes. It is constitutional under the first and fourteenth amendments of the United States Constitution and under article I, §§ 1, 9, 13 of the Idaho State Constitution. The state in exercise of its police powers may regulate the profession of accounting as set forth in I.C. § 54-201 et seq., and require licensing of "certified public accountants" and "public accountants" as defined in that chapter. The state may also restrict the use of the term "accountant" or other labels or terms to those who are licensed by the State Board of Accountancy.

**ANALYSIS:***I. Statutory Authority*

Title 54, chapter 2 of the Idaho Code, known as The Accountancy Act, regulates the profession of accounting and creates the Idaho State Board of Accountancy and the Public Accountant's Advisory Committee. It creates a two-tier licensing system for "certified public accountants" and "public accountants." By definition, all members of these classes must hold a valid, unrevoked and unsuspended certificate and/or license under this chapter. I.C. § 54-206. The profession of "public accountant" is a "dying class," meaning that since July 1, 1977, with limited exceptions that have now expired, the class of licensed public accountant has been closed to new applicants. I.C. § 54-214.

The section that directly concerns the question presented is § 54-218. Subsections (1) and (2) restrict the use of the terms "certified public accountant" and "public accountant" to licensed persons. Subsection (3) states:

No person, partnership or corporation shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," "registered accountant," "accredited accountant," "accountant," "auditor or other title or designation or any of the abbreviations "CA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "certified public accountant" or "public accountant"; . . .

Thus, the Idaho Legislature has restricted to licensed persons the use of titles containing the word “accountant” or “auditor,” as well as the use of these words themselves. There shall be no profession of unlicensed accountants in the state, with the exceptions noted in subsection (3), to be discussed later.

Subsection (4) similarly provides that only a licensed person may render opinions or perform attestation as an accountant or auditor.

Similar restrictions regarding the titles and functions of accountants have existed for nearly 70 years. The Idaho State Board of Accountancy was established in 1917 to issue certificates to practice as a certified public accountant “and no other person shall be permitted to assume and use such title, or to use any words, letters or figures to indicate that the person using the same is a certified public accountant.” 1917 Idaho Session Laws, ch. 126, § 3. Similar language was retained in the law until a new chapter was enacted in 1974 stating that no person shall assume or use the titles of “certified public accountant,” or “public accountant” or the letters “C.P.A.” in connection with his name or business in this state without holding a valid, unrevoked and unsuspended certificate issued or recognized by the board. 1974 Idaho Session Laws, ch. 263, § 54-218. In 1976, when the licensing of “public accountants” was written into the law as a dying class, the more specific and restrictive use-of-title language that we have today was added to § 54-218 (3).

Idaho is not unique in its regulatory scheme. Accountancy laws governing the licensing of professional accountants have been enacted in all fifty states, the District of Columbia, Guam, Puerto Rico and the United States Virgin Islands. Certified public accountants (CPAs) are licensed in all states. Forty-seven (47) states, as well as the District of Columbia, Guam, Puerto Rico and the United States Virgin Islands, have regulatory accountancy laws that restrict to licensees the use of the titles “Certified Public Accountant,” “Public Accountant,” and other similar titles, and that regulate the performance of specific professional accounting services. Digest of State Accountancy Laws and State Board Regulations, 1985, published jointly by the American Institute of Certified Public Accountants, Inc. and the National Association of State Boards of Accountancy.

## *II. Fourteenth Amendment: Due Process and Equal Protection*

The question addressed in this opinion deals mainly with the constitutional limits upon the state’s authority to license and thereby to regulate certain professions, including accounting. This authority is grounded in the police power, which is the intrinsic power of the state to protect the health, safety and general welfare of its people. *Jones v. State Board of Medicine*, 97 Idaho 859, 868, 555 P.2d 399 (1976) cert. denied 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 123 (1977); *Comprehensive Accounting Service Co. v. Maryland State Board of Public Accountancy*, 284 Md. 474, 397 A.2d 1019 (1979); *Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938); *Montejano v. Rayner*, 33, F.Supp. 435 (D. Idaho 1939); *Dent v. West Virginia*, 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

There have been no cases in Idaho interpreting § 54-218 or other sections of the Accountancy Act, but the Idaho Supreme Court has upheld similar professional li-

censing requirements in the field of medicine when challenged by persons in the field of naturopathy, an unlicensed occupation. *State v. Kellogg*, 102 Idaho 628, 636 P.2d 750 (1981); *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977); *State v. Maxfield*, 98 Idaho 356, 564 P.2d 968 (1977).

Under the fourteenth amendment of the United States Constitution, and art. I, §§ 1 and 13 of the Idaho Constitution, challenges to police power regulations such as those found in The Accountancy Act may be made on a number of bases. Challenges may be made that such regulations interfere with the liberty and property interests protected by the due process clauses of both constitutions and that a classification established by the regulation violates the equal protection clause of the U.S. Constitution. The standard to measure a violation under any of these constitutional grounds is the same: the law or rule complained of need only bear a rational relationship to a legitimate legislative purpose. *Bint v. Creative Forest Products*, 108 Idaho 116, 697 P.2d 818 (1985). *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

The rational relation standard of review receives near unanimous acceptance today. Cases from the 1920's that allowed the unlicensed use of the term "accountant," and found its restriction unconstitutional on due process and equal protection grounds, reflected the courts' interventionist views of that era. See, *State v. Riedell*, 109 Okla. 35, 233 P. 684 (1924); *Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926).

The views of the 1920's changed direction in the 1934 U.S. Supreme Court case of *Nebbia*, supra, which espoused the rational relation standard. See also, *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Under this standard, courts have routinely upheld the constitutionality of statutes regulating accountants against challenges that such statutes violate fourteenth amendment rights to due process and equal protection. *Texas State Board of Public Accountancy v. Fulcher*, 515 S.W.2d 950 (Tex. Civ. App. 1974); *Comprehensive Accounting Service*, supra. It is our opinion that a challenge to the Idaho accountancy statute on similar grounds would likewise be dismissed as lacking in merit.

### III. First Amendment and Commercial Speech:

This opinion also addresses the issue of a possible constitutional violation of free speech under the first amendment of the United States Constitution and art. I, § 9, of the Idaho Constitution. While there is little doubt that The Accountancy Act, § 54-201 et seq., is constitutional on due process and equal protection grounds, the question is closer when the Act is tested for violation of free speech because the standard of review is different than in the due process/equal protection areas.

Protection of commercial speech is a recent development in constitutional jurisprudence. In *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the United States Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." The cornerstone of commercial speech is the dissemination of information. The ability to hold oneself out and advertise in an occupational area such as ac-

counting meets this definition. Such speech enjoys protection under the first amendment of the United States Constitution. See, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1976).

As with other forms of speech, however, commercial speech may justifiably be regulated or even suppressed in certain situations. In fact, the protections afforded commercial speech are somewhat less than other forms of speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Bolger v. Young Drug Products Corp.*, 463 U.S. 60-65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981), *Central Hudson*, supra at 562-63.

In determining the validity of government restrictions on commercial speech, a four-part test was enunciated in *Central Hudson*, supra:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve the interest. 447 U.S. at 566, 100 S.Ct. at 2351.

Because Idaho has no commercial speech cases to guide us, we will apply the test laid out in *Central Hudson*, look at other statements of the United States Supreme Court and see what other sources have said on the issue.

The first inquiry mandated by *Central Hudson* is whether the commercial speech in question is misleading, i.e., whether use of the title "accountant" by unlicensed persons would mislead the public.

Idaho has a two-tier licensing system for "certified public accountants" and "public accountants." It is not difficult to imagine that the public could be misled if persons who were unlicensed could use the most basic term of the profession of accounting, i.e. "accountant." Even a sophisticated person likely does not know what functions the state allows only a licensed accountant to perform. As the law presently stands, one may be assured that if a person holds himself an "accountant" the person has been licensed by the state and has thus met certain educational and examination requirements. Third parties relying on financial compilations, reviews and audits also have this assurance. Thus, the Idaho law protects the public from confusing or misleading representations.

Assuming, however, that the use of the term "accountant" by unlicensed persons is not misleading or deceptive, do the Idaho Accountancy Act restrictions, § 54-201 et seq., falter on one or more of *Central Hudson's* remaining grounds of analysis? Is the governmental interest substantial and does it directly advance the interest asserted? On these two grounds, the answers appear to be "yes."

Clearly, the governmental interest at stake is "substantial," as required by the second test in *Central Hudson*. The financial harm that incompetent or unscrupulous practitioners may inflict upon the general public was expressed by Arizona's Office of Auditor General, in an August 1979 report to the Arizona Legislature at p. 33:

The critical nature of the financial audit stems from the reliance others place on its accuracy and completeness and the independence of the auditor. Audited financial statements are a primary means of communicating financial information to those outside an entity. . . . Persons outside the organization rely on audited financial statements to be accurate, complete and factual.

Audited financial statements are intended to provide information that is useful in making business and economic decisions. Individuals, enterprises, markets and governments in making decisions use audited financial statement information to evaluate various alternatives and assess the expected returns, costs and risks.

Just as clearly, the third part of the *Central Hudson* test is met, i.e., the government's regulation of the title "accountant" directly advances the governmental interest asserted. By prohibiting the use of the title "accountant" or similar titles by those who are not "certified public accountants" or "public accountants," the legislature protects the public from the confusion and uncertainty that results when an unlicensed person uses terms that may lead one to believe such person possesses the skills and qualifications of the licensed person. The legislature in its statement of legislative intent in § 54-202 said this legislation was necessary "to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice as a certified public accountant or public accountant. . . ."

The legislature saw that today's business climate is becoming increasingly complex. Such a situation increases the public interest in the reliability and credibility of those with whom the public must deal, and just as importantly, with those upon whose information the public must rely. When the information is important, and the confusion from use of like terms is subject to misunderstanding, the tight restriction of professional titles by the state is reasonable. The licensing requirement thus directly advances a substantial governmental interest.

The fourth and final question under the *Central Hudson* test of the analysis is the issue of whether the regulation is more extensive than necessary to serve the interest of the state. In looking at § 54-218(3), it is important to note that the statute does not completely forbid the use of the term "accountant." It provides these exceptions:

. . . provided, that the provisions of this subsection shall not prohibit any officer, employer, partner or principal of any organization from using the designations accountant or auditor in reference to any wording designating the position, title or office which he holds in said organization nor shall the provisions of this subsection prohibit the use of the designations accountant or auditor by any public officials or public employee in reference to his public position, title or office.



The exceptions are not insignificant. This part of § 54-218(3) allows the use of the term “accountant” by unlicensed persons working for any private organization or in any public position. These are two areas in which little confusion would arise. Similarly, a person is free to advertise and to hold himself out in such unregulated occupations as bookkeeping and tax preparation. It is only the holding out of oneself as an “accountant” that requires a license under Idaho law.

It is our opinion, therefore, that the regulation of commercial speech by The Accountancy Act is constitutional under the four-part test of *Central Hudson*. The use of the term “accountant” by unlicensed persons is likely to mislead the public. The government has a substantial interest in protecting the public from such misleading representation. Requiring that persons who hold themselves out to the public as “accountants” be licensed is a direct and reasonable means of attaining this goal. Idaho’s regulatory scheme is not more extensive than is necessary to serve its valid purposes.

Only two cases have been found that address the question of whether use of the term “accountant” by unlicensed persons is protected commercial speech under the first amendment.

In *Comprehensive Accounting Service, supra*, the Maryland Supreme Court found a ban on the use of the word “accountant” by unlicensed persons to be unconstitutional. Comprehensive Accounting Service was part of a nationwide network of 150 franchises serving 15,000 clients throughout the country. It advertised that it would “undertake *all* the bookkeeping, accounting, systems work, and permanent records for taxes for the business. . . .” (emphasis in original). 397 A.2d at 1021. It maintained it could provide essential accounting services to smaller businesses at reasonable prices using specialized, mass-production methods that allowed it to furnish monthly financial statements and a tax preparation service. Comprehensive did not represent that it conducted “audits” or “examinations,” nor did it furnish written certificates or opinions concerning the correctness of financial statements, schedules, reports or exhibits which it prepared.

Maryland’s statute was not a model of clarity. It forbade the unlicensed use of the terms “accountant” or “auditor” but it failed to define public accounting. The court also stated that the statute provided language of exception which said that nothing in the statute should be construed to prohibit any person from:

Offering or rendering to the public bookkeeping and tax services, including devising and installing systems, recording and presentation of financial information or data, preparing financial statements, schedules, reports and exhibits, or similar services; . . . *Id.* at 1020.

The court said that this exception in the statute allowing persons to perform certain functions could not be reconciled with a ban on advertising the fact that they performed those services:

Thus § 15(e) expressly authorizes an uncertified accountant to perform accounting services to the public, while at the same time § 14(e) prohibits him from describing those services to the public as accounting, or holding himself out to the public as an accountant. *Id.* at 1023.

Idaho does not have a statute with language of exception comparable to the Maryland statute.

The court in *Comprehensive* stated that even though commercial speech which is misleading or deceptive may be restrained, the legislature cannot choose the most drastic remedy of complete suppression of the use of certain words in order to prevent public confusion and deception. *Id.* at 1026-1027, citing *Beneficial Corporation v. F.T.C.*, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). The court said:

As there has been no showing by the state that a *compelling need* underlies the enactment of § 14(e), that provision violates *Comprehensive's* first amendment free speech rights. (Emphasis added.)

In reaching this conclusion, the Maryland court did not have the benefit of the standards laid down in *Central Hudson*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). In that case, the United States Supreme Court stated that the governmental interest must be "substantial." The Supreme Court did not require a showing by the state of a "compelling need" in order to regulate in the commercial speech area.

The case of *Fulcher v. Texas State Board of Public Accountancy*, 571 S.W.2d 366 (Tex. Civ. App. 1978), upheld the constitutionality of the Texas statute. The court addressed the issue of whether Fulcher, an unlicensed person, had violated the Texas statutes by representing himself as providing "accounting" services on the door to his office and in announcements sent concerning his new office; on his card, letterhead and envelopes; and on his tax form covers. The Texas statutes required both a license for the person and the registration of his or her office(s) to practice public accounting and only a person who did both, "may hold himself out to the public as an 'accountant' or 'auditor' or combination of said terms." *Id.* at 369.

The Texas court said that the statutes evidenced a legislative intent to prevent any unlicensed person from holding himself out as having expert knowledge and that Fulcher did so hold himself out. It said such conduct was misleading and remained subject to restraint under *Bates v. State Board of Arizona*, 433 U.S. 350, 383, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). In accord with the *Fulcher* decision, although not on constitutional grounds, is *People v. Hill*, 66 Cal.App.3d 324, 136 Cal. Rptr. 30 (1977).

A Nebraska Attorney General Opinion, No. 339, December 12, 1980, found the Nebraska statute requiring an affirmative disclosure of the fact that an accountant is not licensed to be constitutional. Regarding a total ban of the use of the terms, the opinion said:

We believe it could be effectively argued that the unrestricted use of the titles "Accountant" or "Auditor" by an unlicensed person could in fact cause confusion which would be detrimental to the public and therefore the state regulation of those terms is rationally related to a legitimate state interest. Since the "speech" at issue here is "commercial," it is subject to "reasonable regulation that serves a legitimate public interest." *Bigelow v. Virginia*, 421 U.S. 809 at 825-826.

In the professional field of engineering, the restriction of the terms “engineer” or “engineering” in a business or trade name has likewise been upheld. See *McWhorter v. State Board of Registration*, 359 So.2d 769 (Ala. 1978). A recent American Law Reports annotation on this topic, analogous to ours, said:

Laws of the type dealt with in this annotation have been challenged on a variety of constitutional grounds, generally without success. It has been argued that these laws, by prohibiting a business from referring to itself by a certain name, violate the participants’ freedom of speech; but, while recent decisions of the United States Supreme Court have extended First Amendment protection to so-called “commercial speech,” it has been pointed out that the court reaffirmed the validity of laws prohibiting commercial speech that is false or misleading. 13 A.L.R.4th 676 at 677 (1982).

In summary, the use of the term “accountant” and other restrictions of title found in The Accountant Act directly advance the state’s substantial interest in protecting the public from misleading advertising. The unrestricted use of such terms can be deceptive and misleading. We stress, however, that the question before us is not presented in a factual context. We have not been presented with a scenario that makes a case, in the context of the Idaho statute, that the regulation of the unlicensed use of the term “accountant” is not misleading or that it is more extensive than necessary to serve the state’s interest in protecting the public. Hence, although it is a close question, we believe the legislature’s judgment in restricting this and other terms is constitutional when tested by the standard of review applicable to commercial speech under the first amendment of the United States Constitution and art. I, § 9, of the Idaho Constitution.

The regulation of the use of titles is common throughout title 54 of the Idaho Code which includes the professional and occupational licensing statutes. Without a license, one may not in Idaho call oneself a “social worker,” Idaho Code § 54-3214(2); a “medical physician” or “medical doctor,” Idaho Code § 54-1804(3); a “dentist,” Idaho Code § 54-903; a “nurse,” Idaho Code § 54-1401, or an “engineer,” Idaho Code § 54-1202 and 54-1212. One must note too that in judging the constitutionality of a statute, a presumption of constitutionality attaches in favor of the statute. *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010 (1962); *State v. Hanson*, 81 Idaho 403, 410, 342 P.2d 706 (1959).

From the above analysis, we believe that if challenged, title 54, chapter 2, containing § 54-201 et seq., particularly § 54-218, would be found to be constitutional under both the Idaho and the United States Constitutions.

#### AUTHORITIES CONSIDERED:

##### 1. *U.S. Constitution:*

U.S. Const. amend. I

U.S. Const. amend, XIV § 1

2. *Idaho Constitution:*

Idaho Const. art. I § 1

Idaho Const. art. I § 9

Idaho Const. art. I § 13

3. *Statutes:*

Idaho Code § 54-201 et seq.

Idaho Code § 54-202

Idaho Code § 54-206

Idaho Code § 54-214(1)

Idaho Code § 54-214(2)

Idaho Code § 54-214(3)

Idaho Code § 54-214(4)

Idaho Code § 54-218(3)

Idaho Code § 54-903

Idaho Code § 54-1202

Idaho Code § 54-1212

Idaho Code § 54-1401

Idaho Code § 54-1804(3)

Idaho Code § 54-3214(2)

1917 Idaho Sess. Laws, ch. 126, § 3

1974 Idaho Sess. Laws, ch. 263, § 54-218

4. *U.S. Supreme Court Cases:*

*Bates v. State Board of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)

*Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983)

*Bigelow v. Virginia*, 421 U.S. 809, S.Ct., L.Ed., (1977)

*Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)

*Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889)

*Metromedia Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)

*Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)

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

*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)

*Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)

*Zauderer v. Office of Disciplinary Counsel of the U.S.*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985)

5. *Other Federal Cases Considered:*

*Montejano v. Rayner*, 33 F.Supp. 435 (1939)

6. *Idaho Cases Considered:*

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

*Bint v. Creative Forest Products*, 108 Idaho 116, 697 P.2d 818 (1985)

*Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976)  
cert. denied 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 123 (1977)

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

*State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977)

*State v. Kellogg*, 102 Idaho 628, 636 P.2d 750 (1981)

*State v. Maxfield*, 98 Idaho 356, 564 P.2d 968 (1977)

7. *Cases Considered from Other Jurisdictions:*

*Comprehensive Accounting Service v. Maryland State Board of Public Accountancy*, 284 Md. 474, 397 A.2d 1019 (1979)

*Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926)

*Fulcher v. Texas State Board of Public Accountancy*, 571 S.W.2d 366 (Tex. Civ. App. 1978)

*Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938)

*McWhorter v. State Board of Registration*, 359 So.2d 769 (Ala. 1978)

*People v. Hill*, 66 Cal.App.3d 324, 136 Cal.Rptr. 30 (1977)

*State v. Riedell*, 109 Okla. 35, 233 P. 684 (1924)

*Texas State Board of Public Accountancy v. Fulcher*, 515 S.W.2d 950 (Tex. Civ. App. 1974)

8. *Other Authorities*

1980 Op. Att'y Gen. No. 339 (Neb.)

13 ALR 4th 676 (1982)

*Digest of State Accountancy Laws and State Board Regulations*, American Institute of Certified Public Accountants and the National Association of State Boards of Accountancy, (1985)

*Report to the Arizona Legislature*, Arizona Office of the Auditor General, (August 1977)

DATED this 24th day of January, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON  
Chief Deputy Attorney General

BARBARA ROBERTS  
Intern

**ATTORNEY GENERAL OPINION NO. 86-2**

TO: Wayne Mittleider, Administrator  
Division of Insurance Management  
Department of Administration

Per request for Attorney General's Opinion.

Re: Personal Liability of State Employees, Board Members and Elected Officials

**ISSUE PRESENTED:**

Your agency has requested an opinion from this office on the following issue:

Public officials serving on state-appointed boards have become increasingly concerned about their personal liability arising out of lawsuits which may exceed the ability of the Bureau of Risk Management to pay. This has all occurred as a result of the state's loss of liability insurance beyond the self-insured retention.

**DISCUSSION:**

It is our understanding that, as of September 30, 1985, the State of Idaho does not have any liability insurance or reinsurance but is self-insured through the Retained Risks Account in the state treasury.

The Risk Manager has the authority to self-insure liability claims through the state comprehensive liability plan. The Idaho Tort Claims Act provides:

[The Risk Manager] shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits. He shall be responsible for the acquisition and administration of all liability insurance of the state or for the use of the retained risk fund provided in section 67-5757, Idaho Code, to meet the obligations of the comprehensive liability plan.

Idaho Code § 6-919.

The definition of "employee" in the Tort Claims Act includes all regular employees of the state, board members, elected officials, and any authorized volunteer. Idaho Code § 6-902(4). Under the Idaho Tort Claims Act, no employee of the government may be held personally liable for a judgment or any other cost or expense unless the employee was acting outside the course and scope of employment or with malice or criminal intent. Idaho Code § 6-903(a), (c) and (e).

The Idaho Tort Claims Act requires the "governmental entity" to defend and indemnify the employee if the claim is brought in the Idaho District Court under Idaho law or is brought in the United States Court under federal law. Idaho Code § 6-903(c). A "governmental entity," for this purpose, is both the state and its political

subdivisions. The “state” is broadly defined to mean “the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.” Idaho Code § 6-902(1). A “political subdivision” is also very broadly defined as “any county, city, municipal corporation, school district, irrigation district, special improvement or taxing district, or any other political subdivision or public corporation.” Idaho Code § 6-902(2).

It is important to note that the governmental entity, not the Division of Insurance Management, has the duty to defend and indemnify its employees. Thus, the question of whether or not the state or other governmental entity has liability insurance has no bearing on the question of whether or not a government employee could be held personally liable for a money claim. The Idaho Tort Claims Act provides that, if a judgment is rendered in excess of the state’s insurance limits or the comprehensive liability plan, then the “judgment shall be paid from the next appropriation of the state instrumentality whose tortious conduct gave rise to the claim.” Idaho Code § 6-922. Political subdivisions likewise have authority to “levy and collect property tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act where the political subdivision has failed to purchase insurance or otherwise provide a comprehensive liability plan to cover a risk” under the Tort Claims Act. These property tax levies are expressly exempted from the limits of the one percent property tax law. Idaho Code § 6-928.

The governmental entity, in providing a defense for its employee, is also responsible for all attorney fees, court costs, judgments or settlements.

There are two narrow exceptions to the rules stated above. The first concerns an employee who is driving his or her own vehicle on state business. In that case, the employee’s personal insurance would be primary, and the state’s duty to defend and indemnify would be secondary. In no event would the employee be held personally responsible for the excess judgment.

The second concerns an employee acting outside the course and scope of his or her employment or with malice or criminal intent. Such an employee can be held personally liable for money damage claims as well as for the costs associated with litigating such claims. There is a rebuttable presumption that if the employee is within the time and at the place of employment, then any act or omission made by the employee is within the course and scope of employment and without malice or criminal intent. Idaho Code § 6-903(e).

If the governmental entity intends to argue that the employee should be held personally responsible for any money damage claim, the employee must be notified in writing prior to the time any government attorney enters an appearance in the action. If a government attorney enters a defense for an employee, absent extraordinary circumstances (e.g., subsequent felony indictment), the governmental entity is barred from trying to recoup legal fees or any part of the judgment back against the employee.



**AUTHORITIES CONSIDERED:**1. *Idaho Statutes:*

Idaho Code § 6-902(1)

Idaho Code § 6-902(2)

Idaho Code § 6-902(4)

Idaho Code § 6-903(a)

Idaho Code § 6-903(c)

Idaho Code § 6-903(e)

Idaho Code § 6-922

Idaho Code § 6-928

DATED this 12th day of March, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

**ATTORNEY GENERAL OPINION NO. 86-3**

TO: The Honorable Joe R. Williams  
Idaho State Auditor  
STATEHOUSE MAIL

Per request for Attorney General Opinion.

**QUESTION PRESENTED:**

Prior to January 1, 1982, § 209(b) of the Social Security Act [42 U.S.C. § 409(b)] excluded from the definition of wages any payments to employees under a plan or system which made provision for employees generally or classes of employees on account of sickness or accident disability. For the period January 1, 1978, through December 31, 1981:

1. Did sick pay plans exist for all classified and exempt employees within the meaning of the Act?
2. Were such plans legally authorized or mandated?
3. Did the state exercise its authority to make payments on account of sickness, and were payments on account of sickness made pursuant to such authority?

CONCLUSIONS:

1. Sick pay plans were established for all classified and exempt state employees prior to 1978 and have been continuously in effect since then.
2. Such plans are constitutionally permitted. Sick pay plans were statutorily mandated for classified and nonclassified employees by 1977. 1977 Idaho Sess. Laws, ch. 307.
3. During the relevant time period, the state exercised its authority to make payments on account of sickness for all employees pursuant to ch. 307, 1977 Sess.L., and implementation occurred by 1977 in accordance with the implementation provisions of that chapter. Payments on account of sickness were made pursuant to the requirements thereof.
4. Attorney General Opinion 80-28 addressed substantially these same questions based upon different factual assumptions. However, critical factual assumptions contained in that opinion, upon which its analysis was based, have proven to be clearly erroneous. Accordingly, Attorney General Opinion 80-28 is hereby rescinded.

ANALYSIS:

The questions set forth above are addressed in the context of § 209(b) of the Social Security Act [42 U.S.C. § 409(b)]. During the period January 1, 1978, through December 31, 1981, 42 U.S.C. § 409 provided in pertinent part:

For the purposes of this subchapter, *the term "wages" means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; except that, in the case of remuneration paid after 1950, such term shall not include —*

*(b) The amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of (1) retirement, or (2) sickness or accident disability, or (3) medical or hospitalization expenses in connection with sickness or accident disability, or (4) death; [emphasis added].*

Thus, Congress has expressly provided that "wages" shall not include the amount of any payment made to an employee under a plan or system established by an employer which makes provision for its employees generally or for a class or classes of its employees on account of sickness or accident disability.

Such statutes are interpreted by the courts in a manner which will give effect to congressional intent. *See, e.g., Sierakowski v. Weinberger*, 504 F.2d 831 (6th Cir. 1974); *Evelyn v. Schweiker*, 685 F.2d 351 (9th Cir. 1982). The pertinent sick pay provisions of § 209 of the Social Security Act [42 U.S.C. § 409] were adopted by Congress in 1939. Section 209 of the Social Security Act was amended at that time to provide in pertinent part:

The term “wages” means all remuneration for employment including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include —

\* \* \*

(3) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death, . . .

Thus, the pertinent provisions of that act, as they affect the questions you have asked, were identical to those found in § 209 of the Act [42 U.S.C. § 409] prior to January 1, 1982. The congressional purpose for the provision was explained at page 20, *Sen. Rept. No. 734 Soc.Sec. Act Amend. of 1939*:

Exclusion of payments to employer welfare plans. — The term “wages” is amended so as to exclude from tax payments made by an employer on account of a retirement, annuity, sickness, death or accident-disability plan, or for medical and hospitalization expenses in connection with sickness or accident disability. Dismissal wages which the employer is not legally required to make, and payments by an employer of the worker’s Federal insurance contributions or a contribution required of the worker under a state unemployment compensation law are also excluded from tax. This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

Thus, the primary purpose of the sick pay amendment was to:

. . . eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

The secondary purpose was to save employers time and money. As noted above, to the extent of any ambiguity in the Act, it should be interpreted in a manner which is consistent with the intent of Congress.

The sick pay provisions of the Act have been interpreted by duly adopted Social Security Regulations (20 C.F.R. § 404.1051A). Those regulations provide:

(a) Payments made prior to January 1, 1982. Sickness and accident disability payments that are paid by the employer to or on behalf of the employee or employee's dependents or into a fund to provide for such payments are excluded from wages if —

- (1) Paid prior to January 1, 1982, and
- (2) Paid under a plan or system set up by the employer, or
- (3) Paid more than six calendar months after the month the employee last worked.

Such regulations have the force and effect of law provided they are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law ( *See, e.g., Key v. Heckler*, 754 F.2d 1545 (9th Cir. 1985)). The above-quoted regulation is a restatement of the statutory provisions. As such, it is consistent with congressional intent and has the force of law.

In addition to the statute and regulations, the Social Security Administration has set forth its interpretation of the sick pay exclusion provisions in Social Security Rulings and in its Handbook for State Social Security Administrators. Neither of the foregoing have the force and effect of law. *Schweiker v. Hansen*, 450 U.S. 785 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981); *Lewin v. Schweiker*, 654 F.2d 631 (9th Cir. 1981); *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir. 1981); *Evelyn v. Schweiker*, 685 F.2d 351 (9th Cir. 1982); *Powderly v. Schweiker*, 704 F.2d 1092 (9th Cir. 1983); *Luca v. Heckler*, 615 F.Supp. 249 (D. Fla. 1985). However, courts accord such interpretations some deference where they appear to be consistent with the terms and purpose of the statutes they implement. *See, in addition to the above, Chamberlain v. Schweiker*, 518 F.Supp. 1836 (D. Ill. 1981); *Bouchard v. Sec. of H.H.S.*, 583 F.Supp. 944 (D. Mass. 1984).<sup>1</sup>

Social Security Ruling 79-31 which modifies Social Security Ruling 72-56, interprets the sick leave exclusion provisions, in pertinent part as follows:

Payments to employees of state and local governments whose services are covered by a Federal-State agreement under § 218 of the Social Security Act (Act) and who are absent from work due to illness, are excluded from wages under § 209(b) of the Act as payments "on account of sickness" if the following conditions are met:

1. The payments must be made under a sick leave plan or system established by the employer.

<sup>1</sup>This opinion does not address the question of consistency of administrative interpretations with the language and purpose of 42 U.S.C. § 409. Nor does it address the question whether current administrative interpretations would satisfy the "impracticable" requirement necessary to justify discrimination against state employees as discussed in *New Mexico v. Weinberger*, 517 F.2d 989 (10th Cir. 1975) *cert. den.* at *New Mexico v. Matthews*, 423 U.S. 1051, 96 S.Ct. 779, 46 L.Ed.2d 640 (1976). Resolution of such questions is unnecessary in light of the conclusion herein that Idaho satisfies the statutory requirements for exclusion, as administratively interpreted.

2. The plan must provide for employees generally, employees generally and their dependents, a class or classes of employees, or a class or classes of employees and their dependents.
3. The employer must have legal authority to make the payments “on account of sickness” and the employer must have exercised this authority.
4. The payments must be made solely “on account of sickness” and not be merely a continuation of salary while the employee is absent due to illness.

Following this statement of the administrative criteria listed above, the Ruling sets forth three examples, the first two of which involve situations in which sick pay plans exist. These examples, together with handbook statements regarding the criteria, will be examined hereinafter as they relate to Idaho’s constitution, laws, and sick pay plan

The Idaho Constitution places no restriction upon payments of fringe benefits to employees such as payments on account of sickness. It is settled law in Idaho that the constitution is in no manner a grant of power to the legislature, but is a limitation placed thereon; if no interdiction of a legislative act is found in the constitution, then it is valid. *State v. Dolan*, 13 Idaho 693, 92 P. 995 (1907); *Idaho Power Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914); *Independent Sch. Dist. v. Pfof*, 51 Idaho 240, 4 P.2d 893 (1931); *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 308 P.2d 225 (1957); *Smith v. Cenarrusa*, 93 Idaho 818, 475 P.2d 11 (1970); *State v. Cantrell*, 94 Idaho 653, 496 P.2d 276 (1972). Since there is no restriction upon the state’s authority to make payments to employees on account of sickness, it is clear that the state has authority to adopt plans to pay employees on account of sickness.

This authority was exercised at both the legislative and administrative levels for both classified and nonclassified employees. In 1977, the Idaho Legislature enacted major revisions to the state’s personnel policies. Chapter 307, 1977 Sess. L. That enactment has remained unchanged in relevant detail to the present time. While sick pay provisions existed prior to 1977, the statutes in effect at that time represent the pertinent statutes for the relevant time period of January 1, 1978, to December 31, 1981.

Idaho Code § 67-5333 establishes a mandatory sick leave plan for the state’s classified workforce. It defines the rate and conditions under which sick leave shall accrue. It provides that sick leave shall be taken on a workday basis and provides that in cases where absences for sick leave exceed three consecutive work days, the appointing authority may require verification by a physician or other authorized practitioner. The Idaho Personnel Commission has been given authority to promulgate regulations with respect to sick leave (Idaho Code §§ 67-5338 and 67-5333[7]).

Idaho Personnel Commission Rule 24.A.3 (IDAPA 28) sets forth the circumstances under which sick leave may be used:

Sick leave shall only be used in case of actual illness or disability or other medical and health reasons necessitating the employee’s absence from work,

or in situations where the employee's personal attendance is required or desired because of serious illness, disability, or death and funeral in the family.

Therefore, those payments to employees for "actual sickness or disability or other medical and health reasons necessitating the employee's absence from work" would be excluded from being considered wages under the terms of section 209(b) of the Social Security Act. Those situations where the state permits the use of sick leave where the employee is not actually ill or where vacation leave may be used in lieu of sick leave would not be excluded from consideration as wages under the terms of § 209(b) of the Social Security Act.

In 1977, the legislature also mandated a sick leave plan for nonclassified employees with the adoption of ch. 16, title 59, Idaho Code, which has remained the same in pertinent detail to the present. The chapter addressed various personnel matters including salary comparability with classified employees, credited state service, sick leave, vacation leave, hours of work, and the use of compensatory time and overtime.

Idaho Code § 59-1604 provides credited state service for nonclassified employees for purposes of payroll, vacation leave, and sick leave. Subsection (3) of the section provides in pertinent part:

Members of the legislature, the lieutenant governor, and members of part time boards, commissions, and committees, shall not be eligible for annual leave or sick leave.

Idaho Code § 59-1605 mandates a sick leave plan for nonclassified employees. Subsection (1) of Idaho Code § 59-1605 provides:

Eligible nonclassified officers and employees *shall* accrue sick leave at the same rate and under the same conditions as is provided in § 67-5333, Idaho Code, for classified officers and employees. [Emphasis added]

The section is mandatory. It defines the sick leave right by defining both the rate and conditions under which sick leave shall accrue. Subsection (2) then provides:

Sick leave *shall* be taken by nonclassified officers and employees in as nearly the same manner as possible as is provided in § 67-5333, Idaho Code, for classified officers and employees. [Emphasis added]

This section is likewise mandatory. However, it provides that sick leave shall be taken "in as nearly the same manner as possible" as provided in Idaho Code § 67-5333. The phrase "same manner" is ordinarily construed to relate to procedural rather than substantive matters. *See, generally, cases collected at 38 Words and Phrases* 327-331. This result is clear in the context of this statute. It would be unreasonable to construe subsection (1) as mandating the rate and conditions which define the substantive sick leave right, and then construe subsection (2) as permitting an exempt agency to eliminate or defeat that right by a discretionary redefinition of the substantive right.

Rather, subsections (1) and (2) grant nonclassified officers and employees the same substantive rights as those provided to classified employees by Idaho Code § 67-5333. The language, “in as nearly the same manner as possible,” is merely legislative recognition of the fact that different procedural requirements may be necessary for different classes of exempt employees. For example, record keeping forms designed for the classified work force may not be adequate when applied to exempt classes of employees such as employees of the Idaho Military Department under federal control, employees of the legislative department, or the governor’s office.

Thus, while some procedural differences are allowable, Idaho Code § 59-1605(1) and (2) provides the same substantive sick leave rights to nonclassified employees as those provided for classified employees. Such substantive rights include those found in Idaho Code § 67-5333 defining the rate and conditions under which sick leave rights shall accrue, and providing the right to take sick leave on workdays, with the proviso that the employer may require verification by a physician or other authorized practitioner. Separate provisions were statutorily provided for two classes of employees. Idaho Code § 59-1605(3) requires the Idaho Supreme Court to determine the sick leave policy for employees of the judicial department. Idaho Code § 59-1605(4) requires the State Board of Education to determine sick leave policies for the non-classified employees of the board.

The State Board of Education and the Idaho Supreme Court adopted sick leave policies as required. The State Board of Education policy was in effect during the entire relevant time period.

The relevant provisions of the Board’s policy regarding accrual rights and taking sick leave were as follows:

Sick leave for all faculty and professional employees who are employed on a nine-month or more basis and all classified employees shall accrue at the rate of one (1) day for each full month of service. Sick leave shall accrue without limitation. Sick leave shall be charged for absences due to illness only on working days.

\* \* \*

The Idaho Supreme Court’s policy which was effective for the relevant period provided in pertinent part:

Sick leave will accrue at the rate of one day for each month of service and begins accruing in the first month worked. Accumulated sick leave shall be limited to 120 working days of leave, and all sick leave shall be forfeited at the time of termination. No employee shall be reimbursed for earned but unused sick leave.

Sick leave is to be used only in cases of actual sickness or disability. With the approval of the Administrative Director of the Courts, sick leave may be used where the individual’s personal attendance is required or desirable because of serious illness, disability or death in his/her immediate family, or may be taken in advance of earning that leave in a later month.

Finally, Idaho Code § 59-1605(5) required the State Board of Examiners to adopt comparative charts to compute equivalent sick leave for persons paid on a daily, weekly, bi-weekly, calendar month, or annual period. (This requirement is the counterpart of Idaho Code § 67-5332(3) which requires the Personnel Commission to adopt comparative charts to compute credited state service for sick leave, annual leave, and other purposes on daily, weekly, bi-weekly, monthly, and annual periods.) The Board of Examiners adopted the comparative charts in 1977 as required.

Thus, all requirements for administrative implementation of the mandatory sick leave plans of Idaho Code §§ 59-1605 and 67-5333 for statutorily eligible nonclassified and classified employees were completed by 1977.

From the foregoing discussion, it is apparent that Idaho complied with the actual terms of 42 U.S.C. § 409 which excludes from the definition of wages:

... any payment ... made to an employee ... under a plan or system established by an employer which makes provision for ... a class or classes of his employees ... on account of ... sickness or accident disability.

It is also clear that the state has legal authority to make payments on account of sickness, that the state exercised this authority in accordance with state law by statutorily and administratively establishing and implementing a mandatory sick leave plan for classified and nonclassified eligible employees, and that payments were made on account of sickness pursuant to the sick leave statutes providing benefits in addition to separately defined salary benefits rather than pursuant to salary statutes which provide merely for continuation of salary during illnesses.

As discussed previously, the provisions of 42 U.S.C. § 409(b) have been administratively interpreted by the Social Security Administration in Social Security Rulings and in its Handbook for State Social Security Administrators. Social Security Ruling 79-31 provides that payments on account of sickness are excluded from the definition of wages if the following conditions are met:

1. The payment must be made under a sick leave plan or system established by the employer.
2. The plan must provide for employees generally, employees generally and their dependents, a class or classes of employees, or a class or classes of employees and their dependents.
3. The employer must have legal authority to make the payments "on account of sickness" and the employer must have exercised this authority.
4. The payments must be made solely "on account of sickness" and not be merely a continuation of salary while the employee is absent due to illness.

The Ruling then sets forth three illustrative cases. The first two involve sick pay plans in which payments qualify for exclusion from "wages" under the Act.



In the first case, a hospital district established a plan under which employees received one day of sick leave for each month of service. Sick leave could be used only for the employee's illness or disability, and the hospital could require a doctor's statement justifying use of sick leave. The hospital maintained records which showed sick leave used and expenses in connection with such use. State law did not restrict the hospital district's authority to pay employees on account of sickness.

In the second case, a city established a sick leave plan under which employees received four hours of sick leave each two-week pay period. The city passed an ordinance providing that sick leave was intended to be payment "on account of sickness" and not as a continuation of salary. Sick leave absences beyond five working days required a doctor's statement explaining the reason for absence. The state attorney general issued an opinion which concluded that while the state did not have legal authority to pay state employees on account of sickness from its regular salary account from funds appropriated for salary purposes, there was no such restriction applicable to political subdivisions.

In the case of the hospital district, the ruling found:

Accordingly, payments made under the hospital district's sick leave plan are excluded from wages under § 209(b) of the Act. The hospital district has the legal authority to pay "on account of sickness," and the creation of a sick leave plan with separate accounting for sick leave use and expenditures is evidence that this authority has been exercised.

In the case of the city, the ruling found:

Accordingly, the payments to the employees of City A absent on sick leave are excluded from wages under § 209(b) of the Social Security Act as payments "on account of sickness." The opinion of the attorney general of State B plus the local ordinance adopted by the governing body of City A establish that the city has the legal authority to pay "on account of sickness," and the ordinance and creation of the sick leave plan are evidence that this authority has been exercised.

The Ruling makes it clear that evidence of compliance with the administrative criteria established can be shown in various ways. For example, although the hospital district had not adopted a resolution or ordinance such as the city's, it separately accounted for sick leave use and expenses evidencing it had exercised its authority to make sick leave payments. The city, on the other hand, did not separately account for personal sick leave expenses, but was permitted by state law to pay sick leave from its salary account and adopted an ordinance distinguishing payments on account of sickness from regular salary provisions.

Like the city and hospital district, Idaho has adopted a sick leave plan which defines accrual of sick leave rights. Employees receive the equivalent of one day of sick leave for each month of service (96 hours per 2080 hours of credited state service). Like the city and hospital district, Idaho employees have the right to use sick leave on work days on account of sickness. (As discussed previously, only those payments due

to the employee's sickness or accident disability are excluded. Situations in which the state permits sick leave to be used for other purposes, such as serious illness in the family, are not excluded.) Like the city and hospital district, Idaho may require verification of illness by a physician or other authorized practitioner. Like the city and hospital district, Idaho is legally authorized to pay employees on account of sickness.

The city by ordinance and the state by statute mandated that payments be made to employees absent from work on account of sickness to the extent of their sick leave accrual rights. Like the city, these payments are payments statutorily separate and distinct from salary rights set out separately in Idaho's statutes.

In the case of the city, state law permitted the city to pay sick leave from its salary account. Idaho appropriates funds for various programs utilizing standard classifications of personnel costs, operating expenditures, and capital outlay. Personnel costs include a number of things, including salary, sick leave, annual leave, overtime, compensatory time, and the employer's share of contributions relating to employees such as retirement, health and life insurance, workmen's compensation, employment security, and social security. Thus, Idaho's budgeting process permits payment of sick leave from appropriations for personnel costs more clearly than was the case in the city example of the social security ruling. Idaho, like the city, meets the terms of the sick pay exclusion as interpreted by the ruling.

The hospital district, by contrast, provided evidence that it exercised its authority to pay on account of sickness by accounting for sick leave use and expenses as distinguished from regular salary and vacation leave. Likewise, Idaho maintained records separately accounting for sick leave accruals and utilization during the relevant period. The State Auditor's Office undertook a program to review the relevant records of the various agencies. Sick leave use and expenses were identified. Payments made for other than personal sick leave were excluded as well as leave which could not be distinguished from other types of leave such as family sickness. The Auditor, like the hospital district, thereby separately identified and accounted for sick leave utilization and expenditures qualifying for exclusion.

Thus, evidence that Idaho exercised its authority to make payments on account of sickness is provided by both methods found to be sufficient evidence in S.S.R. 79-28. Idaho qualifies for the exclusion as it is interpreted by the ruling.

The Handbook for Social Security Administrators also discusses the administrative criteria set forth in Social Security Ruling 79-31. The guidelines generally follow the provisions of S.S.R. 79-31. However, in addition to the types of evidence found sufficient in S.S.R. 79-31 to establish that payments were made pursuant to authority to pay on account of sickness, the handbook provides that such evidence might take the following forms:

\* \* \*

2. A separate appropriation or budgeting solely for payments on account of sickness; or

3. A separate sick-pay account. The sick-pay account may be used either to make payments direct to the employee or to reimburse the regular salary account for payments on account of sickness made from it.

In conclusion, the state of Idaho met the sick pay exclusion requirements of 42 U.S.C. § 409 and 20 C.F.R. 404.1051A for the period January 1, 1978, through December 31, 1981. The state likewise met the terms of the Act and regulations as administratively interpreted.

On December 12, 1980, Attorney General Opinion No. 80-28 was issued. That opinion addressed substantially the same questions as those addressed in this opinion. Since that time, the State Auditor's Office conducted an extensive review of the state sick-pay policies and implementation thereof for the period January 1, 1978, through December 31, 1981. In the process, it was learned that various critical factual assumptions which formed the basis of Opinion 80-28 were in error.

The Auditor learned, for example, that the administrative implementation provisions of Idaho Code § 59-1605 had, in fact, occurred. The opinion also erroneously assumed that only the state Auditor's bi-weekly payroll records after 1980 provided identification of sick leave use and expenses. This also proved to be untrue.

Attorney General Opinion No. 80-28 is hereby rescinded and is replaced by this opinion.

#### AUTHORITIES CONSIDERED:

1. *Federal Statutes:*

42 U.S.C. § 409

Social Security Act § 209(b), 42 U.S.C. § 409(b)

Social Security Act § 218, 42 U.S.C. § 418

2. *Idaho Statutes:*

Idaho Code § 59-1600 et seq.

Idaho Code § 59-1604

Idaho Code § 59-1604(3)

Idaho Code § 59-1605(1)

Idaho Code § 59-1605(2)

Idaho Code § 59-1605(4)

Idaho Code § 59-1605(5)

Idaho Code § 67-5332

Idaho Code § 67-5333(7)

Idaho Code § 67-5338

1977 Idaho Sess. Laws, ch. 307

3. *U.S. Supreme Court Cases*

*Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)

4. *Other Federal Cases:*

*Evelyn v. Schweiker*, 685 F.2d 351 (9th cir. 1982)

*Key v. Heckler*, 754 F.2d 1545 (9th cir. 1985)

*Lewin v. Schweiker*, 654 F.2d 631 (9th cir. 1981)

*New Mexico v. Weinberger*, 517 F.2d 989 (10th cir. 1975), *cert. den.* at *New Mexico v. Matthews*, 423 U.S. 1051, 96 S.Ct. 779, 46 L.Ed.2d 640 (1976)

*Powderly v. Schweiker*, 704 F.2d 1092 (9th cir. 1983)

*Sierakowski v. Weinberger*, 504 F.2d (6th cir. 1974)

*Whaley v. Schweiker*, 663 F.2d 871 (9th cir. 1981)

*Brouhard v. Sec. of H.H.S.*, 583 F.Supp 944 (D. Mass. 1984).

*Chamberlin v. Schweiker*, 518 F.Supp 1836 (D. Ill. 1981)

*Luca v. Heckler*, 615 F.Supp 249 (D. Fla. 1985)

5. *Idaho Cases:*

*Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 308 P.2d 225 (1957)

*Idaho Power Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914)

*Independent Sch. Dist. v. Pfost*, 51 Idaho 240, 4 P.2d 893 (1931)

*Smith v. Cenarrusa*, 93 Idaho 818, 475 P.2d 11 (1970)

*State v. Cantrell*, 94 Idaho 653, 496 P.2d 276 (1972)

*State v. Dolan*, 13 Idaho 693, 92 P. 995 (1907)

6. *Other Authorities:*

1980 Op. Att'y Gen. No. 28 (Idaho)

Social Security Ruling 72-56

Social Security Ruling No. 79-31

Idaho Personnel Commission Rule No. 24.A.3 (IDAPA 28) S. Rep. No. 734, p. 20

38 *Words and Phrases* 327-331

20 C.F.R. § 404.1051A

DATED this 18th day of March, 1986

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-4**

TO: John Rooney  
Department of Law Enforcement  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

**QUESTION PRESENTED:**

(A) Does H 708 extend from 1 o'clock a.m. to 2 o'clock a.m. the ability of a county to permit by ordinance sales of both liquor by the drink and beer or wine?

(B) Does H 708 grant a grace period from 2 o'clock a.m. to 2:30 o'clock a.m. for the consumption of both liquor by the drink and beer or wine?

**CONCLUSION:**

(A) No. H 708 does not grant to a county the ability to extend by ordinance beer and wine sales from 1 o'clock to 2 o'clock a.m.

(B) No. H 708 similarly does not grant a grace period from 2 o'clock a.m. to 2:30 o'clock a.m. for the consumption of either liquor by the drink or beer and wine.

#### ANALYSIS:

H 708 amends chapter 9 of title 23 Idaho Code. In general, title 23 deals with most aspects of state regulation of alcoholic beverages. Specifically, chapter 9 regulates the sale of liquor by the drink while chapters 10 and 13 regulate the sale of beer and wine, respectively. The various chapters of title 23 have been added over the years in response to changed conditions perceived to exist by different Idaho Legislatures. Additionally, various sections of these chapters have been amended from time to time. This has resulted in an ambiguous and apparently contradictory series of laws that require a historical review for a proper interpretation of H 708.

Chapters 1 through 8 of title 23, enacted by the 1939 legislature and known as the Idaho Liquor Act, created the state liquor dispensary system and replaced a bonded warehouse system. Not until 1947, with the enactment of chapter 9, was the retail sale of liquor by the drink from liquor purchased from the state liquor system permitted. See Idaho Code § 23-901. State regulation of beer, the sale of which was permitted in 1933, was rewritten and incorporated in chapter 10 of title 23. Chapter 13, known as the County Option Kitchen and Table Wine Act, was added to title 23 in 1973. Due to the way the code has been amended and reenacted over the years, the Idaho Supreme Court has acknowledged that ambiguities exist in the code provisions regarding alcohol. See *State v. Bush*, 93 Idaho 538, 466 P.2d 478 (1970). Nevertheless, the plain and literal wording of a statute must be our starting point in providing guidance in interpreting H 708. *Local 1494 of Int'l Ass'n of Firefighters v. Coeur d'Alene* (99 Idaho 630, 639, 586 P.2d 1346 (1978)). Further, absent ambiguity, the plain meaning of a statute must be given effect. *Intermountain Health Care Inc. v. Board of County Commissioners*, 710 P.2d 595, 109 Idaho 685 (1985).

We begin our analysis by reviewing the bill itself. H 708 is entitled:

[A]n act relating to the days and hours of the sale of *liquor by the drink*; amending § 23-927, Idaho Code, to provide a county option for extending the hours of sale and permitting Sunday sale of *liquor by the drink*. (emphasis added)

On its face, H 708 appears to be clear and unambiguous. However, when placed in context with title 23, some confusion is apparent. As noted above, H 708 permits, on a county option basis, Sunday sales and extends from 1 o'clock a.m. to 2 o'clock a.m., the sale of liquor by the drink. Idaho Code § 23-902(g) defines liquor as "all kinds of liquor sold by and in a state liquor store." Because fortified and table wines have been sold in state liquor stores since 1937, and beer has been sold in state liquor stores since the early 1970's, it is possible to read H 708 as extending beer and wine sales from 1 o'clock a.m. to 2 o'clock a.m. This argument is supported by the apparent intent of the 48th Idaho Legislature to accomplish this result. See House State Affairs Committee Minutes of March 20, 1986. However, for the reasons stated below, we are unable to conclude that H 708 accomplished this result.

As noted above, H 708, by its very terms, deals only with “liquor by the drink.” While “liquor” is broadly defined in Idaho Code § 23-902(g), Idaho Code § 23-105 further defines “alcoholic liquor,” “spirits” and “wine” for purposes of the state liquor dispensary system. Further, as “beer” is defined in Idaho Code § 23-1001(a) and “wine” is defined in Idaho Code § 23-1303(a), it is our conclusion when reading the statutes together that the “liquor” referred to in Idaho Code § 23-902(g) relates only to liquor that *must* be purchased in a state liquor store, and cannot be read to include beer and wine which *may be* purchased in a state liquor store.

This interpretation is further supported by the entire format of title 23 which sets specific and at times different regulatory requirements for the sale of liquor, liquor by the drink, beer and wine. The separate treatment of each category — i.e. the inclusion and exclusion of various alcoholic beverages from each chapter — evidences legislative intent that each beverage be, for certain purposes, treated separately. Idaho Code § 23-1012 sets the permissible hours during which beer may be sold. The statute clearly limits beer sales to 1 o’clock a.m.

In addition, Idaho Code § 23-1332 provides that:

Wine sold for consumption or dispensed on the licensed premises (of a liquor by the drink licensee) may be sold, consumed or dispensed only during hours that beer can be sold, consumed or dispensed pursuant to the laws of this state.

In Attorney General Opinion 73-227, this office concluded that a retail liquor by the drink license did not confer upon the licensee the right to sell wine on Sundays, absent compliance with Chapter 13 (the County Option Kitchen and Table Wine Act). We found that the separate treatment of different alcoholic beverages by the legislature was intentional and that different statutorily set hours and days for the sale of beer and wine, as opposed to liquor by the drink, must be adhered to by a liquor by the drink license. We stated:

It is a canon of legislative construction to find against an implied repeal of existing legislation. I am constrained to advise that the legislature did not intend to repeal existing legislation by the enactment of H.B. 206 (which set different hours for the consumption of beer and wine as opposed to liquor-by-the-drink). Holders of a retail liquor by the drink license may continue to sell wine for consumption on the premises notwithstanding the alcohol by weight in such beverages. Such sales can only occur during those hours and days permitted for alcoholic beverages per se. In other words, the holder of a retail liquor by the drink license may not sell kitchen and table wine on Sunday nor on proscribed days and hours.

If a holder of a retail liquor by the drink license intends to sell wine for consumption off the premises during permissible days and hours, he must also possess a retail wine license. On the other hand, the holder of a retail wine license not possessing a retail liquor by the drink license, may only sell kitchen and table wine for consumption off the premises during permissible hours of beer sale.

73 Attorney General Opinion 227.

H 708 presents the reverse factual situation as liquor by the drink hours are treated more expansively than beer and wine consumption hours. We are likewise constrained to advise that H 708 does not amend by implication the hours when beer and wine may be sold by a retail liquor by the drink establishment.

Concerning your second question regarding the grace period provided by H 708, it is our conclusion that all drinking on licensed premises must stop at 2 o'clock a.m. H 708 provides that:

(3) Any patron present on the licensed premises after the sale of liquor has stopped *as provided in subsection (1) above* shall have a reasonable time, not to exceed thirty (30) minutes, to consume any beverages already served. (emphasis added.)

Subsection (1) provides in general for a 1 o'clock a.m. cessation of drinking. H 708 by adding a new subsection (2) extends liquor by the drink sales to 2 o'clock a.m. By limiting the applicability of the grace period to only those hours specified in subsection 1, the legislature failed to extend the grace period to the extended hours provided for in the new subsection 2.

In summary, it must be pointed out that H 708 accomplished many of the goals envisioned by the 48th Legislature, including the ability of retailers to sell liquor by the drink on Sundays and until 2:00 o'clock a.m. However, sales of beer and wine must be concluded by 1:00 a.m., with unconsumed beer and wine beverages removed from tables by 1:30 o'clock a.m. and all liquor-by-the-drink beverages removed from tables at 2:00 o'clock a.m.

**AUTHORITIES CONSIDERED:**

1. *Idaho Statutes:*

Idaho Code § 23-105

Idaho Code § 23-901

Idaho Code § 23-902(g)

Idaho Code § 23-927

Idaho Code § 23-1001(a)

Idaho Code § 23-1012

Idaho Code § 23-1303(a)

Idaho Code § 23-1332



2. *Idaho Cases:*

*Intermountain Health Care Inc. v. Board of County Commissioners of Madison County*, 109 Idaho 685, 710 P.2d 595 (1985)

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

*State v. Bush*, 93 Idaho 538, 466 P.2d 478 (1970)

3. *Other Authorities:*

73 Op. Att'y Gen. 227 (Idaho)

DATED this 27th day of June, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

**ATTORNEY GENERAL OPINION NO. 86-5**

TO: Jerry M. Conley, Director  
Idaho Department of Fish and Game  
600 South Walnut  
P.O. Box 25  
Boise, ID 83707  
STATEHOUSE MAIL

Per Request for Attorney General Opinion.

ISSUE PRESENTED:

You have asked for an opinion regarding the constitutionality of § 36-401, Idaho Code. Specifically, you question whether this statute imposes a form of licensure or registration upon ownership or possession of firearms prohibited by article I, § 11, of the Idaho Constitution.

CONCLUSION:

Because the intent of Idaho Code § 36-401 is only to punish a use of firearms by unlicensed hunters, it has not been made unconstitutional by subsequent amendment

of article I, § 11, Idaho Constitution. So long as a charge under Idaho Code § 36-401 presents proof of both a criminal act (being unlicensed and in possession of an uncased firearm while in the fields and forests of the state), and criminal intent (intent to engage in hunting), the law is constitutional and enforceable.

#### ANALYSIS:

Idaho Code § 36-401 was enacted March 12, 1976. Those sections of the statute which are pertinent to the present inquiry have remained unchanged since adopted. The statute provides:

It is a misdemeanor for any person to hunt, trap, or fish for or take any wild animal, bird, or fish of this state or *have in his possession any uncased firearm while in the fields or forests of the state, without* first having procured a license (emphasis added).

The statute in its present form then provides 14 instances where no license is required. Relevant exceptions will be discussed below.

On November 7, 1978, the citizens adopted an amendment to article I, § 11, of the Idaho Constitution which deals with the right of citizens to keep and bear arms. Prior to the 1978 enactment, this section read:

Right to bear arms. — The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

Through its 1978 amendment, this section now sets out ways in which the legislature may and may not regulate firearms. It now reads:

Right to keep and bear arms. — The people have the right to keep and bear arms, which right shall not be abridged; *but this provision shall not* prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon.

Idaho Code § 36-401 focuses even more clearly the legislature's intent to prohibit hunting or attempted hunting of Idaho's fowl and other game without being licensed. The statute does not prohibit mere possession of a firearm without licensure; rather, the statute punishes a form of firearm use: Being in the fields and forests of the state with an uncased firearm while in the activity of hunting. "Uncased firearm" is not defined in the law but presumably refers to a firearm which is not encumbered, packaged, or protected by a sheath, scabbard, or other container; if operational and loaded, it would be in a condition ready to be discharged.

Therefore, Idaho Code § 36-401 quite apparently prohibits an intended *use* of a firearm for hunting shown by the carrying of a firearm while in fields and forests —

places where one would go to hunt game and fowl. The statute creates a *prima facie* case of unlawful use of a firearm during hunting by inferences which may be drawn from the following facts:

1. The person is in the fields or forests of the state without a license to hunt.
2. The person is in possession of an uncased firearm (presumably, one which is ready for use).
3. The person does not fit into any of the exemptions listed in the statute, i.e.:
  - a. The person is not in field or forested property owned, leased, or controlled by that person, or on adjoining property for the purpose of taking predatory animals. Idaho Code § 36-401(a).
  - b. The person is not carrying the uncased firearm for protection of life and property. Idaho Code § 36-401(k).

It is difficult if not impossible to postulate a scenario in which the statute would be applied unconstitutionally to mere possession of a firearm. Nevertheless, as with any *prima facie* case, a prosecution for violation of § 36-401(a)(k) can be controverted by evidence of innocuous possession without intent to hunt or by some other reasonable, lawful explanation for the conduct which, as applied to the particular facts, would make application of the statute conflict with the constitution.

There are, of course, many statutory provisions which give rise to a *prima facie* case against an accused. It is not, therefore, persuasive to object that Idaho Code § 36-401 creates an unlawful or unconstitutional presumption against the accused so long as the jury is properly instructed. Idaho Rule of Evidence 303(a) and (b) provide guidance for such cases:

- (a) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused . . . including statutory provisions that certain facts are *prima facie* evidence of other facts or of guilt, are governed by this rule.
- (b) Submission to jury. The court shall not direct the jury to find a presumed fact against the accused. The court may submit the question of guilt or the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt on the presumed fact beyond a reasonable doubt.

This statute does not abrogate the basic principles of criminal justice. If a charge is brought for violation of Idaho Code § 36-401 for failure to obtain a license to hunt, the state continues to have the burden of proving unlawful hunting from the inferences created by the statute and reasonably suggested by the facts of the case. This, like other criminal code sections, can only be violated by union of criminal act (possession of an uncased firearm while in the fields and forests) and criminal intent (to hunt without a license). Idaho Code § 18-114. Possession of an uncased firearm in such a

setting will also supply part of the proof of intent to hunt since intent is manifested by the circumstances connected with an offense. Idaho Code § 18-115.

It should be clear to any reasonable person of ordinary understanding that Idaho Code § 36-401 prohibits possession of an uncased firearm while in the fields and forests of this state without a license to hunt while being in the act of or intending to hunt. The intent to hunt is implicit in the statutory description of the prohibited act and by the context of the section.

#### CONCLUSION:

The prohibition of Idaho Code § 36-401 is quite exoteric. The statute prohibits the possession of an uncased firearm while a person is in the forests and fields intending to hunt without a license. Giving the words of Idaho Code § 36-401 a meaning consonant with the legislature's intent in enacting the statute, the law conforms to article I, § 11, of the Idaho Constitution.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution:*

Idaho Const. art. I, § 11

2. *Idaho Statutes:*

Idaho Code § 18-114

Idaho Code § 18-115

Idaho Code § 36-401

Idaho Code § 36-401(a)

Idaho Code § 36-401(k)

3. *Idaho Case:*

*State v. Newman*, 108 Idaho 5, 696 P.2d 856 (1985)

4. *Other Authorities Considered:*

Idaho R. Evid. 303(a)

Idaho R. Evid. 303(b)

DATED this 2nd day of July, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

**ANALYSIS BY:**

D. Marc Haws  
Deputy Attorney General  
Chief, Criminal Justice Division

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-6**

TO: The Honorable Larry EchoHawk  
Idaho State Representative  
1777 Lancaster  
Pocatello, Idaho 83201

Per Request for Attorney General's Opinion.

**QUESTION PRESENTED:**

Must an elected representative of the Idaho Legislature resign from his legislative position prior to assuming the office of prosecuting attorney within the State of Idaho?

Would that same individual be required to resign from his position on the 1986 general election ballot as a candidate for a legislative position?

**CONCLUSION:**

A prosecuting attorney may not serve as a member of the Idaho Legislature. Therefore, prior to assuming office as prosecutor, a legislator must resign from his legislative office. However, a prosecutor is not barred from seeking a legislative office.

**ANALYSIS:**

Idaho Code § 31-2601 sets forth the qualifications for prosecuting attorney:

No person shall be eligible to qualify for the office of prosecuting attorney who is not an attorney and counselor at law duly licensed to practice as such in the district courts of the state at the time he assumes office as prosecuting

attorney. *No prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney provided, however, that a prosecuting attorney or a deputy prosecuting attorney may be appointed by the attorney general as a special assistant attorney general for the performance of duties pursuant to such appointment in any other county than the county in which such prosecutor or deputy prosecutor serves. . . .* (emphasis added)

It is axiomatic that where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect. *Intermountain Health Care v. Board of County Commissioners*, 109 Idaho 685, 710 P.2d 595 (1985). It is clear that the office of prosecuting attorney, in this context, is a county office. See Idaho Code § 31-2001. It is equally clear that a legislator is a state office holder within the meaning of Idaho Code § 31-2601. See Idaho Code §§ 67-301, 67-401 *et seq.* Therefore, a prosecutor is statutorily barred from serving as a legislator.

Further, even if Idaho Code § 31-2601 did not bar a prosecutor from holding a legislative office, it is our opinion that a prosecutor required to devote full time to the position of prosecuting attorney pursuant to Idaho Code § 31-3113 could not serve as a legislator. That statute mandates that the Bannock County Prosecutor devote full time to the performance of his official duties. We do not believe that a “full time” prosecutor could also serve as a “part-time” legislator given the time requirements imposed upon an Idaho legislator. Because of these two independent statutory bases, we do not believe it is necessary to address the potential incompatibility of these two offices, which could provide yet a third ground for prohibiting an individual from holding these two offices.

Concerning your second question, we do not find any statutory or constitutional prohibition that prevents a prosecutor from seeking a legislative seat. However, for the reasons set forth above, once elected the prosecutor would be required to make a choice between the two offices.

#### AUTHORITIES CONSIDERED:

##### 1. *Idaho Statutes:*

Idaho Code § 31-2001

Idaho Code § 31-2601

Idaho Code § 31-3113

Idaho Code § 67-301

Idaho Code § 67-401 *et seq.*

##### 2. *Idaho Case:*

*Intermountain Health Care v. Board of County Commissioners of Madison County*, 109 Idaho 685, 710 P.2d 595 (1985)

DATED this 3rd day of July, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

### **ATTORNEY GENERAL OPINION NO. 86-7**

TO: Dana L. Rayborn Wetzel  
City Attorney  
Coeur d'Alene, Idaho 83814

Per Request for Attorney General's Opinion.

#### **QUESTION PRESENTED:**

Whether the Coeur d'Alene police department must disclose all documents and records to the public or the news media.

#### **CONCLUSION:**

Generally, public records are open to the public. However, Idaho Code § 9-335(1) (Supp. 1986) exempts from disclosure certain law enforcement investigatory records and documents that might otherwise be subject to disclosure under Idaho Code chapter 3, title 9, or other related statutes.

#### **ANALYSIS:**

Idaho Code chapter 3 of title 9 affords the public the right and opportunity to examine public records of state and local officers. The Idaho Supreme Court has held that unless otherwise exempted by statute, all public records are subject to inspection by any citizen of this state. *Dalton v. Idaho Dairy Products Comm'n*, 107 Idaho 6, 9, 684 P.2d 983, 986 (1984). The *Dalton* court defined public documents as all "[w]ritings coming into the hands of public officers in connection with their official functions. . . ." 107 Idaho at 10, 684 P.2d at 987.

#### ***1. Exemptions from Disclosure of Active Investigatory Records***

In response to the Idaho Supreme Court's holding in *Dalton*, the Idaho Legislature enacted Idaho Code § 9-335, governing disclosure of law enforcement investigatory records and documents. Because of its recent enactment, the courts have not yet interpreted section 9-335. Therefore, our analysis relies on general rules of statutory con-

struction. Prefatorily, it should be noted that Idaho Code § 9-335 is effective only through June 30, 1987.

The general rules for statutory interpretation of an Idaho statute based upon or adopted from a foreign statute are well settled. When a statute is adopted from another jurisdiction it is presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdiction. *See Liefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983). The genesis of Idaho Code § 9-335 is exemption seven of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (b)(7) (1977). Accordingly, Idaho Code § 9-335 should be construed consistently with the FOIA. *See Odenwalt v. Zaring*, 102 Idaho 1, 624 P.2d 383, (1980); *see also, Marlin v. Lewallen*, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 464 (1928).

Exemption seven of the FOIA provides exemption from disclosure for certain law enforcement records and documents classified as "investigatory." "Investigatory" records or documents are (1) compiled for law enforcement purposes, (2) compiled by a law enforcement agency, (3) contain certain information with respect to an identifiable person or group of persons, and (4) contain information which resulted from the investigation of a specific act or omission. 5 U.S.C. § 552 (b)(7).

Once it is determined that a disclosure request pertains to "investigatory records compiled for law enforcement purposes,"<sup>1</sup> the next step is to determine whether disclosure of the information would trigger one of the harms specified in Idaho Code § 9-335(1)(a) through (f). If not, the material must be released despite its characterization as an "investigatory record compiled for law enforcement purposes."<sup>2</sup>

Idaho Code § 9-335(1) exempts disclosure of law enforcement investigatory records in six instances:

Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:

- (a) Interfere with enforcement proceedings;
- (b) Deprive a person of a right to a fair trial or an impartial adjudication;
- (c) Constitute an unwarranted invasion of personal privacy;

<sup>1</sup>The exemption from disclosure of investigatory records is not limited to the enforcement of criminal laws; it applies to investigatory materials relating to the enforcement of civil laws as well. *Pope v. U.S.*, 599 F.2d 1383 (5th Cir. 1979).

<sup>2</sup>However, restrictions upon disclosure other than those expressly set forth in exemption seven may also apply. Exemption five of the FOIA precludes the disclosure of an attorney's work product. 5 U.S.C. § 552 (b)(5) (1977). Rule 6 of the Federal Rules of Criminal Procedure prohibits the disclosure of grand jury proceedings. Canon 4 of the Code of Professional Responsibility (DR 4-101) precludes an attorney from disclosing confidential client information without prior approval.



- (d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;
- (e) Disclose investigative techniques and procedures; or
- (f) Endanger the life or physical safety of law enforcement personnel.

A brief discussion of these six exemptions and an explanation of federal court interpretations should provide guidance for individuals evaluating disclosure requests.

(a) Interference with enforcement proceedings, as interpreted by the federal courts, includes prematurely revealing the government's case, thus enabling suspected violators to construct defenses in response thereto, *Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980); *Polynesian Cultural Center, Inc. v. NLRB*, 600 F.2d 1327 (9th Cir. 1979); enabling litigants to discern the identity of prospective government witnesses, as well as confidential informants, or the nature of the government's evidence and strategy, *Kanter v. IRS*, 433 F.Supp. 812 (N.D.Ill. 1977); and exposing affiants and potential witnesses to intimidation or harassment, *Polynesian Cultural Center*, 600 F.2d at 1328.

(b) Another ground for exemption is disclosure of law enforcement records that would "deprive a person of a fair trial or an impartial adjudication" of his or her case. I.C. § 9-335(1)(b); 5 U.S.C. § 552(b)(7)(B). The intent of this section is to insure that parties will not be prejudiced by premature release of information concerning their case. *Marathon Oil* (DOE, November 22, 1978) case no. DFA-0254; *Gilmore Broadcasting Corp.*, FCC 78-845, FOIA control no. 8-51, 44 ADL.2d 886 (1978).

(c) A third ground for exemption exists whenever disclosure of law enforcement investigatory records or reports would cause an "unwarranted invasion of personal privacy." *Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977); 5 U.S.C. § 552(b)(7)(C). The courts have not defined what constitutes "an unwarranted invasion of personal privacy" within the meaning of this exemption. Rather, courts have applied a balancing test whereby the individual's interest in maintaining privacy is weighed against the public's need for disclosure.

In applying this balancing test, courts have held that revealing (1) identities of persons who were the subjects of enforcement investigations, (2) identities of persons providing information to the law enforcement agency, (3) identities of third persons referred to in investigation records, or (4) identities of investigating officers or other agents, constituted unwarranted invasions of personal privacy. See *Nix v. U.S.*, 572 F.2d 998 (4th Cir. 1978).

(d) The fourth exemption from disclosure was created to encourage cooperation from confidential informants. Thus, governmental agencies need not disclose "the identity of a confidential source" of information, or the information obtained from that source. *Founding Church of Scientology of Washington, D.C., Inc. v. Regan*, 670 F.2d 1158 (D.C. Cir. 1981) cert. den. 456 U.S. 976, 102 S.Ct. 2242, 72 L.Ed.2d 851

(1982). The Senate Conference Report No. 93-1200, 3 U.S. Code Cong. and Adm. News, 93 Congress 2d Sess. (1974), states that an agency can, in cases involving enforcement of civil or criminal law, withhold the names, addresses and other information that would reveal the identity of a confidential source, but that *all* of the information furnished by such sources may be withheld where the records in question were compiled by a criminal law enforcement authority.

Thus, with regard to civil enforcement proceedings the identity of witnesses may not be disclosed, but the contents of affidavits may be disclosed. *Furr's Cafeterias, Inc. v. NLRB*, 416 F.Supp. 629 (N.D. Tex. 1976). In criminal cases, once the source of information is established to be "confidential," the exemption applies to both the identity of the source as well as the information provided, *Shaver v. Bell*, 433 F.Supp. 438 (N.D. Ga. 1977), including information that is not, strictly speaking, "confidential," because identical information has been furnished by a nonconfidential source. *Lame v. Department of Justice*, 654 F.2d 917 (3d Cir. 1981). The practical effect of this exemption is that it is unnecessary and contrary to the statute to consider whether the exempt documents can be edited to exclude details that might identify informants. *Duffin v. Carlson*, 636 F.2d 709 (D.C. Cir. 1980).

(e) The fifth exemption from disclosure applies to documents that would reveal to the public the investigative techniques and procedures utilized by law enforcement agencies. This exemption applies only to specialized and obscure techniques and procedures, *Shaver, supra*, not to routine techniques already known to the general public.<sup>3</sup> *Ferguson v. Kelly*, 448 F.Supp. 919 (N.D. Ill. 1979) (disapproved on other grounds by *Keeney v. FBI*, 630 F.2d 114 (2d Cir. 1980)).

(f) The final exemption from disclosure of law enforcement investigatory records applies when release of the records would "endanger the life or physical safety of law enforcement personnel." Thus, the disclosure of the names of law enforcement personnel may be precluded. *Nunez v. DEA*, 497 F.Supp. 209 (S.D. N.Y. 1980). Further, their names may have to be deleted from otherwise disclosable material. *Shaver*, 433 F.Supp. at 438. This exemption applies only to law enforcement agencies. Agencies not legitimately involved in law enforcement will not normally be included in this exemption, even if the possibility of danger to their employees exists. *Fonda v. CIA*, 434 F.Supp. 498 (D.D.C. 1977).

## 2. Inactive Investigatory Records

The guidelines sketched above govern access to active law enforcement investigatory files. Access to inactive investigatory records is governed by Idaho Code § 9-335(2), which states:

An inactive investigatory record shall be disclosed unless the disclosure would violate the provisions of subsection (1)(a) through (f) of this section. Investigatory record as used herein means information with respect to an

<sup>3</sup>Similarly, this exemption does not apply to records falling into the scope of 5 U.S.C. § 552 (a)(2), that provides for the disclosure of ordinary staff manuals and instructions that affect the public. *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978).

identifiable person or group of persons compiled by a law enforcement agency in the course of conducting an investigation of a specific act or omission and shall not include the following:

- (a) The time, date, location, and nature and description of a reported crime, accident, or incident;
- (b) The name, sex, age, and address of a person arrested, except as otherwise provided by law;
- (c) The time, date, and location of the incident and of the arrest;
- (d) The crime charged;
- (e) Documents given or required by law to be given to the person arrested;
- (f) Information and indictments except as otherwise provided by law; and
- (g) Criminal history reports.

This section identifies those portions of inactive or closed documents that are not exempt from disclosure under section 9-335 and, therefore, must be disclosed provided they do not violate any of the exemptions discussed earlier in this opinion. Documents whose exemption is based solely upon possible “interference with enforcement proceedings” are no longer exempt after completion of the actual or contemplated proceedings, provided no other exemptions apply at that time.

However, not all exemptions lose their force immediately upon conclusion of the investigation. In some cases the potential for enforcement proceedings remains for some time. *Pope, supra*. In such cases an agency’s closed files relating to enforcement proceedings may still be exempt from disclosure, provided such records are relevant to other cases and at least one of the six specified conditions for exemption exists. *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976).

In order for an agency to justify the withholding of information on the ground that its disclosure would interfere with some future enforcement investigation, the agency must show that the relevant investigation is most likely to occur. *RCA Global Communications v. FCC*, 524 F.Supp. 579 (D.Del. 1981).

Most of the items set forth above in Idaho Code § 9-335(2), require no explanation. However, subsection (e) warrants clarification. A review of the legislative history of exemption seven and comments of the U.S. Attorney General’s 1974 amendments to the FOIA<sup>4</sup> clarify the intended meaning of § 9-335(2)(e). This section should be construed to mean that the exemptions provided in Idaho Code § 9-335(1) are not intended to repeal or foreclose discovery rights of litigants such as those under the Jencks Act or the Federal Rules of Civil or Criminal Procedure. Subsection (e) does not provide that those documents discoverable by party litigants are also disclosable to the public in general. A.G.’s Amendments to FOIA 1974 n.3 at 5.

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<sup>4</sup>U.S. Attorney General Opinion 1967 FOI Memorandum at 38.

### 3. *Summary*

The question presented is broad. As a rule, the public has access to public documents. However, in the case of active investigatory records, six exclusions preclude disclosure. Records are “investigatory” when they are compiled by and for a law enforcement agency and contain information about identifiable persons resulting from an investigation. Such records must be released unless disclosure would (1) interfere with enforcement proceedings, (2) deprive a person of a fair trial, (3) constitute an unwarranted invasion of privacy, (4) disclose the identity or information furnished by a confidential informant, (5) disclose non-routine investigative techniques or procedures, or (6) endanger the life or safety of law enforcement personnel. Inactive records must be disclosed, unless one of the “active” exemptions applies. The courts have held that such records are exempt from disclosure. A party denied access to such information may apply to the state courts to determine whether the denial of disclosure is warranted. The agency denying disclosure bears the burden of establishing exemption.

#### AUTHORITIES CONSIDERED:

##### 1. *Federal Statutes:*

5 U.S.C. § 552(a)(2)

5 U.S.C. § 552(b)(5)

5 U.S.C. § 552(b)(7)

5 U.S.C. § 552(b)(7)(B)

##### 2. *Idaho Statutes:*

Idaho Code § 9-301 et seq.

Idaho Code § 9-335

Idaho Code § 59-1109

##### 3. *U.S. Supreme Court Case:*

*Marlin v. Lewallen*, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 464 (1928)

##### 4. *Other Federal Cases:*

*Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980)

*Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978)

*Duffin v. Carlson*, 636 F.2d 709 (D.C. Cir. 1980)

*Founding Church of Scientology of Washington, D.C. Inc., v. Regan*, 670 F.2d 1158 (D.C. Cir. 1981), *cert. denied* 456 U.S. 976, 102 S.Ct. 2242, 72 L.Ed. 2d 851 (1982)

*Keeney v. FBI*, 630 F.2d 114 (2d Cir. 1980)

*Lame v. Department of Justice*, 654 F.2d 917 (3rd Cir. 1981)

*Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977)

*New England Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976)

*Nix v. U.S.*, 572 F.2d 998 (4th Cir. 1978)

*Polynesian Cultural Center, Inc. v. NLRB*, 600 F.2d 1327 (9th Cir. 1979)

*Pope v. U.S.* 599 F.2d 1383 (5th Cir. 1979)

*Ferguson v. Kelly*, 448 F.Supp. 919 (N.D.Ill. 1979)

*Fonda v. CIA*, 434 F.Supp 498 (D.D.C. 1977)

*Furr's Cafeterias v. NLRB*, 416 F.Supp. (N.D.Tex. 1976)

*Kanter v. IRS*, 433 F.Supp. 812 (N.D.Ill. 1977)

*Nunez v. DEA*, 497 F.Supp. 209 (S.D.N.Y. 1980)

*RCA Global Communications v. FCC*, 524 F.Supp. 579 (D.Del. 1981)

*Shaver v. Bell*, 433 F.Supp. 438 (N.D.Ga. 1977)

#### 5. *Idaho Cases:*

*Dalton v. Idaho Dairy Products Comm'n*, 107 Idaho 6, 684, P.2d 983 (1984)

*Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983)

*Odenwalt v. Zaring*, 102 Idaho 1, 624 P.2d 383 (1980)

#### 6. *Administrative Decisions:*

*Gilmore Broadcasting Corp.*, FCC 78-845, 44 ADL.2d 886 (1978) FIOA Control no. 8-51

*Marathon Oil*, Case no. DFA A-0254 (DOE Nov. 22, 1978)

*7. Other Authorities Considered:*

Model Code of Professional Responsibility DR4-101 S. Conf. Rep. No. 1200, 93rd Cong. 2d Sess. (1974)

DATED this 7th day of August, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON  
Chief Deputy

**ATTORNEY GENERAL OPINION NO. 86-8**

TO: Gary Gould, Director  
Department of Labor and Industrial Services  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

You have asked whether the plumbing division of the State Department of Labor and Industrial Services has the authority to issue plumbing permits to nonlicensed individuals or firms, other than those identified in Section 54-2602 (a), (b), (c) and (d), Idaho Code and, if so, how such permits should be issued.

CONCLUSIONS:

1. The plumbing division of the State Department of Labor and Industrial Services has authority, pursuant to chapter 26 of title 54 of the Idaho Code, to issue plumbing permits to nonlicensed individuals or firms when necessary to protect the public health and safety.

2. The process for issuing such permits is within the discretionary powers of the board as the board shall establish by exercise of its rulemaking powers.

ANALYSIS:

The question presented involves an apparent conflict between the license and permit provisions of the Plumbing Act in chapter 26 of title 54 of the Idaho Code.

The licensing provisions are set forth in Idaho Code §§ 54-2608 through 54-2618 and provide a system of competency certificates progressing from plumbing apprentice to plumbing journeyman to plumbing contractor. Idaho Code § 54-2611. It is un-

lawful to engage in plumbing unless one has a certificate of competency (license). Idaho Code § 54-2610. Idaho Code § 54-2602 provides exemptions from this licensing requirement in seven limited situations, which may be described in shorthand form as follows:

- (a) owners doing plumbing work in single or duplex family dwellings;
- (b) farm buildings outside city limits;
- (c) logging, mining or construction camps;
- (d) piping systems in industrial processing plants outside city limits;
- (e) on-premise plumbing system work by employers who employ their own maintenance or construction plumbers;
- (f) sewer contractors, sewage disposal contractors, or excavating or utility contractors and their employees;
- (g) water treatment installation and repairs on residential or business premises.

Thus, the licensing provisions are clear. Persons who perform plumbing work must be licensed except in these seven situations.

The conflict arises in trying to dovetail these clear licensing provisions of Section 54-2602 with the equally clear permit provisions of Section 54-2620. That section makes it unlawful for anyone to do:

[a]ny construction, installation, improvement, extension or alteration of any plumbing system in any building, residence or structure, or service lines thereto, in the state of Idaho, without first procuring a permit from the department of labor and industrial services authorizing such work to be done, . . .

Again, there are exceptions. However, the exceptions to the permit requirements in Section 54-2620 do not perfectly parallel the exceptions to the licensing requirements in Section 54-2602. The best way to resolve the conflicts is to walk through the exceptions one at a time.

The easiest cases are the three situations outlined in Idaho Code § 54-2602(b), (c) and (d). As noted earlier, these deal with farm buildings outside city limits; logging, mining or construction camps; and piping systems in industrial processing plants outside city limits. Persons working on such projects do not need to be licensed plumbers. Such projects are also expressly exempted from plumbing job permit requirements. *See*, Idaho Code § 54-2620(b). Thus, no conflict or confusion occurs in these three situations because all such projects are exempt from *both* the licensing and permit requirements.

There is likewise no difficulty in construing subsection (a) of Idaho Code § 56-2602 which governs persons doing their own work in family dwellings. Such persons do not need plumbing licenses. They do need permits under Section 54-2620, but that section expressly provides for issuing permits “to a person who does his own work in a family dwelling as defined in § 54-2602(a).”

The most problematic situations are those outlined in Idaho Code § 54-2602(e), (f) and (g). Persons working on projects encompassed by these three subsections are exempted from plumbing *licensing* requirements. However, the projects themselves are not exempted from plumbing *permit* requirements.

The conflict arises because plumbing permits can only be issued to persons holding a valid plumbing license. A vicious circle results: The three categories are exempt from licenses, but need permits, but cannot get the permits because permits can only be issued to valid license holders.

Closer analysis yields answers to some, but not all, of these situations.

In the case of water treatment installations and repairs, the general conflict is resolved by the specific provisions of Idaho Code § 54-2602(g). That subsection sets forth a separate inspection process for projects of this type:

[w]hen installed, repaired or completed, [these projects] shall be inspected by a designated, qualified and properly identified agent of the department of labor and industrial services as to quality of workmanship and compliance with the applicable provisions of this act.

The wording here is identical to the generic inspection provisions of Idaho code § 54-2624. Thus, the public interest is fully protected by the separate inspection provisions of Idaho Code § 54-2602(g) and there is no need to resort to the general permit provisions of Idaho Code §§ 54-2620 to 54-2627. The public health and safety is further protected by surety bond provisions in the same subsection of the code.

There is also little real conflict between the licensing and permitting requirements with regard to sewer contractors, sewage disposal contractors and excavating or utility contractors, listed in Idaho Code § 54-2602(f). Persons engaged in these professions are separately and expressly exempted from the “certificate of competency” (license) requirements of Idaho Code § 54-2610. These same individuals benefit further from the express treatment provided in Section 54-2602(f):

Nothing contained in this section *or any other provision of this code* shall be construed or applied to require a sewer contractor, sewage disposal contractor, or any excavating or utility contractor . . . to obtain a valid contractor’s certificate of competency. . . . (emphasis added)

The legislative intent is absolutely clear. Members of this category need not be licensed for any purpose whatsoever.



The permit provisions of the code could not possibly be used to override this strong expression of legislative intent. It is our opinion, therefore, that with respect to the class of contractors in Section 54-2602(f), the department would have to waive the requirement of Section 54-2620 that permits be issued only to persons holding valid licenses. The department would, however, retain its duty to inspect the work such individuals perform and to insure compliance with appropriate plumbing codes.

The final category is even more problematic. Idaho Code § 54-2602(e) provides that no license is needed by persons who “work on plumbing systems on premises owned or operated by an employer who regularly employs maintenance or construction plumbers.” This exemption from the licensing requirements was enacted in 1963. Idaho Session Laws, chapter 138.

The same bill that exempted such persons from licensing requirements struck down the permit exemption that had been enjoyed by workers in a previous subsection (e) category. *Id.* This was a strong indication that the legislature expressly intended to bring these projects within the permit requirements of what is now Idaho Code § 54-2620. This reading is bolstered by the fact that the same legislature also expressly provided in Idaho Code § 54-2602(e) that “alterations, extensions and new construction shall comply with the minimum standards, rules and regulations applicable to plumbing practices provided by this act.”

The board can carry out its duties either by waiving the requirement that permits be issued only to licensed plumbers for projects of this type or by issuing permits in the name of a representative of the firm doing the work, who will be responsible for supervising the work.

Neither approach is very satisfactory. Either would require that the board engage in rulemaking pursuant to Idaho Code § 54-2605.

We suggest, rather, that the board attempt to amend the code at the next legislative session in a way that comports both with the legislative intent that certain types of work may be done by unlicensed individuals and that work be done in accordance with the applicable plumbing codes. Our office is available to assist in reviewing any such proposed legislative revision.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code:*

Idaho Code § 54-2602(a)-(g)

Idaho Code § 54-2605

Idaho Code § 54-2608

Idaho Code § 54-2610

Idaho Code § 54-2611

Idaho Code § 54-2618

Idaho Code § 54-2620

Idaho Code § 54-2624

Idaho Code § 54-2627

DATED this 12th day of August, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON  
Chief Deputy Attorney General

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

### ATTORNEY GENERAL OPINION NO. 86-9

TO: The Honorable C. A. "Skip" Smyser  
Senator, District 11  
134 South Fifth Street  
Boise, ID 83702

Per Request for Attorney General's Opinion.

#### QUESTION PRESENTED:

Whether Idaho Code § 34-2217, which outlines procedures for the ratification of amendments to the U.S. Constitution, impermissibly infringes upon our legislature's federally derived ratifying function.

#### CONCLUSION:

The provision of § 34-2217 requiring that the legislature defer action on ratification until it receives the results of a popular referendum conflicts with and is rendered a nullity by art. V of the Federal Constitution.

#### ANALYSIS:

Idaho Code § 34-2217 requires that, prior to ratifying an amendment to the United States Constitution, our legislature must first submit the issue to the electorate for an "advisory" vote. The statute provides:

The legislature of the state of Idaho shall not in any case ratify an amendment to the United States Constitution unless the proposed amendment shall first have been submitted to the electorate. The question shall be submitted to the electorate at a regularly scheduled general election by concurrent resolution of the legislature. The results of such submission of the question to the electorate shall be advisory in nature only, and shall not prevent the legislature from acting in any manner on the proposed amendment.

In the course of our research, we have located no statute from any other jurisdiction which is identical to § 34-2217. The law was enacted in 1975 while Idaho was embroiled in controversy regarding its position on the equal rights amendment. Our legislature initially ratified the amendment on March 24, 1972, but then rescinded the ratification on February 9, 1977. *See State v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981). We may speculate that the passage of § 34-2217 was a product of this imbroglio and was intended to insure that future amendments be cautiously considered prior to ratification.

\* \* \*

Article V of the Federal Constitution states, in relevant part:

The congress, whenever two-thirds of both houses deem it necessary, shall propose amendments to this Constitution, . . . which . . . shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; . . .

The power of a state legislature to ratify an amendment to the Federal Constitution is derived from that instrument. By virtue of the supremacy clause in art. VII, it is clear that the legislature's ratifying function may not be abridged by a state. A unanimous Supreme Court articulated this rule in *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922):

But the function of a state Legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

258 U.S. at 136-37.

Clearly, therefore, if the Federal Constitution specifies that ratification be accomplished in a particular way, no state may superimpose more stringent requirements on that federal specification. The states have the power to regulate the ratification process only so long as the state provisions do not conflict with the mandate of art V. *See, Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972). The question we must resolve is whether § 34-2217 "conflicts" with art. V.

There are two aspects of § 34-2217 which merit consideration. First, the law requires the holding of a nonbinding popular vote on the question of ratification. Sec-

ond, the statute provides that ratification cannot take place until an advisory election is held “at a regularly scheduled general election.” In our view, the former requirement is not fatal to the statute; however, the mandatory election prior to ratification presents serious constitutional concerns.

(a) *Nonbinding Referenda.*

It is settled that ratification of a constitutional amendment cannot be conditioned upon approval by the voters via the referendum process. The Supreme Court reached this conclusion in *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920), where it observed:

Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people . . .

The framers of the Constitution might have adopted a different method. Ratification might have been left to the vote of the people. . . . [However the] language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method by which the constitution is fixed.

253 U.S. at 206 - 227.

The Court, in *Hawke*, held that conditioning ratification upon a popular vote is contrary to the constitutional delegation of the ratifying function to state legislatures. Accordingly, had § 34-2217 provided for a binding referendum prior to ratification, it would have unquestionably run afoul of the rule of *Hawke v. Smith*. However, a referendum conducted pursuant to our law is merely “advisory”; approval or disapproval of a proposed amendment is not delegated to the voters. This factor renders *Hawke* inapposite.

There is contemporary authority which supports the validity of nonbinding referenda as part of the ratification process. In *Kimball v. Swackhamer*, 584 P.2d 161 (Nev. 1978), the Nevada Supreme Court reviewed a statute requiring submission to the voters of an advisory question as to whether the voters recommended ratification by the state legislature of the equal rights amendment. The Nevada provision, like § 34-2217, expressly stated that the result of the referendum would not place any legal requirements on the legislature in terms of its ultimate action on the ratification question. In upholding the law, the Nevada Supreme Court distinguished *Hawke v. Smith* on the ground that the Nevada law:

. . . does not concern a binding referendum, nor does it impose a limitation upon the legislature. . . . [T]he legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

584 P.2d at 162.

When opponents of the Nevada initiative sought a stay from the United States Supreme Court, Justice Rehnquist, sitting as circuit justice, denied the stay with the following order:

Appellants' . . . contention . . . is in my opinion not substantial because of the nonbinding character of the referendum. . . . Under these circumstances, . . . reliance [on] . . . *Leser v. Garnet*, [258 U.S. 130 (1922)], . . . and *Hawke v. Smith*, . . . is obviously misplaced. . . . I can see no constitutional obstacle to a nonbinding advisory referendum of this sort.

*Kimball v. Swackhamer*, 439 U.S. 1385, 1387 - 1388, 99 S.Ct. 51, 53 - 54, 58 L.Ed.2d 225 (1978).

In view of the holdings of the Nevada Supreme Court and Justice Rehnquist in the *Swackhamer* case, we believe that a provision requiring a nonbinding popular vote passes constitutional muster.

(b) *Mandatory Election.*

The more difficult question arises from the requirement of § 34-2217 that our legislature defer ratification until after the popular vote. The statute reviewed in *Swackhamer* did not preclude the Nevada legislature from ratifying an amendment pending the required election. Justice Rehnquist made reference to this point in his opinion:

Applicants also contend that art. V is offended insofar as the statute requires the Nevada legislature to defer action on ratification until it receives the results of the referendum, which is not to occur until the next regularly scheduled election of Nevada legislators.

The plain meaning of the Nevada statute and the opinion of the Supreme Court of Nevada convince me that the deferral issue presented by the latter contention is not in this case because the Nevada statute does not *prevent* the state legislature from acting on the Equal Rights Amendment before the referendum. That the Nevada Legislature is *unlikely* to vote on the amendment before a referendum that it mandated is not a constitutionally cognizable grievance. (Court's emphasis)

439 U.S. at 1386.

We believe there is a substantial likelihood that the *Swackhamer* outcome would have been different had the Nevada statute mandated that the referendum be held prior to ratification. The inclusion of such a provision represents a dictation of the timing of ratification.

As mentioned above, our § 34-2217 *requires* that an issue be submitted to the voters prior to ratification. Application of the law will result in significant delay since it bars the legislature from ratifying an amendment until after the next general election; since general elections are held biennially (Idaho Code § 34-601), the legislature may be prevented from exercising its ratifying authority for nearly two years.

In *Walker v. Dunn, supra*, the Tennessee Supreme Court reviewed a section of the state constitution which provided that the legislature could not act upon any amendment until a general election intervened. The Tennessee legislature ignored this section in ratifying the twenty-sixth amendment. The plaintiffs argued that unless the election requirement was judicially enforced, they would be deprived of their right to "indirectly vote" on the amendment through their vote for their legislators. The court rejected this claim and found the election requirement to be contrary to the legislature's federally granted prerogative to ratify constitutional amendments. The court concluded that a state constitutional provision may not impose a temporal condition precedent to ratification; the timing of ratification is a matter that lies within the discretion of the body to which Congress has delegated the task of ratifying. We find this analysis to be compelling.

We are cognizant of the fact that the limitation in § 34-2217 was the result of an act of the legislature itself; our case is, therefore, arguably distinguishable from *Walker v. Dunn* where the election requirement was mandated by the draftsmen of the state constitution. However, we believe that Idaho's 1975 legislature was powerless to bind future sessions of that body which may seek to exercise the federally derived ratifying function without waiting for the results of the "advisory" election. The issue of when ratification may occur is, in our view, reserved exclusively to the legislature charged with the responsibility of considering the pending amendment.

Our statute clearly requires the legislature to defer action on ratification until an election on the question has been held. This is a state imposed limitation upon the federally created right of our legislature to ratify. We are not unmindful of our constitutional oath to uphold and support the constitution and laws of the state of Idaho; nor do we ignore the presumptive validity of statutory enactments. However, our analysis of the issue you have presented allows, in our opinion, no other reasonable conclusion but that § 34-2217 is in conflict with art. V. Application of the supremacy clause, therefore, renders the conflicting requirement of the statute a nullity.

#### AUTHORITIES CONSIDERED:

1. *U.S. Constitution:*

U.S. Const. art. V

U.S. Const. art. VII

2.. *Idaho Code:*

Idaho Code § 34-601

Idaho Code § 34-2217

3. *U.S. Supreme Court Cases:*

*Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920)

*Kimball v. Swackhamer*, 439 U.S. 1385, 99 S.Ct. 51, 58 L.Ed.2d 225 (1978)

*Lesser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed.2d 505 (1922)

4. *Other Federal Case:*

*State v. Freeman*, 529 F.Supp. 1107 (D.Idaho 1981)

5. *Cases from other Jurisdictions:*

*Kimball v. Swackhamer*, 584 P.2d 161 (Nev. 1978)

*Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972)

DATED this 18th day of August, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

P. MARK THOMPSON  
Assistant Attorney General  
for Special Litigation

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-10**

TO: W. R. Schroeder  
Assessor  
Ada County  
650 Main Street  
Boise, Idaho 83702

Per Request for Attorney General's Opinion.

**QUESTIONS PRESENTED:**

You have asked us to respond to several questions. These questions present three legal issues:

1. May a board of county commissioners establish a mandatory countywide personnel system affecting deputies and assistants of other county officers?

2. May a board of county commissioners create offices other than those specifically authorized by statutes or the constitution?
3. May a board of county commissioners hire its own employees?

#### CONCLUSIONS:

1. County commissioners may not directly control the work activities of deputies and assistants of other officers, nor may they establish mandatory grievance or termination procedures for other offices. County commissioners set the salaries of other officers and their deputies and assistants. The power to set salaries entails some power to mandate a personnel system.
2. New offices may not be created by county commissioners.
3. County commissioners have implied authority to directly employ persons needed to carry out their duties.

#### ANALYSIS:

### I AUTHORITY OF COUNTY COMMISSIONERS

Previously this office issued a guideline dated December 12, 1979, discussing the issues raised in your letter. 1979 *Attorney General's Opinions* at 248. That guideline is adopted with some expansion and modifications as the opinion of this office.

County offices are established by art. XVIII, § 6, Idaho Const., which states, in pertinent part:

The legislature by general and uniform laws shall, commencing with the general election in 1970, provide for the election biennially, in each of the several counties of the state, of county commissioners and a coroner, and for the election of a sheriff and a county assessor and, a county treasurer, who is ex officio public administrator, every four (4) years in each of the several counties of the state. . . . The clerk of the district court shall be ex officio auditor and recorder. . . . No other county offices shall be established. . . . The county commissioners may employ counsel when necessary. The sheriff, county assessor, county treasurer, and ex officio tax collector, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistants as the businesses of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners.

Thus, there are six county offices: commissioner, coroner, sheriff, assessor, treasurer, and clerk of the district court. Of these, the sheriff, assessor, treasurer, and clerk may appoint deputies and assistants as authorized by the county commissioners.



The text of art. XVIII, § 6, neither allows nor forbids commissioners to regulate deputies of other officers. Further, there is no Idaho law directly addressing the commissioner's power to establish a mandatory countywide personnel system. There is, however, a substantial body of Idaho authority defining the general contours of commissioners' power under art. XVIII, § 6, and delineating specific powers under that section. From these authorities one can draw conclusions about particular types of countywide personnel ordinances.

As a general principle, the various county offices should be viewed as being independent of one another. The Idaho Supreme Court has held that the commissioners may not assume the duties of other offices. *Meller v. Board of Commissioners*, 4 Idaho 44, 35 P. 712 (1894); *Clark v. Board of Commissioners*, 98 Idaho 749, 754, 572 P.2d 501, 506 (1977); *Gorman v. Board of Commissioners*, 1 Idaho 553 (1874). The *Gorman* court stressed the fact that each officer is an elected official in his or her own right. From these cases, one can conclude that the commissioners are not above the other officers. It follows that any mandatory countywide personnel system enacted by the commissioners and imposed on other county officers is suspect.

Because the commissioners may not assume the duties or judge the job performance of other county officers, direct supervision of these officers, deputies and assistants by the commissioners is almost certainly forbidden. Also, *Gorman* can easily be extended to prevent commissioners from judging the job performance of deputies of other officers. Thus, any mandatory personnel system that would allow the commissioners to control the discipline, suspension, or firing for cause of deputies and assistants of other officers would almost certainly be forbidden.

Under art. XVIII, § 6, county officers cannot appoint deputies and assistants unless authorized to do so by the commissioners. *Taylor v. Canyon County*, 6 Idaho 466, 56 P. 168 (1899), *on appeal after remand*, 7 Idaho 171, 61 P. 521 (1900); *Campbell v. Board of Commissioners*, 5 Idaho 53, 46 P. 1022 (1896). The commissioners may limit an authorization by only allowing appointment of a part-time assistant. *Dygert v. Board of County Commissioners*, 64 Idaho 160, 129 P.2d 660 (1942). However, commissioners have been ordered to authorize an appointment upon a district court's finding that the business of an office required a deputy. *Dukes v. Board of County Commissioners*, 17 Idaho 736, 107 P. 491 (1910). Thus, the power to authorize appointments does not give the commissioners an effective indirect means of controlling other offices.

Because the commissioners authorize all appointments, but cannot withhold such authorization when deputies and assistants are needed, some means by which the commissioners can assess the manpower needs of each county office is required. A countywide personnel system to make such assessments might therefore be both permitted and desirable.

County commissioners set the salaries of all county officers, deputies, and assistants. Idaho Const. art. XVIII, §§ 6, 7; Idaho Code §§ 31-3106-3107. *Etter v. Board of County Commissioners*, 44 Idaho 192, 255 P. 1095 (1927); *Criddle v. Board of Commissioners*, 42 Idaho 811, 248 P. 465 (1926). However, the commissioners cannot cut salaries in order to assert authority over other offices. *Planting v. Board of*

*County Commissioners*, 95 Idaho 484, 511 P.2d 301 (1973). Thus, like the power to authorize appointments, the power to set salaries does not provide the commissioners with a roundabout method of controlling deputies and assistants of other offices.

Because the commissioners must set salaries but cannot set them arbitrarily or for improper motives, a system of pay scales could well be a permissible component of a countywide personnel system.

Another permissible component of a countywide personnel system may be regulation of working hours. Under the Fair Labor Standards Act, employees are entitled to overtime pay if they work more than a certain number of hours in a given period. 29 U.S.C. § 207. Under *Garcia v. San Antonio Metropolitan Transit System*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the FLSA applies to employees of local governments. The commissioners' right to set salaries may, in light of the FLSA, empower the commissioners to set work schedules as well, at least to the extent of setting the maximum number of hours each employee can work in a given period of time. See also, *Dygert v. Board of County Commissioners*, *supra*.

A personnel system could also be established on an advisory basis. The 1979 guideline on this subject concluded:

[N]othing would appear to prevent the county commissioners from establishing guidelines and generalized procedures for personnel on a countywide basis to be used by the commissioners and other county officers to aid them in administering their various duties and offices, so long as the ordinance does not attempt to dictate such matters to the elective county officers, but leaves control of the offices and personnel of the various county offices within the hands of elective county offices.

1979 *Attorney General's Opinions* at 251.

In 1983, the Idaho Supreme Court tacitly agreed. In *Holloway v. Palmer*, 105 Idaho 220, 668 P.2d 96 (1983), the court reversed a decision of the County Sheriff's Deputies Merit System Commission (since disbanded) in terminating a deputy. However, neither the majority nor the dissenters questioned the Commission's authority, even though the Commission was created by county ordinance and one of the five Commission members was appointed by the county commissioners. The sheriff participated in the system, appointing two of the Commission members. Thus, the court appears to have recognized that county officers may voluntarily bring their deputies and assistants within a comprehensive personnel system established by the commissioners.

## II. CREATION OF NEW COUNTY OFFICES

Article XVIII, § 6, of the Idaho Constitution lists the various county offices and states: "No other county offices shall be established. . . ." This language was invoked in the case of *Meller v. Board of Commissioners*, *supra*. In *Meller*, the board of commissioners for Logan County hired an attorney for a fixed term whose duties included prosecution and proceedings before grand juries. The court held that the position was

an "office," and thus its creation was forbidden by art. XVIII, § 6. The court so held despite the language in that section permitting commissioners to "employ counsel when necessary." The latter clause was said not to allow creation of a permanent office.

Thus, it is clear that the county commissioners may not create new offices. Less clear is whether a particular position created by the commissioners is an "office" as that term is used in art. XVIII, § 6. The problem is to distinguish between "officers" and "employees."

McQuillin lists three distinguishing characteristics of an officer: "(1) An authority conferred by law, (2) the power to exercise some portion of the sovereign functions of government, and (3) permanency and continuity." *McQuillin Mun. Corp.* § 12.30. That section also states:

The officer is further distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position.

These statements indicate that the distinction is a matter of degree. Whether a particular position is an "office" could only be decided by court action. Three Idaho cases have discussed this issue, primarily relying on conclusory statements from other jurisdictions as to each particular position's status. They are *Meller v. Board of Commissioners, supra*, (county attorney is an officer); *Hertle v. Ball*, 9 Idaho 193, 72 P. 953 (1903) (irrigation district directors are officers); *In re Bank of Nampa, Ltd.*, 29 Idaho 166, 157 P. 1117 (1916) (irrigation district treasurer is an officer). On the other hand, a manager of a private irrigation company, who was paid through company funds and who took no oath of office, was held not to be an officer even though his post was established by statute. *Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928).

In summary, the county commissioners clearly cannot create new offices. However, every position created by the commissioners is not an office. Whether a position is an office must be decided on a case by case basis.

### III.

#### HIRING OF EMPLOYEES BY COUNTY COMMISSIONERS

Article XVIII, § 6, does not expressly authorize the county commissioners to employ deputies or assistants. The Idaho Supreme Court has nonetheless concluded that such a power must be implied from the nature of commission functions. For example, the court has recognized the right of commissioners to hire an accountant to perform a statutorily authorized audit of county funds. *Prothero v. Board of County Commissioners*, 22 Idaho 598, 127 P. 175 (1912). The power to hire the accountant was said to be implied in the power of the commission to perform audits. The court quoted with approval *Harris v. Gibbins*, 114 Cal. 418, 46 P. 292 (1896):

Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted.

22 Idaho at 602, 127 P. at 177. The commissioners need not make a specific finding that an assistant is needed prior to hiring. Instead, under *Prothero*, the fact that an assistant is hired creates a presumption that the commissioners found an assistant necessary.

The implied powers approach of *Prothero* is now codified in Idaho Code § 31-828. That section gives county commissioners the power “[t]o do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.”

The Idaho Code lists other powers of county commissioners that would require them to employ assistants. Idaho Code § 31-809, a predecessor of which was applied in *Prothero*, authorizes audits. Idaho Code § 31-805 authorizes laying out and maintaining roads. Idaho Code § 31-806 authorizes provision of a poor farm. Idaho Code § 31-822 authorizes maintenance of fair grounds. These are examples of powers of county commissioners that clearly could not be personally carried out by them.

The implied power to hire employees could allow county commissioners to hire personnel managers. Art. XVIII, § 6, requires the commissioners to set salaries and authorize appointments for deputies and assistants of other officers. It is possible that a county could have so many deputies and assistants in various offices that the commissioners could not intelligently set salaries and determine manpower needs by themselves. In such a county, *Prothero* would allow the commissioners to hire the needed personnel managers.

#### SUMMARY:

County commissioners have power to authorize appointment of deputies and employees for other county offices, to set salaries for these deputies and employees, and to insure that their work schedules are in compliance with the Fair Labor Standards Act. To the extent the commissioners determine that a countywide personnel system is the most efficient and professional way to carry out these responsibilities, commissioners would have power to create such a system and to hire employees to staff it. The commissioners could not, however, use such a system to control the other county officers or to judge their job performance.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*:

Idaho Const. art. XVIII, § 6

Idaho Const. art. XVIII, § 7

2. *Federal Statute:*

29 U.S.C. § 207

3. *Idaho Statutes:*

Idaho Code § 31-805

Idaho Code § 31-806

Idaho Code § 31-809

Idaho Code § 31-822

Idaho Code § 31-828

Idaho Code § 31-3106

Idaho Code § 31-3107

4. *U.S. Supreme Court Case:*

*Garcia v. San Antonio Metropolitan Transit Sys.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)

5. *Idaho Cases:*

*In re Bank of Nampa, Ltd.*, 29 Idaho 166, 157 P. 1117 (1916)

*Campbell v. Board of Commissioners*, 5 Idaho 53, 46 P. 1022 (1896)

*Carter v. Niday*, 46 Idaho 505, 269 P. 91 (1928)

*Clark v. Board of Commissioners*, 98 Idaho 749, 572 P.2d 501 (1977)

*Criddle v. Board of Commissioners*, 42 Idaho 811, 248 P. 465 (1926)

*Dukes v. Board of Commissioners*, 17 Idaho 736, 107 P. 491 (1910)

*Dygert v. Board of Commissioners*, 64 Idaho 160, 129 P.2d 660 (1942)

*Etter v. Board of Commissioners*, 44 Idaho 192, 255 P. 109, (1927)

*Gorman v. Board of Commissioners*, 1 Idaho 553 (1874)

*Hertle v. Ball*, 9 Idaho 193, 72 P. 953 (1903)

*Holloway v. Palmer*, 105 Idaho 220, 668 P.2d 96 (1983)

*Meller v. Board of Commissioners*, 4 Idaho 44, 35 P. 712 (1894)

*Planting v. Board of Commissioners*, 95 Idaho 484, 511 P.2d 301 (1973)

*Prothero v. Board of Commissioners*, 22 Idaho 598, 127 P. 175 (1912)

*Taylor v. Canyon County*, 6 Idaho 466, 56 P. 168 (1899), *on appeal after remand*, 7 Idaho 171, 61 P. 521 (1900)

6. *Case Cited from Other Jurisdictions:*

*Harris v. Gibbins*, 114 Cal. 418, 46 P. 292 (1896)

7. *Other Authorities:*

1979 Op. Att'y Gen. 248 (Idaho)

McQuillin on Municipal Corporations § 12.30

DATED this 21st day of August, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

WARREN FELTON  
Deputy Attorney General

BRUCE PADGET  
Legal Intern

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-11**

TO: Mr. Charles D. McQuillen  
Executive Director  
State Board of Education  
Len B. Jordan Bldg., Room 307  
Boise, ID 83720

Per Request for Attorney General's Opinion.

**QUESTION PRESENTED:**

Is it constitutional to impose a five calendar year residency requirement on students who wish to participate in special graduate and professional studies programs offered by the State Board of Education?

**CONCLUSION:**

Although the state may impose a reasonable durational residency requirement for tuition purposes and for participation in higher education programs and courses a five calendar year residency requirement is unreasonable and therefore violates the equal protection clause of the U.S. Constitution.

**ANALYSIS:**

Section 33-3717(2), Idaho Code, imposes a twelve (12) month residency requirement on students who wish to qualify for a tuition-free university or college education. For those students who wish to participate in special graduate and professional studies programs, an additional residency requirement is imposed.

For students who apply for special graduate and professional programs including, but not limited to the WAMI (Washington, Alaska, Montana, Idaho) Regional Medical Program, the WICHE Student Exchange Programs, Creighton University School of Dental Science, the University of Utah College of Medicine, and the Washington, Oregon, Idaho (WOI) Regional Program in Veterinary Medical Education, *additional residency requirements shall be in force. No applicant shall be certified or otherwise designated as a beneficiary of such special program who has not been a resident of the state of Idaho for at least five (5) calendar years previous to the application date.* (Emphasis added.)

Idaho Code § 33-3717(8). Therefore, before a prospective student can apply and be certified for one of the designated programs, he or she must first comply with the five calendar year requirement before making application. Certification does not guarantee admission for applicants to these professional programs, but does significantly enhance the likelihood for admission because of financial assistance available to those who have been certified.

Two reasons are usually cited supporting the five-year residency requirement. The first is that state-funded professional programs should be provided to "legitimate long-term" residents. *See*, Minutes of Idaho House Education Committee, February 2, 1979. The second is to insure that those residents who take advantage of the professional studies programs outside of the state, return to the state to practice in the profession and contribute to the state's economy. *Kuhn v. Vergiels*, 558 F.Supp. 24 (D.Nev. 1982).

Generally, reasonable durational residency requirements of one, four, six, and twelve months for tuition purposes in colleges and universities have been upheld by the courts. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), *summarily aff'd*,

401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), and *Vlandis v. Kline*, 412 U.S. 985, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). *See, also, Kelm v. Carlson*, 473 F.2d 1267 (6th Cir. 1973). Residency requirements of this duration are considered reasonably related to the legitimate state purpose of insuring that only bona fide residents receive the tuition-free or reduced tuition education from a state's colleges or universities. *Id.*

By imposing a five-year residency requirement, on applicants to special graduate and professional studies programs, however, the state creates two classes of resident students and, in effect, distributes benefits unequally between one-year and five-year resident students. This unequal distribution of benefits implicates the constitutional guarantee of equal protection. "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60, 102 S.Ct. 2309, 2313, 72 L.Ed.2d 672, 678.

In *Kuhn v. Vergiels*, *supra*, Nevada's five-year residency requirement for the WICHE program was challenged in federal court. Nev. Rev. Stat. 397.060(1) imposed the requirement on student applicants for the programs. This rule was exactly the same as that now found at Idaho Code § 33-3717(8). The requirement was challenged by a two-year student and a four-year student who were denied certification for the program because they did not meet the five-year residency requirement prior to making application. In granting the two students a preliminary injunction prohibiting the enforcement of the requirement, the court found there not only was the possibility of irreparable injury, but also probable success on the merits. *Id.*, at 26. Irreparable injury was shown because the students possibly could not attend school without WICHE certification. *Id.*

The court found that the five-year requirement did not meet the traditional equal protection "rational basis" test. *Zobel v. Williams*, *supra*. (If the statute affected a fundamental constitutional right, a more stringent standard of "strict scrutiny" would have been used to review the state statute. *See, e.g., Shapiro v. Thompson*, 934 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).) The court stated that the five-year requirement was not rationally related to the objective of giving assistance to students who intend to return to the state following completion of their studies. *Kuhn v. Vergiels*, at 27. The requirement does not fairly treat those individuals who intend to remain in state residents but who have not lived in the state for the five years as required. *Id.* at 27-28. The Idaho statute would fail for this reason as well.

Additionally, Idaho Code § 33-3717 already establishes a one-year test for bona fide residency. The four additional years to establish "legitimate long-term" residency creates an impermissible distinction and would violate the principles enunciated by the U.S. Supreme Court in *Zobel v. Williams*, *supra*. As the court stated in *Kuhn v. Vergiels* at 27, "on its face five years appears to be a wholly unreasonable and arbitrary period of time in this context." The Nevada legislature immediately responded to the court's decision by adopting a one-year residency requirement for participation in these programs. Nev. Rev. Stat. 397.060.

In summary, a one-year durational residency requirement for tuition and special program services in higher education is constitutionally permissible under both the



Idaho and federal constitutions. However, the five-year durational requirement for participation in the special professional and graduate studies programs defined by Idaho Code § 33-3717(8) fails to meet the rational basis test set forth in *Zobel v. Williams* and creates an impermissible distinction between bona fide residents. Therefore, the five-year requirement is unconstitutional.

If we can be of assistance in correcting this statute, please do not hesitate to contact us.

#### AUTHORITIES CONSIDERED:

1. *U.S. Constitution:*

U.S. Const. amend. XIV

2. *Idaho Statutes:*

Idaho Code § 33-3717(2)

Idaho Code § 33-3717(8)

3. *Statute Cited from Other Jurisdiction:*

Nev. Rev. Stat. 397.060

4. *U.S. Supreme Court Cases:*

*Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)

*Vlandis v. Kline*, 412 U.S. 985, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973)

*Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982)

5. *Other Federal Cases:*

*Kelm v. Carlson*, 473 F.2d 1267 (6th Cir. 1973)

*Kuhn v. Vergiels*, 558 F.Supp 24 (D.Nev. 1982)

*Sterns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), summarily aff'd, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971)

6. *Other Authorities Considered:*

Minutes of Idaho House of Representatives, Education Committee, Feb. 2, 1979.

DATED this 29th day of August, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

DANIEL G. CHADWICK  
Deputy Attorney General  
Intergovernmental Affairs

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

### ATTORNEY GENERAL OPINION NO. 86-12

TO: The Honorable Jerry L. Evans  
State Superintendent of Public Instruction  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Is the amount of the premiums paid by a school district in an employer paid fringe benefit package within a "cafeteria plan" included as part of an employee's salary for the purpose of PERSI pursuant to Idaho Code § 59-1302(31)?

CONCLUSION:

Cafeteria plan benefits are included within "salary" as defined by Idaho Code § 59-1302(31) only to the extent an employee has a right to elect to receive cash benefits pursuant to the cafeteria plan. Accordingly, an employee's "salary" for retirement purposes, as well as the employee's retirement benefits and contributions, will be the same whether the employee elects to receive cash or elects to receive alternative benefits with a corresponding reduction in cash received.

ANALYSIS:

A "cafeteria plan" is a type of employee benefit plan recognized by § 125(d) of the Internal Revenue Code. That section defines "cafeteria plan" in pertinent part as a written plan under which:

(a) All participants are employees, and

- (b) The participants may choose among two or more benefits, consisting of cash and statutory nontaxable benefits.

For income tax purposes, cafeteria plan benefits are taxable to the employee only to the extent the employee chooses to receive cash pursuant to the cafeteria plan. I.R.C. §§ 61 and 125. You have asked whether such cafeteria plan benefits are included in “salary” as defined in Idaho Code § 59-1302(31) for purposes of the Public Employee Retirement System of Idaho (“PERSI”).

Prior to 1984, Idaho Code § 59-1302(31) provided:

Salary means the total salary or wages payable by all employers to an active member for personal services currently performed, including the cash value of all remuneration in any medium other than cash in the amount reported by all employers for income tax purposes.

Thus, prior to 1984, the definition included only taxable salary or wages. Deferred compensation plan payments were separately addressed in Idaho Code § 59-513. Accordingly, cafeteria plan benefits would have been included in “salary” only to the extent the employee elected to receive cash pursuant to the cafeteria plan. However, in 1984, PERSI sought and obtained an amendment to this section, which added:

[a]nd also including the amount of any voluntary reduction in salary agreed to by the member and employer where the reduction is used as an alternative form of remuneration to the member.

The 1984 amendment addresses the circumstance in which the employee elects to receive a reduced amount of cash salary and a greater amount of nontaxable benefits. In such a circumstance, “salary” includes the amount by which an employee voluntarily chooses the reduced cash salary in order to receive additional nontaxable benefits.

It has been suggested to our office that the phrase “voluntary reduction in salary agreed to” should be interpreted to include only situations in which employees agree to receive a “reduction” in cash compensation, but not situations in which employees agree to forego an increase in cash compensation. For example, an employee might enter into an agreement with his employer that calls for a base salary of \$2,000 per month, but which could be reduced by voluntary agreement by up to \$200 per month to purchase certain benefits such as health insurance. Alternatively, an employer and employee could agree that the base salary is \$1,800 per month, with an add-on of \$200 per month of optional benefits, which could include cash salary or benefits such as health insurance.

In the above example, if both employees agreed to receive \$1,800 of cash salary and \$200 benefits, the interpretation suggested above would lead to the anomalous result that the first employee’s “salary” would be \$2,000 per month and the second employee’s “salary” would be \$1,800 per month for retirement purposes. Under this interpretation, the two employees’ contribution rates and retirement benefits would differ solely on the basis of the words they chose to express their agreements and would not

depend upon the substance of those agreements. We can conceive of no rational basis supporting such unequal treatment of employees in determining their contribution rates and retirement benefits.

Such anomalous results are not favored by courts in construing statutes. To the extent the language of a statute is capable of more than one construction, resolution should be in favor of the reasonable operation of the statute. *State, ex rel., Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981). It would appear to be more reasonable to interpret the phrase “any voluntary reduction in salary” to include employee elections to forego increases in salary in order to treat employees equally who have equal salary rights.

We note that “salary reduction” language has been used for some time with respect to income tax laws dealing with deferred compensation arrangements. For example, P.L. 95-615, § 5(e), 92 Stat. 3097 (Nov. 8, 1978), provided:

(e) *Salary reduction regulations defined.* For purposes of this section, the term “salary reduction regulations” means regulations dealing with the includibility in gross income (at the time of contribution) of amounts contributed to a plan which includes a trust that qualifies under section 401 (a) [subsec. (a) of this section], or a plan described in section 403(a) or 405(a) [26 USCS §§ 403(a) or 405(a)], including plans or arrangements described in subsection (b)(2), if the contribution is made under an arrangement under which the contribution will be made only if the employee elects to receive a reduction in his compensation or to forego an increase in his compensation, or under an arrangement under which the employee is permitted to elect to receive part of his compensation in one or more alternative forms (if one of such forms results in the inclusion of amounts in income under the Internal Revenue Code of 1954 [26 USCS §§ 1, et seq.]). (Emphasis added)

Thus, for internal revenue purposes, salary reduction agreements are defined to include arrangements under which an employee elects (1) to reduce his compensation, (2) to forego an increase in his compensation, or (3) to elect to receive part of his compensation in one or more alternative forms. Regulations adopted pursuant to the Internal Revenue Code and Social Security regulations likewise define salary reduction agreements to include employee elections to forego an increase in compensation. 26 CFR 1.403(b)-1; 26 CFR 32.1.

We do not suggest that the 1984 amendment was intended to follow internal revenue code rules defining salary. The 1984 amendment was clearly aimed at expanding the definition of “salary” for retirement purposes beyond the tax definition of salary. Nevertheless, we note that even for tax purposes, salary reduction agreements are defined to include agreements whereby employees forego an increase in cash compensation.

In analyzing the language of the 1984 amendment, it is helpful to consider the policy behind the amendment and the reasonableness of alternative interpretations. As the Idaho Supreme Court has pointed out, statutes should be interpreted to give effect to legislative intent, and in determining legislative intent, it is appropriate to examine

not only the language used, but also the reasonableness of the proposed interpretations and the policy behind a particular statute. *Umpfrey v. Sprinkel*, 106 Idaho 700, 706, 682 P.2d 1247 (1983); *Garcia v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980). Thus, in addition to analysis of the reasonableness of alternative interpretations discussed above, a brief review of the circumstances surrounding this amendment may be helpful.

In 1983, PERSI observed that cafeteria plans, although beneficial to the participant for Internal Revenue Service purposes, had an adverse impact on both the Retirement System and the Retirement System members. This concern was expressed in a May 19, 1983, letter from Robert Venn, Executive Director of PERSI, to the Retirement System's actuarial firm, regarding possible legislative changes for 1984. In this letter, Mr. Venn states:

*Salary, 59-1302(31)*: There is evidence of an increasing interest in voluntary salary reduction plans as a scheme to shelter the tax liability for dependent group insurance premiums. Already implemented by some school districts, the plan encourages selection against the System by reducing income to the fund resulting from smaller contribution on reduced salary. However, members will elect to discontinue the voluntary salary reduction during their five-year salary base period to upset salary assumptions in your plan to fund the System.

A solution would be to expand the salary definition by adding to the sentence: "... and also including the amount of any voluntary reduction made through agreement between the member and the employer."

The problems discussed in the letter resulted from the definition of salary (Idaho Code § 59-1302(31)) and from the way retirement contributions and benefits are calculated. Employer and employee contributions are calculated as a percentage of current salary. Idaho Code §§ 59-1304 and 59-1330. Retirement benefits, on the other hand, are based upon months of service and the employee's "average monthly salary." "Average monthly salary" is defined in Idaho Code § 59-1302(5A) to include only the highest salary during a consecutive 60-month base period. The base period is normally the five year period preceding retirement.

Before the 1984 amendment, an employee within a cafeteria plan could have elected tax-free fringe benefits during the early years of his or her career, thereby reducing retirement contributions. During the five-year period preceding retirement, the employee could elect cash compensation thereby increasing the "average monthly salary," the base upon which retirement benefits are calculated. As Mr. Venn's letter noted, such plans would encourage selection against the system by reducing income to the fund until the five-year base period thereby upsetting the actuarial assumptions (regarding contribution rates) necessary to fund system benefits.

In 1984, PERSI proposed and the legislature adopted the amendment to the definition of salary set forth above at page 2. The Statement of Purpose for this amendment states that the amendment:

[P]revents adverse fiscal impact on either the Retirement Fund or a member's benefit entitlement in cases of voluntary salary reductions; . . .

The Fiscal Impact Statement is similar:

Prevents the adverse fiscal impact of certain member voluntary salary reduction elections.

The Senate and House State Affairs Committee minutes also reflect these same concerns. The March 5, 1984, Senate State Affairs Committee minutes note:

*Robert Venn*, Director of the Public Employee Retirement System, explained this legislation prevents adverse fiscal impact on either the Retirement Fund or a member's benefit entitlement in cases of voluntary salary reductions; . . .

The March 9, 1984, Senate Affairs Committee minutes note:

Robert Venn, Director of the Public Employee Retirement System, explained the changes outlined in this legislation, stating they were mostly corrections in grammar, clarification of language, etc. Among other things covered by the bill are members who take voluntary salary reduction; . . .

The March 23, 1984, House State Affairs Committee minutes note:

Mr. Venn said that the bill redefines salary to include the voluntary salary reduction, . . .

Finally, the Title to the 1984 Session Laws, Ch. 132 (S.B. 1363) reads:

An Act relating to the Public Employee Retirement System of Idaho; Amending § 59-1302, Idaho Code, . . . to expand the definition of "salary" to prevent inequities by changing circumstances, . . .

The background and legislative history indicate that the amendment was aimed at avoiding adverse fiscal impacts upon the retirement fund and member benefits and preventing inequities between members. Our interpretation of the amendment furthers these purposes.

Employees with identical salary rights are treated identically for retirement purposes whether they elect to receive cash remuneration or alternative forms of remuneration. Both the contributions they make and the retirement benefits they receive will be the same. Thus, the interpretation above prevents inequities between members with identical salary rights.

The interpretation avoids adverse fiscal impacts on the retirement fund in those cases in which employees elect to receive fringe benefits during part of their work career and elect to receive cash during the five-year base period used to calculate retirement benefits. All members with the same years of service and same salary rights con-

tribute an equal amount to the retirement fund based upon the amount of cash salary they have the option to receive. Likewise, the interpretation avoids adverse fiscal impacts upon member benefits in those instances in which members elect cash benefits during a portion of their work career but elect to receive alternative fringe benefits during the five-year base period used to calculate benefits. Again, all members with the same years of service and same salary rights receive the same retirement benefit.

Our interpretation of the section furthers the legislative purposes of the amendment. The alternative interpretation (that salary includes optional cash payments selected but not optional fringe benefits selected in lieu of cash) would create inequity between members with identical salary rights and cause adverse fiscal impacts on the retirement fund and member benefits.

It is our understanding that following the 1984 amendment, most, if not all, political subdivisions with cafeteria plans continued to remit retirement contributions only on taxable salary. On May 1, 1985, the executive director of the retirement system responded to several cafeteria plan questions raised by the Boise Education Association. In the letter, he advised that nontaxable employer-paid fringe benefits within cafeteria plans would fail the test for PERSI salary, whether used to pay insurance premiums or to provide cash to the employee. He qualified his advice, noting that it reflected his own analysis without having referred the questions to the Retirement Board. However, the letter was apparently distributed by the Boise Education Association to a number of school districts. On June 9, 1986, the retirement system attempted to correct the problem with a memorandum to all employers within the retirement system. The interpretation of "salary" in the June 9, 1986, memorandum is consistent with this opinion.

The courts give some deference to an administrative interpretation of a statute by an administrative agency which administers the law. *Bashore v. Adopf*, 41 Idaho 84, 238 P. 534 (1925); *United Pacific Insurance Co. v. Bakes*, 57 Idaho 537, 67 P.2d 1024 (1937). This does not limit an agency's right to change a prior administrative interpretation which it considers to be erroneous. *Idaho Compensation Co. v. Hubbard*, 70 Idaho 59, 62, 211 P.2d 413 (1949). Therefore, upon issuance of its June 9, 1986, memorandum to political subdivisions, the retirement system should properly insist upon compliance with the statute as interpreted in its memorandum and in this opinion.

In summary, cafeteria plan benefits should be included within the computation of salary to the extent the employee has a right to elect to receive cash benefits pursuant to the cafeteria plan. By doing so, both retirement benefits and contributions will be the same whether the employee elects to receive cash or alternative benefits with a corresponding reduction in cash received.

#### AUTHORITIES CONSIDERED:

##### 1. *Federal Statutes:*

I.R.C. §§ 1 et seq.

I.R.C. § 61

I.R.C. § 125

I.R.C. § 401(a)

I.R.C. § 403(a)

I.R.C. § 405(a)

Pub. L. No. 95-615, § 5(e), 92 Stat. 3097 (1978)

2. *Idaho Statutes:*

Idaho Code § 59-513

Idaho Code § 59-1302(5A)

Idaho Code § 59-1302(31)

Idaho Code § 59-1304

Idaho Code § 59-1330

1984 Idaho Sess. Laws, ch. 132

3. *Idaho Cases:*

*Bashore v. Adopf*, 41 Idaho 84, 238 P. 534 (1925)

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

*Idaho Compensation Co. v. Hubbard*, 70 Idaho 59, 62, 211 P.2d 413 (1949)

*State, ex rel., Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981)

*Umphrey v. Sprinkel*, 106 Idaho 700, 706, 682 P.2d 1247 (1983)

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

4. *Other Authorities Considered:*

26 CFR 1.403(b)-1

26 CFR 32.1

DATED this 13th day of November, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES



**ANALYSIS BY:****DAVID G. HIGH**

Deputy Attorney General  
Chief, Business Affairs and  
State Finance Division

**MARILYN T. SCANLAN**

Deputy Attorney General  
Business Regulation Division

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-13**

**TO:** The Honorable Pete T. Cenarrusa  
Secretary of State  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

Dear Secretary Cenarrusa:

**QUESTION PRESENTED:**

Does Idaho Constitution art. XII, § 4, prohibit a school district from creating or controlling by membership on the board of directors, a nonprofit corporation, the purpose of which is to accept and manage gifts to the public schools that qualify for income tax credits pursuant to Idaho Code § 63-3029A?

**CONCLUSION:**

School districts are constitutionally prohibited from creating or aiding any private non-profit corporation, and are not statutorily authorized to create public corporations. However, individuals acting in a private capacity may create a non-profit corporation for the purpose of soliciting and managing gifts exclusively in support of a public school system. Gifts to such a non-profit corporation would qualify for income tax credits provided by Idaho Code § 63-3029A.

**ANALYSIS:**

Idaho Constitution art. XII, § 4, provides in pertinent part:

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

School districts are municipal corporations within the meaning of this section. *School District No. 8 v. Twin Falls Mutual Fire Insurance Co.*, 30 Idaho 400, 164 P. 1174 (1917). Therefore, a school district may not become a stockholder in, raise money for, make a donation to, or loan its credit in aid of any corporation or association. The section was found to prohibit membership by a school district in a non-profit mutual fire insurance company in *School District No. 8 v. Twin Falls Mutual Fire Insurance Co.* supra. Similarly, Idaho Const. art. VIII, § 4, prohibits school districts from lending their credit directly or indirectly in aid of any individual, association or corporation.

Because of the constitutional prohibitions, a school district cannot create a private, non-profit corporation to administer donations to the schools. The above analysis does not prohibit school district trustees or other individuals acting as private citizens, from creating non-profit corporations to solicit and administer gifts to the public schools. Creation of such private non-profit corporations by individuals is authorized by Idaho Code §§ 30-301 through 30-332. The articles of incorporation should ideally contain healthy qualifying language disclaiming any control or involvement by the school district. This type of corporation would be similar in nature to university foundations which are private controlled non-profit corporations created to receive and administer gifts from the public on behalf of the universities.

Alternatively, a school district can establish a separate trust fund or account within its existing financial structure, to receive, invest, and distribute donations to the public schools. Such an account or system does not appear to be contrary to the prohibitions found in art. VIII, § 4, and art. XII, § 4. As was stated in *Idaho Falls Consolidated Hospital v. Board of County Commissioners*, 102 Idaho 838, 642 P.2d 553 (1982), where a fund was established by the county to aid indigents, “[a fund] remaining within control of the municipality helps insure that private interests will not gain advantage at the expense of the taxpayer.” 102 Idaho at 841.

By proceeding cautiously, the school districts or interested members of the public can use the mechanisms described above to create an effective means of receiving and administering donations to the public schools.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution:*

Idaho Const. art. VIII, § 4

Idaho Const. art. XII, § 4

2. *Idaho Statutes:*

Idaho Code § 30-301 et seq.

Idaho Code § 63-3029A

3. *Idaho Cases:*

*School District No. 8 v. Twin Falls County Mutual Fire Insurance Co.*,  
30 Idaho 400, 164 P. 174 (1917).

*Idaho Falls Consolidated Hospital v. Board of Commissioners*, 102 Ida-  
ho 838, 642 P.2d 553 (1982).

DATED this 2nd day of December, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

DAVID G. HIGH  
Chief, Business Affairs  
and State Finance

DANIEL G. CHADWICK  
Deputy Attorney General  
Intergovernmental Affairs

### **ATTORNEY GENERAL OPINION NO. 86-14**

TO: Larry G. Looney  
Chairman  
Idaho Department of Revenue and Taxation  
700 West State Street, P.O. Box 36  
Boise, Idaho 83720  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

#### **QUESTIONS PRESENTED:**

1. Under Idaho Code § 23-1319, wine produced in Idaho is taxed \$.20 per gallon, whereas wine produced out of state, but sold in Idaho, is taxed \$.45 per gallon. Is this tax preference constitutional?
2. If the preference provided by Idaho Code § 23-1319 is unconstitutional, must the state refund those taxes in excess of \$.20 per gallon, paid by distributors of non-Idaho produced wine?

#### **CONCLUSION:**

1. The legal guideline issued by our office on March 21, 1984, is withdrawn and this opinion substituted therefor. Based upon the U.S. Supreme Court decision in *Bacchus Imports Ltd. et al. v. Dias*, 468 U.S. 263, 82 L.Ed. 2d 200, 104 S.Ct. 3049

(1984), we now conclude that § 23-1319 is unconstitutional as a violation of the commerce clause of the U.S. Constitution.

2. Because § 23-1319 is unconstitutional, distributors of non-Idaho produced wine are entitled to a refund for those taxes paid in excess of \$.20 per gallon, provided they comply with the procedure and time limit set forth in § 23-1319(c) and (d) in making a refund claim.

#### ANALYSIS:

Originally, § 23-1319 applied a single tax on all wine sold or produced for use in the state of Idaho. 1971 Idaho Sess. Laws, Ch. 156, p. 767. However, in 1984, that section was amended to create the differential tax between Idaho and non-Idaho produced wines:

Upon all wines sold by a distributor or winery to a retailer or consumer for use within the state of Idaho pursuant to this act there is hereby imposed an excise tax of forty-five cents (45¢) per gallon on all wines produced outside the state of Idaho, and there is hereby imposed an excise tax of twenty cents (20¢) per gallon on all wines produced inside the state of Idaho.

1984 Idaho Sess. Laws, Ch. 283, pp. 656-657.

On March 21, 1984, this office issued a legal guideline which construed the differential tax as constitutional. Our analysis in that guideline was based largely on the Hawaii Supreme Court's decision in *Matter of Bacchus Imports, Ltd.*, 565 P.2d 724 (1982). In that case, the state of Hawaii had imposed a substantially similar tax at wholesale on all alcoholic beverages with specific exemptions provided for certain locally produced products. The purpose of the exemption was to encourage development of the Hawaiian liquor industry.

The Hawaii Supreme Court held that the challenged exemption was a rational means to a legitimate state purpose and thus did not violate the equal protection clause. The court further held that the statutory exemption for Hawaiian products had not been applied selectively to discourage imports or to threaten the federal treasury and thus did not violate the import-export clause. Finally, the court held that the selective tax did not violate the commerce clause because it did not discriminate against interstate commerce and was fairly related to services provided by the state.

In *Bacchus Imports, Ltd., et al. v. Dias, supra*, the U.S. Supreme Court overturned the decision of the Hawaii Supreme Court and ruled that the differential liquor tax was clearly discriminatory and thus was unconstitutional as a violation of the commerce clause.

The Court affirmed that although a state can encourage the development of domestic industry, it cannot tax interstate transactions or take other discriminatory action which favors local business over out-of-state business. *Bacchus Imports, Ltd.*, 82 L.Ed. 2d at 209. See also, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 50 L.Ed.2d, 514, 97 S.Ct. 599 (1977); and *Northwestern States Portland*

*Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959). The Court found irrelevant the assertion by Hawaii that its intent was to aid local businesses rather than harm out-of-state producers. *Id.* at 211.

Hawaii raised the additional argument that even if the exemption violated the commerce clause, the twenty-first amendment to the United States Constitution saved it. Hawaii relied on section 2 of the amendment which reads: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Supreme Court indicated that, under the twenty-first amendment, a state may be properly concerned with matters such as temperance. However, state laws which constitute mere economic protectionism are not "entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 212. The purpose of the Hawaii statute was clear and that was to aid local business. Such a purpose, the Court ruled, was a clear violation of the commerce clause and no real concern of the twenty-first amendment. *Id.* As a result, the statute was declared unconstitutional. *See also, Stein Distributing Co. v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 779 F.2d 1407 (9th Cir. 1986).

If challenged in court, § 23-1319 likely would be declared unconstitutional for substantially the same reasons. When § 23-1319 was amended, the purpose was quite clear. Preferential treatment was given in order to aid the growth and development of the Idaho wine industry. Idaho House of Representatives, Revenue and Taxation Committee, minutes, February 21, March 2 and 23, 1984. Under *Bacchus Imports, Ltd.*, such a preference would be found to violate the commerce clause. Furthermore, no claim can be made that the preference was enacted to combat the perceived evils of alcohol pursuant to the twenty-first amendment since the express purpose was to aid the Idaho wine industry.

Your second question concerns any remedy which might be imposed as the result of the unconstitutionality of the preferential tax. Whether refund is the proper remedy for an unconstitutional tax is left largely up to state law. In *Bacchus Imports, Ltd.*, the U.S. Supreme Court remanded to the state court, but in footnote 14 pointed out that state law might mandate a full refund given an unconstitutional tax. In our case, Idaho Code § 23-1319 does mandate a refund for taxes illegally collected.

In 1986, Idaho Code § 23-1319 was amended to provide for an administrative refund procedure. 1986 Idaho Sess. Laws, Ch. 73, p. 201. Subsections (c) and (d) of § 23-1319 now read:

(c) If the tax commission determines that any amount due under this chapter has been paid more than once or has been erroneously or illegally collected or computed, the commission shall set forth that fact in its records and the excess amount paid or collected may be credited on any amount then due and payable to the commission from that person and any balance refunded to the person by whom it was paid or to his successors, administrators or executors. The commission is authorized and the state board of tax appeals is au-

thorized to order the commission in proper cases to credit or refund such amounts whether or not the payments have been made under protest and certify the refund to the state board of examiners.

(d) No credit or refund shall be allowed or made after three (3) years from the time the payment was made, unless before the expiration of that period a claim is filed by the taxpayer. The three (3) year period allowed by this subsection for making refunds or credit claims shall not apply in cases where the tax commission asserts a deficiency of tax imposed by law, and taxpayers desiring to appeal or otherwise seek a refund of amounts paid in obedience to deficiencies must do so within the time limits elsewhere prescribed by law.

This statutory procedure effectively negates the general rule of law that a state is not required to refund taxes paid under a tax later found to be illegal unless the taxpayer paid the taxes under protest. Thus, any tax paid by distributors which is illegal would be subject to refund pursuant to the procedure and time limits set forth in § 23-1319(c) and (d).

It should also be noted that the refund provisions would not be invalidated if the tax preference portion of the statute is held unconstitutional. The severance clause contained in the original enactment, 1971 Idaho Sess. Laws, Ch. 156, will allow the remainder of the statute, including the refund procedure, to stand.

#### AUTHORITIES CONSIDERED:

1. *U.S. Constitution:*

U.S. Const. art. VIII, § 8

U.S. Const. amend. XXI

2. *Idaho Statutes:*

Idaho Code § 23-1319

Idaho Code § 23-1319(c)

Idaho Code § 23-1319(d)

1971 Idaho Sess. Laws, Ch. 156

1984 Idaho Sess. Laws, Ch. 283

1986 Idaho Sess. Laws, Ch. 73

3. *U.S. Supreme Court Cases:*

*Bacchus Imports Ltd., et al. v. Dias*, 468 U.S. 263, 82 L.Ed. 2d 200, 104 S.Ct. 3049 (1984)

*Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed. 2d 514 (1977)

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959)

4. *Other Federal Case:*

*Stein Distributing Co. v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 779 F.2d 1407 (9th Cir. 1986)

5. *Case from Other Jurisdiction:*

*In Re Bacchus Imports, Ltd.* 565 P.2d 724 (Hawaii 1982)

6. *Other Authority Considered:*

Minutes of Idaho House of Representatives, Revenue and Taxation Committee, February 21, March 2 and 23, 1984.

DATED this 11th day of December, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

DANIEL G. CHADWICK  
Deputy Attorney General  
Intergovernmental Affairs

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-15**

TO: The Honorable Joe R. Williams  
State Auditor  
State of Idaho  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Are elected officials of the executive branch of state government entitled to receive cash compensation for unused vacation leave upon leaving office at the end of their term?

CONCLUSION:

Elected officials of the executive branch of state government may not receive cash compensation for unused vacation leave at the end of their term of office.

ANALYSIS:

Upon separation from state service, “classified” state employees are entitled to be paid their salary for the period of their unused vacation time pursuant to Idaho Code §§ 67-5335 and 67-5337. Idaho Code § 59-1606 provides in pertinent part with respect to “nonclassified” officers and employees:

Eligible nonclassified officers and employees in the executive department and in the legislative department shall accrue vacation leave and take vacation leave at the same rate and under the same conditions as is provided in sections 67-5334 and 67-5335, Idaho Code, for classified officers and employees.

Thus, state employees and “eligible” state officers are entitled to be paid their salary for the period of their unused vacation leave upon leaving state employment. However, this general rule does not apply to the state’s elected executive offices. Idaho Constitution, art. IV, § 19, provides in pertinent part:

*The governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction shall, monthly as due, during their continuance in office, receive for their services compensation, which, for the term next ensuing after the adoption of this constitution, is fixed as follows: Governor, three thousand dollars (\$3,000) per annum;*

\* \* \*

*The compensation enumerated shall be in full for all services by said officers respectively, rendered in any official capacity or employment whatever during their respective terms of office.*

\* \* \*

The legislature may, by law, diminish or increase the compensation of any or all of the officers named in this section, but no such diminution or increase shall affect the salaries of the officers then in office during their term; . . . (Emphasis added.)

Pursuant to Idaho Code § 59-501, the legislature has increased the per annum salary of the elected officials of the executive branch, as permitted by Idaho Constitution, art. IV, § 19. Idaho Code § 59-501 then provides in pertinent part:

Such compensation . . . shall be in full for all services by said officers respectively, rendered in any official capacity or employment whatever during their respective terms of office; . . .



Thus, both the constitution and statute provide that the enumerated per annum compensation of the elected officers in the executive branch shall be in full for all services rendered in any official capacity during their terms of office.

The provisions of Idaho Constitution, art. IV, § 19, were considered by the Idaho Supreme Court in *State ex rel. Wright v. Gossett*, 62 Idaho 521, 113 P.2d 415 (1941). Therein, the court considered a statute passed by the legislature in 1937. The statute authorized and directed the lieutenant governor and the speaker of the house of representatives to remain in Boise to complete legislative business such as preparation of journals, enrolling bills, and indexing the journals and bills. The bill appropriated additional salary for this work.

The Idaho Supreme Court held the statute to be unconstitutional. As to the lieutenant governor, it violated Idaho Constitution, art. IV, § 19. As to the speaker of the house of representatives, the bill violated Idaho Constitution, art. III, § 23. The court held:

And as above related, art. IV, § 19, provides 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.*" To make it more certain and emphatic, if such be possible, this constitutional provision further provides that "*The compensations enumerated shall be in full for all services by said officers respectively, rendered in any official capacity or employment whatever during their respective terms of office.*" It is well settled that in construing the Constitution words are to be given their ordinary meaning. The constitutional provisions above referred to are clear and explicit and that portion of chap. 167, 1937 Sess. Laws, relating to further compensation for the speaker of the house and president of the senate for services performed after the adjournment of the session is in direct conflict with the Constitution. (Emphasis in original.)

62 Idaho at 529.

It is thus clear that the elected officials of the executive branch enumerated in Idaho Constitution, art. IV, § 19, may not be paid more for their services than their per annum salary established by Idaho Code § 59-501.

The basis for the right to compensation for elected executive officers differs fundamentally from that of other employees. Most employees are contractually entitled to compensation for services rendered. In the case of the executive officers elected for a fixed term, salary is an incident to the office. If entitled to hold the office, the right to salary follows.

The Idaho Supreme Court considered this fundamental difference in *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979). The case involved a city police chief who held office for a fixed term at a fixed salary and who was improperly removed from office. The police chief sued for his salary and prevailed. The city sought to offset, from the back salary due, the amount the police chief had earned in the interim from other employment. In evaluating the salary rights of the police chief, the Idaho Supreme Court quoted with approval from a Montana case as follows:

The city is not entitled to have credited upon plaintiff's claim for salary the amount he earned in other employment during the time he was wrongfully excluded from his office. His claim does not rest upon contract. He was not an employee, but an officer. *The salary is an incident to the office, and, if entitled to the office, his right to the salary follows.* (Emphasis added.)

100 Idaho at 462.

The court went on to quote with approval from 150 ALR, 100, 103, in pertinent part as follows:

The reason advanced for excepting public officers from the application of the general rule as to mitigation of damages is that, *according to the general conception of office, no contract, in the usual sense of the word, exists between a public officer and the government, the compensation for the office being a mere incident thereof and belonging to the officer by virtue of his right to the office and not by reason of a contractual relationship.* (Emphasis added.)

100 Idaho at 462

The foregoing statements are equally applicable to elected officials of the executive branch of state government. Like the police chief, they receive a fixed salary for a fixed term of office. Moreover, as noted previously, Idaho Constitution, art. IV, § 19, is quite specific in providing that the officers shall receive "during their continuance in office" the enumerated compensation, and no "diminution or increase shall affect the salaries of officers then in office during their term."

In other words, state elected officials of the executive branch receive fixed compensation so long as they hold their office. Their right to compensation is not affected by sickness or vacation. It is strictly a right incident to their holding office. By the same token, they can receive no more than the compensation fixed by Idaho Constitution, art. IV, § 19, and Idaho Code § 59-501. At the end of their term, they are not entitled to be paid their salary for the period of their unused vacation time.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution:*

Idaho Const. art. III, § 23

Idaho Const. art. IV § 19

2. *Idaho Code:*

Idaho Code § 59-501

Idaho Code § 59-1606

Idaho Code § 67-5334

Idaho Code § 67-5335

Idaho Code § 67-5337

3. *Idaho Cases:*

*Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979)

*State ex rel. Wright v. Gossett*, 62 Idaho 521, 113 P.2d 415 (1941)

4. *Other Authority:*

150 ALR, 100, 103 (Bancroft-Whitney 1944)

DATED this 17th day of December, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

DAVID G. HIGH  
Deputy Attorney General  
Chief, Business Affairs and  
State Finance Division

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-16**

TO: Sheriff Vaughn Killeen  
7200 Barrister  
Boise, ID 83704

Per Request for Attorney General's Opinion.

RE: Felony Convictions

We have received through your counsel, Mr. Larry Richards, your request for a legal opinion. Usually, we refer legal questions from sheriffs back to the county prosecuting attorney since it is the prosecutor's duty to advise county officials. Idaho Code § 31-2604(3). However, yours was the first among several requests from different agencies on a question prompted by recent amendments to the federal firearms laws. Therefore, we have undertaken the following analysis.

QUESTION PRESENTED:

The question you pose is: "When is a person considered to have been convicted of a felony in Idaho?" As you indicated in your letter, this question is important in determining when there has been a violation of the federal Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 which, pursuant to a recent amendment, prohibits the possession and transfer of firearms by persons *convicted of a felony*, as defined by state law. We shall focus our analysis upon the emphasized words.

CONCLUSION:

A person who is pardoned or who has successfully completed the period of a withheld judgment and had his guilty plea or conviction negated or expunged, may possess and transact firearms without violating the federal Gun Control Act. It is our opinion, however, that during the probationary period of a withheld judgment and during and after the term which a person serves on probation with a suspended sentence or on parole, such person is a convicted felon for the purposes of the Gun Control Act.

ANALYSIS:

Under the recent federal amendment, Firearms Owners' Protection Act, Public Law No. 99-308, 100 Stat. 449 (1986), the prohibitions of the Gun Control Act are directed against those persons convicted for a "crime punishable by imprisonment for a term exceeding one year." Idaho Code § 18-111 defines a *felony* offense as any crime which is punishable with death or by imprisonment in the state prison. Under Idaho law a person is sent to the state prison only in cases where the term exceeds one year. Therefore, reading these provisions conjointly, it is apparent that once an Idaho court accepts a guilty plea or guilty verdict in a case where the person may be imprisoned in the state penitentiary in excess of one year, that person becomes a convicted *felon* for the purposes of federal firearms laws.

Under Idaho Code § 19-101, no person can be punished for a public offense except upon a legal *conviction*. As the Idaho Supreme Court stated in *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978), the word "conviction" is susceptible of two meanings — an ordinary or popular meaning which refers to the finding of guilt by plea or verdict, and a more technical meaning which refers to the final judgment entered following a plea or verdict of guilty. The court in *Wagenius* noted that its "prior decisions have not been totally consistent" in determining which meaning to employ in Idaho. 99 Idaho at 277. In construing the statute at issue in *Wagenius*, the court concluded that "conviction occurs when a verdict or plea of guilty is accepted by the court." *Id.* at 278.

At least one court has considered what constitutes a conviction under Idaho law for the purposes of the federal Gun Control Act. The federal court for the district of Idaho reached the conclusion that once a person has entered a plea of guilty or has been convicted by a jury on a felony offense, that person is a convicted felon even though judgment has not been entered:

This Court adopts the view that a “conviction” is the stage of a criminal proceeding where the issue of guilt is determined and a “sentence” is the second stage in criminal proceeding whereupon the Court decrees by judgment the sentence defendant is to receive.

*U.S. v. Locke*, 409 F.Supp. 600, 603 (D.C. Idaho 1976)

Such a view is in harmony with the *Wagenius* decision where the court concluded for purposes analogous to the issue here under consideration that a *de facto* conviction occurs when a verdict or plea of guilty is accepted by a court even before a final judgment is entered. Because of an amendment to Idaho Code § 18-310(2), intervening since *Locke* and *Wagenius*, we consider the question further.

After a guilty plea is entered or a guilty verdict returned, a criminal case may take one of several courses: The judge may *withhold judgment*; the judge may *impose judgment* after which the defendant will pay his debt to society by serving a probation or by serving a prison term or by serving prison time followed by parole; or the defendant may be *pardoned* by the Commission for Pardons and Parole. We will briefly address these in reverse order, considering the impact of each category upon the concept of “conviction.”

The Commission for Pardons and Parole is a constitutional body vested with the unreviewed power to *pardon* any who are convicted of crimes. Article IV, § 7, Idaho Constitution, and Idaho Code § 20-240. This power is used sparingly, usually in cases where it is clear that a convicted person is, in fact, innocent. Public Law No. 99-308, 100 Stat. 449 (1986) expressly provides that any conviction which has been expunged or set aside or for which a person has been pardoned is not considered a conviction for purposes of the Gun Control Act unless such pardon or expungement explicitly forbids the person from shipping, transporting, possessing or receiving firearms. It requires no further analysis to conclude that a person who has received a pardon is not a convicted felon for present considerations.

A major category of persons affected by the Gun Control Act is that group of persons upon whom a felony judgment of conviction is imposed and who either are placed upon *probation* or upon *parole*. The state legislature has attempted to diminish the pariah status of such persons. “(A)ny such person may lawfully exercise all civil rights which are not political during any period of parole or probation.” Idaho Code § 18-310(1) (adopted July 1, 1972). “Political rights” would be those consistent with direct or indirect participation in establishing or administering government; such as, the right of suffrage, the right to hold public office, and the right of petition. *See, Black’s Law Dictionary*, p. 1487, “Rights.”

The legislature has gone further to facilitate the reintegration of felons into society once they have completed their terms of probation, parole or incarceration. “Upon the final discharge of a person convicted of any felony except treason, a person shall be restored to the full rights of citizenship. . . . ‘[F]inal discharge’ means satisfactory completion of imprisonment, probation or parole as the case may be.” Idaho Code § 18-310(2) (adopted March 31, 1981). “Civil rights,” which is probably what the legislature intended when it used the phrase, “full rights of citizenship,” contemplates

those rights of every citizen not connected with the organization or administration of government and including such rights as property, marriage, contract, protection of law, etc. In other words, rights appertaining to a person by virtue of his citizenship in the state. *See, Black's Law Dictionary*, p. 1487, "Rights."

It is our conclusion, despite these statutory changes, that restoration to full rights of citizenship does not dispel the fact of a felony conviction. Idaho Code § 18-310(2) does not extend a right of expungement to a convicted felon. Such a person remains a convicted felon as much for purposes of the federal Gun Control Act, as for other rules and statutes. If such a person appears as a witness in any court proceeding he may, under both the Idaho and federal rules of evidence, be impeached as a convicted felon (IRE § 609; FRE § 609). A prior felony conviction may be taken into consideration at time of sentencing (ICR § 32 and Idaho Code § 19-2520C) and in the setting of bail (ICR § 46). Though returned to full rights of citizenship, a person may be prosecuted as a persistent violator if he has been previously convicted of two felonies. (Idaho Code § 19-2514.) In these other contexts, the courts and legislature have provided that a conviction may be taken into consideration to the disadvantage of the person convicted despite the statutory restoration to "full rights of citizenship" under Idaho Code § 18-310(2). A conviction for felony is a historical fact which does not waft away without an expungement. Therefore, it is our conclusion that for purposes of the federal Gun Control Act, a person remains convicted of a felony after release from imprisonment, probation, or parole.

Under procedures available in Idaho, a person who has been convicted of a felony may have judgment of that conviction *withheld*. Idaho Code § 19-2601(3) and Idaho Criminal Rule 33(d) allow a court, in its discretion, to withhold judgment of a conviction for a specified period of time based on certain conditions or sanctions. Since the use of a withheld judgment is a kind of probation, a convicted felon who has a withheld judgment imposed on him remains a *de facto* felon, as discussed above, until he satisfies the conditions of the probation and applies to have the guilty plea set aside. *U.S. v. Locke, supra*. Upon satisfactory completion of the terms or conditions of the withheld judgment, and affirmative action by the court to dismiss the charge, the person's felony conviction is negated. It is a nullity and the effect is as if it had never been rendered at all. *State v. Cliett*, 96 Idaho 646, 649, 534 P.2d 476 (1975). Thereafter, such a person could possess firearms without being in violation of federal law. However, during the period of a person's *de facto* conviction, as defined above, and until the satisfactory completion of any and all terms of his probation pursuant to a withheld judgment, followed by an order of the court that the entry of the plea be expunged, a person would be considered by Idaho law to be a convicted felon for the purposes of the federal Gun Control Act.

I hope this information answers your question and provides the guidance you requested. If we can be of any further assistance, please call or write.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution:*

Idaho Const. art IV, § 7

2. *Federal Statutes:*

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213

Firearms Owners' Act, Pub. L. No. 94-308, 100 Stat. 449 (1986)

3. *Idaho Code:*

Idaho Code § 18-111

Idaho Code § 18-310(1)

Idaho Code § 18-310(2)

Idaho Code § 19-101

Idaho Code § 19-2514

Idaho Code § 19-2520C

Idaho Code § 19-2601(3)

Idaho Code § 20-240

Idaho Code § 31-2604(3)

4. *Federal Case:*

*U.S. v. Locke*, 409 F.Supp. 600 (D.Idaho 1976)

5. *Idaho Cases:*

*State v. Cliett*, 96 Idaho 646, 534 P.2d 476 (1975)

*State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978)

6. *Other Authorities:*

Fed. R. Evid. 609

Idaho Crim R. 32

Idaho Crim R. 46

Idaho R. Evid. 609

Black's Law Dictionary, P. 1487

DATED this 19th day of December, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

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

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library

**ATTORNEY GENERAL OPINION NO. 86-17**

TO: Pete T. Cenarrusa  
Secretary of State  
Statehouse  
Boise, ID 83720  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Is a designation of the county on a farm product financing statement a reasonable and legally sufficient description of the real estate where farm products are produced or located?

CONCLUSION:

The designation of the county alone is a reasonable and legally sufficient description of the real estate on which farm products are grown or located, for the purpose of perfecting a security interest in farm products by filing a farm products financing statement.

ANALYSIS:

*Necessity of Legal Description*

Your question deals with farm products financing statements and, in particular, the amount of detail needed to describe the real estate on which farm products are grown or located. It has been suggested by one attorney that a full legal description of the real estate is required or is the preferred method of compliance. Others have contended that mere designation of the county is legally sufficient to describe the real estate where farm products are produced or located.



This dispute stems from a conflict between Idaho Code §§ 28-9-110 and 28-9-402(9)(f). The former statute, governing “sufficiency of description” matters in general, states:

[A]ny description of real property [must] be a legal description, that is, a description setting forth a United States government subdivision, the lot and block of a private subdivision, or metes and bounds of the premises affected by the security interest.

Thus, if Idaho Code § 28-9-110 governs, it would appear that a full legal description is necessary. Such was the conclusion reached by the Idaho Bankruptcy Court in 1983 in the case of *Wood v. Pillsbury Co.*, 1983 Bankr. Idaho 151.

On the other hand, Idaho Code § 28-9-402(9)(f), as amended in 1986, describes the “formal requisites of financing statements” as follows:

A financing statement for farm products is sufficient if it contains the following information:

\* \* \*

- (f) A reasonable description of the real estate (including county) where the farm products are located. This provision may be satisfied by a legal description, but a legal description is not required.

Clearly, the two statutes conflict. Idaho Code § 28-9-110 applies to *all* of Chapter 9 of the Uniform Commercial Code (U.C.C.) and requires that “*any* description of real property be a legal description.” (Emphasis added.) By contrast, § 28-9-402(9)(f) states that “a legal description is not required” in the case of farm products financing statements.

Three rules of statutory construction are relevant in determining the priority of such conflicting statutes. The first rule of construction is that a specific statute will prevail over a general statute. *State v. Wilson*, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984); *Packard v. Joint School Dist. No. 171*, 104 Idaho 604, 610, 661 P.2d 770, 776 (Id. App. 1983). Idaho Code § 28-9-402(9)(f) relates to only one very specific type of document (farm products financing statements) among the many that are addressed in Chapter 9 of the U.C.C. By contrast, Idaho Code § 28-9-110 is a general section applicable to the whole chapter. Thus, under the first rule of statutory construction, § 28-9-402(9)(f) must prevail.

The same result follows under the second applicable rule, namely, that “to the extent of a conflict between the earlier and later statute . . . , the more recent expression of legislative intent prevails.” *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980). Section 28-9-110, the general provision governing real estate description, was adopted as a part of the complete Uniform Commercial Code in 1967, and has never been amended. Section 28-9-402 was amended in part by the addition of subsection (9) in 1986. As the later expression of legislative intent, it prevails over § 28-9-110 to the extent of any conflict.

The third relevant rule of construction is that a statute should be construed to implement the intent of the legislature as revealed in the history and purposes of the act. *Liefeld v. Johnson*, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983). The language in § 28-9-402(9)(f), stating that a legal description is not required, was added by senate amendment to Senate Bill No. 1391, and finally signed into law as Senate Bill No. 1490. The addition of this amendment is a clear indication of a specific legislative intent not to require a legal description. Further, the whole purpose of the legislation was to adopt a central filing system to comply with section 1324 of P.L. 99-198, which does not require a legal description.

It is clear from application of the judicially acknowledged rules of construction that a legal description of the real estate on which farm products are produced or located is not required on a farm products financing statement.

### *Sufficiency of County Designation*

We next address the contention that more than designation of the county is required as a description of the real estate where farm products are grown or located. This argument is based on the language in § 28-9-402(9)(f), requiring "a reasonable description of the real estate (including county) . . ." It has been argued that the use of the parenthetical "(including county)" implies that more is required. However, examination of the history of that language dispels any such reading. At the time the legislation was under consideration by the 1986 session of the legislature, the parallel federal regulation had not yet been published. The Idaho legislature therefore had to accommodate the provisions of § 1324 of P.L. 99-198 and yet retain the flexibility to meet the requirements of a federal regulation yet to be promulgated. It was known that § 1324(c)(4)(D)(iv) of P.L. 99-198 required "a reasonable description of the property, including county. . . ." It was not known what the federal regulation would require beyond the county designation, if anything. So the language closely tracked the language of the federal law. There is, therefore, no inference that more than a county designation is required by Idaho Code § 28-9-402(9)(f).

This reading is bolstered by the other amendments made to § 28-9-402 by the Idaho Legislature in 1986. Subsection 3 was amended to delete the example of a form for farm products financing statements, which had previously stated:

(If the collateral is crops) The above described crops are growing or are to be grown on:  
(Describe Real Estate) . . . . .

Thus, the cross reference that would trigger the general real estate description requirements of § 28-9-110 was eliminated as to farm products, while being retained for other collateral such as timber, minerals and the like (including oil and gas) and fixtures. The clear contrast between farm products and other collateral is further highlighted by the amendment to § 28-9-402(1), which spells out "formal requisites of financing statements" in a uniform manner for all forms of collateral "[e]xcept as provided in subsection (9) of this section," namely, the section governing farm products financing statements.

The final question remains: whether a county designation constitutes a “reasonable description of the real estate . . . ,” with nothing more. We take some guidance from the fact that the state administrative rule, at IDAPA 34.U.01.c.viii, requires only the designation of the county. As a general rule, “an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.” *Hopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979). In his adoption of the administrative rule, that is precisely what the Secretary of State did. Further,

The construction given a statute by the executive . . . officers of the State is entitled to great weight and will be followed . . . unless there are cogent reasons for holding otherwise. *Id.*

The administrative rule is, therefore, presumptively valid in requiring no more than a county designation.

There is, however, more support for the validity of the administrative rule. Unlike the legislature, the Secretary of State had the benefit of a federal regulation by the time he drafted the rule. The federal regulation requires only the designation of the county to satisfy the federal law’s requirement for a reasonable description of the property where farm products are produced. 9 C.F.R., § 205, 103(a)(3). Thus, the state administrative rule does no more nor less than the federal regulation.

Finally, the state administrative rule was part of a very detailed application for certification by the United States Department of Agriculture (USDA). After thorough review, USDA certified the Idaho System. Since the statutory standard under both the federal and state statutes is “a reasonable description,” the state administrative rule’s requirement for only the designation of the county must be presumed valid.

#### AUTHORITIES CONSIDERED:

1. *Federal Statute:*

Food Security Act of 1985, Pub. L. No. 99-198, § 1324, 99 Stat. 1354, 1535.

2. *Idaho Statutes:*

Idaho Code § 28-9-110

Idaho Code § 28-9-402(1)

Idaho Code § 28-9-402(9)(f)

3. *Idaho Cases:*

*Hopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979)

*Leliefeld v. Johnson*, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983)

*Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980)

*Packard v. Joint School Dist. No. 171*, 104 Idaho 604, 610, 661 P.2d 770, 776 (Id. App. 1983)

*State v. Wilson*, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984)

4. *Bankruptcy Case:*

*Wood v. Pillsbury Co.*, 1983 Bankr. Idaho 151

5. *Other Authorities:*

9 C.F.R. § 205.103(a)(3)

IDAPA 34.U.01.C.viii

DATED this 22nd day of December, 1986.

ATTORNEY GENERAL  
State of Idaho  
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON  
Chief Deputy Attorney General

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library



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**ATTORNEY GENERAL'S  
SELECTED  
INFORMAL GUIDELINES  
FOR THE YEAR 1986**



**Jim Jones  
Attorney General  
State of Idaho**



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 6, 1986

Mr. F. David Rydalch  
Idaho Water Resources Board  
Route 2, Box 108  
St. Anthony, ID 83445

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

Dear Mr. Rydalch:

Your request for legal guidance on a possible conflict of interest has been referred to me for response.

### **QUESTION PRESENTED:**

Does your personal economic interest in water rights and water distribution companies located on a drainage that may be impacted by negotiations over the reserved water rights of the Shoshone-Bannock Tribes prevent you, under article VI of the water resources board's by-laws, from participating in future board actions regarding these negotiations?

### **BRIEF ANSWER:**

Not unless the economic interest at issue is of an immediate and personal nature and related to your interest alone or solely to the canal and reservoir companies in which you have an interest; at this time, the nature of the board's role in the negotiations does not indicate that such a conflict will arise.

### **BACKGROUND:**

In 1985, the Idaho Legislature passed what is now I.C. § 42-1406A, which requires the director of the department of water resources to commence adjudication of the water rights of the Snake River. The legislature also passed H.C.R. No. 16, which resolved that the State of Idaho should attempt to negotiate issues relating to the reserved water rights of the Fort Hall Indian Reservation before a petition for an adjudication is filed with the district court. The water resources board ("board") has been designated by Governor Evans as the "lead agency to coordinate state activities related to the reserved water rights negotiations and the [Snake River] adjudication," and to represent the state in these negotiations. Executive Order No. 85-9 (May 24, 1985). During the course of these negotiations, it is possible that agreements will be entered into that may impact distribution of water on the Snake River Basin above Milner Dam. You are a shareholder in the North Fork Reservoir Company and the St. Anthony Canal Company, and receive water from these companies for your farming operation which is located upstream from Milner Dam.



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

### ANALYSIS:

Article VI of the board's bylaws states:

2. No Board member shall vote or participate in any discussion or action of the Board nor be present during the Board's deliberations on any matter before the Board in which he has any beneficial financial interest, whether direct or indirect or is an officer, agent or employee of the group seeking Board action or if the Board member or his family will gainfully benefit.

This is a broad conflict-of-interest disqualification that bans participation by board members during board proceedings which (1) benefit the financial interest of the board member directly or indirectly; (2) affect any group of which the board member is an officer, agent, or employee; or (3) gainfully benefit any individuals in the board member's family. The disqualifications in (2) and (3) are fairly self-explanatory, so I will focus on what is meant by direct or indirect beneficial financial interest.

As you mentioned in your request letter, it is uncertain what types of action the board may take in response to the negotiations. Because analysis of conflict of interest problems depends upon the facts of a given situation, I cannot give you detailed guidance. I will describe current Idaho conflict law as it bears on your question.

In general, conflicts of interest arise whenever an officer's private interests impair or influence the performance of a public duty. *McRoberts v. Hoar*, 28 Idaho 163, 174-5, 152 P. 1064 (1915); 76-15 Op. Att'y Gen. 78 (Idaho). However, merely because a public official's action benefits his or her own personal interests does not mean that there is a conflict of interest. For example, no one would suggest that a farmer/legislator should be disqualified from voting on a farm bill; indeed, the legislator may have been elected to represent agricultural interests.

But there is a point at which a conflict may arise. In Attorney General Opinion No. 76-15, the issue was the interpretation of I.C. § 67-6506, which prohibits a member or employee of a zoning or planning commission or a county board of commissioners from acting in a public capacity when he or she has an economic interest in a proceeding or action. The conclusion was that "[a] member/employee should disqualify himself from the performance of a public duty *when the economic interest at issue is of an immediate nature, particular and distinct from the public interest.*" *Id.* at 77 (emphasis added).

As a general rule, then, any actions that a public official takes which affect his or her own personal interests not in common with a class of other people could present a conflict of interest. If the public official is only a member of a class that are all more or less equally affected by an action, there is no conflict of interest.

This general rule is adhered to by states that are recognized as having strict conflict of interest laws. For example, the Code of Ethics adopted by the legislature of the State of Washington concludes that a member "does not have a personal interest which is in conflict with the proper discharge of his duties if no benefit or detriment accrues to him as a member of a business, profession, occupation or a group, to great-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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er extent than to any other member of such business, profession, occupation or group.” *Ethics: A Special Report on Conflict-of-Interest Legislative and Lobbying Regulation in 5 States*, The Citizens’ Conference on State Legislatures, P. 155 (1975).

Two statutes bear on the issue at hand. First, I.C. § 42-1732 discusses the qualifications required for board members:

Appointment of board members shall be made solely upon consideration of their knowledge, interest and active participation in the field of reclamation, water use or conservation and no member shall be appointed a member of the board unless he shall be well informed upon, interested in, and engaged actively in the field of reclamation, water use or conservation of water.

This sentence clearly expresses the legislative intent that board members be individuals involved in irrigation. Obviously, the legislature expected board members to be involved in decisions in which they had an interest in a broad sense as Idaho water users. Therefore, the prohibitions contained in the bylaws must not be read so expansively as to frustrate the legislature’s intent that board members “be well informed upon, interested in and engaged actively in the field of . . . water use.”

This basic principle is illustrated in *Mosman v. Mathison*. 90 Idaho 76, 408 P.2d 457 (1965), where the Idaho Supreme Court considered a conflict of interest of a highway district commissioner. Under the statutory scheme in effect at that time, commissioners were elected from subdistricts and given exclusive general supervision and jurisdiction over all highways in their district. The court recognized that public officials must act without influence of their personal interests. *Id.* at 85. But the court also recognized that the overall statutory scheme for supervision and jurisdiction over highways must be considered and that a commissioner was of necessity affected by highway improvements in the district where he lived. *Id.* To reconcile this problem, the court adopted the so-called rule of necessity:

The courts generally recognize that when the members of the only tribunal with jurisdiction to act are disqualified by reason of bias, prejudice, or interest, still such tribunal is not prohibited from acting, where such disqualification would prevent a determination of the proceeding. Such exception is also recognized as being applicable to administrative officers, commissioners, commissions, boards and other bodies.

*Id.* (citations omitted). This “rule of necessity” should be applied to the board’s conflict of interest bylaws; they must not be read so strictly that they frustrate the legislature’s intent in setting the statutory qualifications for board members.

More pointedly, I.C. § 42-1757 deals with conflicts of interest by board members: “No member of the board shall participate in the action of the board, nor be present during the board’s deliberations, concerning an application for a loan by an entity in which such board member is an officer, agent or employee, or in which such board member has any interest.” This statute describes at least one specific situation, namely, loan applications, where the legislature feels a conflict of interest would be present

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

for individual board members. The language of the statute closely tracks the language of article VI of the bylaws, but it is narrowly drawn to disqualify only when the action affects the board member in an immediate, personal way. The same interpretation must be given to the board's bylaws.

In light of these general principles, it seems unlikely that the board's role in negotiations with the tribes and federal agencies will affect you in a personal and immediate way. According to Executive Order No. 85-9, the board's role is that of the "lead agency" in coordinating state activities relating to state water user interests, including those of the state itself, in negotiations regarding the reserved water rights of Indian tribes and of federal agencies. Any settlement reached by the board will be submitted for district court approval so that the agreement is enforceable; in court, the agreement could be attacked by intervening parties. Also, the board's authority derives from Executive Order No. 85-9, not from statute. This authority could therefore be changed at any time by a subsequent Executive Order by Governor Evans or his successor in office. Given this situation, it seems unlikely that the board alone, in its capacity as lead agency coordinating reserved water rights negotiations, will have a controlling impact on water distribution above Milner Dam.

In conclusion, article VI of the board's bylaws must be harmonized with the above statutory provisions and common law development of conflicts of interest. If the board contemplates action on reserved water rights that will impact your personal interests alone, or only the canal or reservoir companies in which you have an interest, you should disqualify yourself because of a conflict of interest. When a conflict arises, you should seek further counsel at that time. If, as seems more likely, the contemplated action affects you or the canal or reservoir companies only as members of a class of water users or companies that are more or less equally affected, then there is no conflict of interest. Whenever a question of a conflict of interest arises, full disclosure to other board members is always appropriate.

Please contact me if you have any further questions on this matter.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General  
Natural Resources Division

SJS:kjb/cjm

January 16, 1986

Blair D. Jaynes, Captain, IDANG  
Staff Judge Advocate  
Military Division  
State of Idaho  
VIA STATEHOUSE MAIL

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

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

*Re: Establishment of Military Intelligence Units in Idaho Army National Guard*

Dear Capt. Jaynes:

Your inquiry of January 6, 1986, addressed to the Attorney General, has been referred to me for response.

Our answer to the question whether Idaho law would pose any obstacle to the training of Military Intelligence units must necessarily be quite general inasmuch as we are not advised of the specific activities to be undertaken in connection with such training. The assumption on which my response is predicated is that your reference to a "training environment" implies that the training is to be carried out on a military reservation or in some other enclosed location where the training activities are carried out in isolation from the public.

The Idaho Communications Security Act prohibits interception of wire or oral communications. Interception is defined as "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Idaho Code § 18-6701(3). Wire communications are defined as those carried on transmission facilities of various kinds furnished by a common carrier. Oral communications are deemed to be those uttered under circumstances justifying an expectation of privacy.

These definitional elements appear to take training activities, where there is no intrusion on the transmissions of a common carrier and no intrusion on private conversations, beyond the scope of the act.

Manufacture, distribution and possession of intercepting devices is prohibited, but the United States, states, political subdivisions, and their officers and employees are exempt from the prohibition.

Inasmuch as the Communications Security Act does not appear to apply to military intelligence training, on the assumption previously stated, there is no occasion to consider questions of federal preemption, which might otherwise be significant.

Very truly yours,

LYNN E. THOMAS  
Solicitor General

LET:eo

January 16, 1986

Ms. Lou Hamill  
Director, Women's Crisis Center/Rape Crisis Alliance  
720 W. Washington  
Boise, Idaho 83702

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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

Re: Conflict of Interest

Dear Ms. Hamill:

You have requested advice on whether your job as the Director of the YWCA Women's Crisis Center and the Rape Crisis Alliance disqualify you from serving on the Idaho Council on Domestic Violence because of a conflict of interest under I.C. § 59-201. You have also asked whether the new proposed council regulations and by-laws dealing with conflicts of interest are appropriate if the answer to the first question is yes.

#### **BRIEF ANSWER**

It does not appear that your dual role presents a conflict of interest such that you must disqualify yourself from serving on the Council. However, you should continue to disqualify yourself from considering grants to entities within your health and welfare district. The proposed section 5.c. of the Council's bylaws goes beyond what is required by I.C. § 59-201.

#### **BACKGROUND**

As I understand the facts of this situation, you are a member of the Idaho Council on Domestic Violence ("Council"). The responsibilities and duties of the Council are listed in I.C. § 39-5208; these responsibilities include distribution of funds from the domestic violence project account (I.C. § 39-5212) to local projects that meet Council standards for aiding victims of domestic violence. The distribution of these funds is determined on the basis of grant applications which are submitted to the Council by local domestic violence groups. You have always disqualified yourself from involvement in decisions on grant applications submitted by the Boise YWCA and from other domestic violence organizations within your health and welfare district.

You have also been employed by the Boise YWCA as the Director of the Women's Crisis Center and the Rape Crisis Alliance since 1979. The YWCA has received grants from the Council to help fund their domestic violence program since 1984, but none of this money has been used to supplant or enhance your own salary. The money granted to the Boise YWCA by the Council is used for items such as rents, furniture, housekeeping and janitorial supplies, and emergency medical supplies.

#### **ANALYSIS**

I.C. § 59-201 states that "[m]embers of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." This statute is intended to prevent public officers from acting under the influence of their own personal interests rather than the interest of the public. *McRoberts v. Hoar*, 28 Idaho 163, 174, 152 P.1046 (1915).

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Assuming that you are a public officer involved in awarding contracts, we must consider whether you have an "interest" in the grants awarded to the Boise YWCA. Idaho courts have not interpreted what is meant by "interest," but the kind of "interest" referred to is probably a financial interest, either direct or indirect. *See* Executive Order No. 85-17 (August 13, 1985). In addition, other states recognize that there is a point where an "interest" is so remote that it could not reasonably influence a public officer's decision. In *Stigall v. City of Taft*, 58 Cal.2d 565, 25 Cal. Rptr. 441, 375 P.2d 289, 291 (1962), the California Supreme Court stated that conflict of interest statutes "are concerned with any interest, *other than perhaps a remote or minimal interest*, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interest of the city." (Emphasis added.) *See Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App.3d 201, 137 Cal. Rptr. 118 (1977).

Since the *Stigall* case, the concept of a "remote interest" has been spelled out in the California Government Code § 1091; under this section, a public officer is not interested in a contract if the interest is remote and the officer discloses the interest. One type of a remote interest is defined as "[t]hat of an officer or employee of a nonprofit corporation." Cal. Gov't Code § 1091(b)(1).

Washington, which has strict conflict of interest statutes, also recognizes that a remote interest may not disqualify a public officer from considering certain matters. For example, Wash. Rev. Code § 42.23 deals with remote interests of municipal officers when making city contracts. One type of remote interest is defined by Wash. Rev. Code § 42.23.040(2) as "[t]hat of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary."

The above case and statutes are not Idaho law but they persuasively suggest that a reasonable limit should be placed on defining what an "interest" is in contracts awarded by the Council. This may have been what was intended by Governor Evans in Executive Order No. 85-17 when he directed that "[s]tate employees shall not have a *private* interest in any contract or grant made by them in their official capacity." (Emphasis added.) In your case, your interest in grants to the Boise YWCA seems too remote to require that you disqualify yourself from serving on the Council. Your salary is fixed and is not paid by grants from the Council. You were employed by the YWCA before Council money was available, and presumably you would continue at your position if Council money were discontinued. Most importantly, your situation does not involve the more typical conflict of interest case where there is some commercial involvement by one of the parties; this case involves a non-profit organization. In short, I do not see that there is any of the self-dealing that I.C. § 59-201 aims to prevent.

In summary, we have assumed that you are a state officer involved in awarding contracts. It is clear that you have an "interest" in the grants awarded to the Boise YWCA in a broad sense, but that I.C. § 59-201 must be interpreted reasonably so that members are not disqualified from serving on the Council because of a merely "remote" interest. Other states have similarly held that their conflict of interest laws do not apply to an employee of a nonprofit corporation or to an employee on a fixed sal-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

ary. In your case, you do not appear to have a private interest in the grants, and you work for a nonprofit corporation at a fixed salary. Therefore, it does not appear that you have a conflict of interest.

It is also significant to note that I.C. § 39-5204 requires Council members to be “representative of persons who have been victims of domestic violence, care providers, law enforcement officials, medical and mental health personnel, counselors, and interested and concerned members of the general public.” It seems clear that the legislature intended members of the Council to be knowledgeable about and deeply involved in organizations that deal with the problem of domestic violence. It would be expected that many Council members would be involved in their local domestic violence relief centers. This in fact is the case; five out of seven Council members are involved to some degree with entities that receive grants administered by the Council. Therefore, the term “interest” must not be read so expansively that it frustrates legislative intent and prevents qualified, competent individuals from serving on the Council. To the contrary, it seems that it would be in the best interest of the victims of domestic violence to enlist individuals actively involved in the field.

Practically speaking, I.C. § 59-203 states that prohibited contracts which violate the conflict of interest law are voidable and not void. This means the contracts are valid unless and until they are successfully challenged in court. Thus, even if an Idaho court were to find that one of the Council’s grants was in violation of I.C. § 59-201, the remedy would be prospective only and would not undo work previously done under other grants.

Finally, it is my opinion that the proposed amendment to section 5.c. of article III of the Council’s bylaws goes beyond what is required by I.C. § 59-201. As discussed above, it appears that a remote interest should not act to disqualify an individual from serving on the Council. Disqualification from consideration of grants in a Council member’s own health and welfare district would seem adequate to prevent even the appearance of impropriety in the awarding of grants. Perhaps the bylaw could be clarified to disqualify a council member when his or her interest is less remote, such as when grant money is actually used to pay his or her salary.

Please do not hesitate to contact me if you should have any further questions on this matter.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General

SJS/kjb:cjm

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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January 21, 1986

The Honorable Ron Slater  
Idaho House of Representatives  
STATEHOUSE MAIL

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

Dear Representative Slater:

At the direction of Pat Kole, I am responding to your request concerning the constitutionality of the legislation designated as RS11739, which proposes to amend sections 33-512 and 33-1602, Idaho Code. The proposed amendment to section 33-512 would require each school board of trustees to exclude from its school libraries "all books, tracts, papers and catechisms . . . *for or against any sectarian . . . or denominational doctrine.*"

The proposed amendment to section 33-1603 would prohibit the teaching of "*instruction for or against sectarian or denominational doctrine . . . in the public schools.*" A new paragraph is added which proposes that:

*Any teacher or other employee of a school district who violates the provisions of this section shall have his teaching certificate revoked. The state board of education shall revoke the certificate pursuant to procedures contained in sections 33-1208 and 33-1209, Idaho Code. For the purpose of section 33-1208, Idaho Code, a violation of the provisions of this section shall be gross neglect of duty.*

Sections 33-512 and 33-1603 as they are now written conform to the prohibitions contained within article IX, subsection 6 of the Idaho Constitution which states:

No sectarian or religious tenets or doctrines shall ever be taught in the public schools. . . . No books, papers, tracts or documents of a political sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article. . . .

Additionally, the statutes must meet the three-part test established by the United States Supreme Court in the case of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 20 L.Ed. 2d 745 (1971). This test provides that in order to avoid a violation of the first amendment, a state statute or state action must, 1) have a secular purpose; 2) have a primary effect which neither advances nor inhibits religion; and 3) not foster an excessive entanglement between church and state.

As I indicated, the language of the two sections as they are now written meet the tests established by both the federal and state constitutions. However, the addition of the language of "*for or against any*" and "*or denominational doctrine*" would not be a violation of the constitution.



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

However, the proposed changes to section 33-1603 raise some serious constitutional problems. The ability to teach and be certificated is a constitutionally and statutorily recognized property interest which is entitled to constitutional and statutory due process protections. These are the reasons for sections 33-1208 and 33-1209, Idaho Code, which cover revocation proceedings and sections 33-514 and 33-515, Idaho Code, which cover protections afforded annual and renewable contract (tenure) teachers.

First, teachers and others are entitled to notice as to the reasons for which they may be discharged. Those reasons cannot be susceptible to arbitrary and capricious application. That is, the reasons cannot be interpreted and applied on a basis of definition determined by the person(s) making the decision. The addition of the word "instructing" would raise this problem because of the variable meaning afforded to the word, which can range from mere innocent reference to an outright presentation of lessons on religious topics. The addition of "instruction" coupled with the prohibitions contained in the constitutions and the proposed mandated revocation would result in an arbitrary and capricious denial of a constitutionally protected interest.

The sanction imposed by the new language, mandated revocation of the teacher or administrator certificate, does not take into consideration the nature of the "instruction" such as the innocent reference and allow the mitigation of the sanction to something less such as suspension of the certificate or a reprimand. When dealing with a constitutionally protected interest such as the contract or certificate, a court would probably look with disfavor on the mandatory revocation without consideration of the mitigating circumstances and consider such a mandate arbitrary and capricious and a violation of due process and equal protection provisions of the federal and state constitutions. The only way to avoid this problem is to substitute the word "may" for the word "shall." The remainder of the proposed change appears to be constitutionally permissible.

Should you have further questions or should you need further assistance, please do not hesitate to contact me.

Sincerely,

DANIEL G. CHADWICK  
Deputy Attorney General  
Department of Education

DGC/s

January 22, 1986

Mr. A. I. Murphy  
Director  
Department of Corrections  
STATEHOUSE MAIL

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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

Dear Mr. Murphy:

You have asked us whether the use of EMIT-d.a.u. (drug abuse urine) assays by the department of corrections constitutes a "laboratory" within the definition of IDAPA 16.02.6003.01. The more normal procedure would be to address the question to the administering agency by way of a request for declaratory ruling under the Idaho A.P.A., I.C. § 67-5208. However, since both agencies have requested our opinion on this matter, we issue this legal guideline.

The EMIT-d.a.u. assay materials and equipment are used by the department of corrections for the chemical examination of urine samples from parolees or probationers. The purpose is to provide information for diagnosis or prevention of impairment to their physical or mental health or for assessment of their condition. It is our opinion that these facilities are within the broad definition of "laboratory" as provided by IDAPA 16.02.6003.01 and the sub-classification of "other laboratory" as provided by IDAPA 16.02.6003.01.d.

#### **ANALYSIS:**

As described by SYVA Company, the producer of the EMIT-d.a.u. assays, the assays in question are immunochemical tests designed as primary screening tests to detect the presence of specific groups or classes of drugs in human urine samples. A separate assay is required to detect the concentration of each different suspected group or class of drugs within the detection limits of the test. The different assays are basically performed by mixing prepared EMIT reagents and bacteria samples with a small amount of urine and monitoring the resultant reaction with a digital reading spectrophotometer. Each assay also requires buffer and cleaning solutions, calibrators, pipette-diluters, beakers, a data processor and other laboratory equipment. The tests must be performed by trained personnel.

The purpose of performing these tests, as stated by the department of corrections, is to assist in determining whether suspected individuals may have violated their parole or probation agreements by using certain drugs. The non-prescription use of the drug groups or classes detected by the EMIT-d.a.u. assays is not only prohibited by probation and parole agreements, but is also unlawful under Idaho law. See, "Uniform Controlled Substances Act," I.C. § 37-2701 to 2751. These prohibitions seek to prevent drug abuse and the physical and mental impairment of individual and public health associated with the non-prescription use of these drugs.

The definition of "laboratory or clinical laboratory" is provided by IDAPA 16.02.6003.01:

A facility for the biological, microbiological, serological, chemical immunohematological, hematological, biophysical, cytological, pathological or other examinations of material derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of the health of man.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

All laboratories are divided into four categories: "hospital," "independent," "private," and "other" laboratories. This last category is defined in catch-all terms by IDAPA 16.02.6003.01.d as "a public or private facility which performs tests on material derived from the human body but is not a part of [the other three categories.]"

As a general rule of statutory construction, "the words of a statute must be given their plain, usual and ordinary meaning, in the absence of any ambiguity." *Walker v. Hensley Trucking*, 107 Idaho 572, 573, 691 P.2d 1187 (1984). This principle of statutory construction also applies to the construction of rules and regulations promulgated by an administrative agency. *Higginson v. Westergard*, 100 Idaho 687, 690-691, 604 P.2d 51 (1979).

The definition of "laboratory" is clear and unambiguous. The definition is not based on design, size or type of equipment. Rather, it refers to a broad type of activity: the examination of material from a human source to provide information for certain general purposes. An EMIT-d.a.u. assay is a chemical examination of human urine. The purpose of the examination is to gain information to deter or prevent drug use and its associated impairments to physical and mental health. At a minimum, the information is used to help assess an individual's physical condition or health. Even if these assays are performed only to screen for possible drug use, with further examinations being provided by the department of health and welfare, the regulations provide no exemption for "mere screening" and none can be inferred from a review of the entire set of regulations and their underlying statutory authority.

Based on the preceding, it is our opinion that use by the department of corrections of the EMIT-d.a.u. assays does constitute a "laboratory" and is subject to regulation by the department of health and welfare. Please call if further assistance is required.

Cordially,

JOHN J. McMAHON  
Chief Deputy

JJM/lh

February 3, 1986

Mr. Bruce Balderston  
Legislative Auditor  
STATEHOUSE MAIL

RE: State Liquor Dispensary/Political Activities

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

Dear Mr. Balderston:

The Attorney General has asked me to respond to your letter of January 27, 1986 wherein you inquire whether our laws prohibit classified employees of the state Li-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

quor Dispensary from devoting work time to the opposition of legislation which would privatize the Dispensary's functions. You also question whether the superintendent of the Liquor Dispensary is unlawfully using his influence to induce his employees to adopt his political views. We will address the latter issue first.

In your letter, you cite the potential applicability of Idaho Code § 23-213 which states:

No officer or employee of the dispensary shall, while holding such office or position, serve on or be a member of any committee of any political party, nor shall he, directly or indirectly, use his influence to induce any other officer or employee to adopt his partisan political views, nor shall he actively engage in or contribute to partisan primary or election campaigns.

We have been able to locate no court decisions or prior opinions of this office interpreting § 23-213. Accordingly, we have no preexisting authority upon which to base a construction of this provision. Further, there is no meaningful legislative history which could aid in the interpretation of this 1939 law. Idaho Sess.L. 1939, ch. 222, § 503, p. 472.

Section 23-213 appears to be aimed at immunizing employees of the Liquor Dispensary from partisan political pressures which may be exerted by fellow employees. This provision follows other sections that prohibit Dispensary personnel from having a personal interest in the liquor industry (§ 23-211) and from holding any other position which may be inconsistent or interfere with duties related to the Dispensary (§ 23-212). These provisions, collectively, suggest a legislative concern that employees of the Dispensary be in a position to fulfill the obligations of their office in a manner consistent with the public interest while avoiding even the appearance of impropriety or outside influence.

As you note in your letter, § 23-213 proscribes the use of personal influence by a Dispensary employee to induce a co-worker to adopt "partisan political views." This term is not defined in this section nor in any other provision of our law. However, reference to authorities construing similar language in other, topically related statutes suggests that the phrase may be directed solely at matters relating to political parties or candidates. For example, the United States Supreme Court, in interpreting the federal Hatch Act (5 U.S.C. § 7324), recognized the distinction between partisan and nonpartisan political activity by federal employees:

It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities, and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward the party's success.

*United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947).

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In the present context, it is doubtful whether the superintendent of the Dispensary needs to exert any of his "influence" in order to induce his employees to oppose privatization. This is a matter in which personnel of the Dispensary may understandably have an acute interest since it goes to the very survival of that entity. In any event, the privatization question is not a clearly partisan issue. It has implications for Idaho's economy which extend across party lines. Even if the Dispensary's administrator is exerting his "influence" in an attempt to mobilize opposition to privatization within the ranks of his employees, we believe that such activity, while not necessarily laudable, is not prohibited by § 23-215; the statute is only pertinent to partisan activities.

\* \* \*

You also cite us to Idaho Code § 67-5311 and inquire whether the referenced activities within the Liquor Dispensary are violative of any of the provisions of that enactment. Again, we can find no violation.

Subsection (2)(1) of § 67-5311 authorizes a state employee to participate fully in public affairs "in a manner which does not materially compromise the neutrality, efficiency, or integrity of his administration of state functions." This provision has not been interpreted by our courts, and it includes terms which are difficult in both definition and application. The administrator of the Dispensary could certainly argue that his efforts and those of his employees in opposition to privatization are directly aimed at preserving the efficiency and integrity of his administration by combatting efforts to abolish the Dispensary. The present facts are not sufficient to lead us to conclude that § 67-5311(2)(1) has been contravened.

We see no meaningful distinction between the scenario you reference and those which frequently arise in other state agencies. For example, it would not seem uncommon for a classified employee of the Department of Education to be asked to devote a substantial portion of his on-the-job time to opposing legislative proposals aimed at reducing school funding. Similarly, the Department of Corrections may well choose to channel the efforts of its employees into activities opposing proposals to cut prison funding. Decisions regarding the necessity and propriety of delegating such tasks to classified employees are management functions and this office is in no position to comment upon the merits of such decisions.

\* \* \*

In the present context, the Liquor Dispensary unquestionably has an interest in legislation which would result in its abolition. The efficacy of privatization is a matter of public interest which cuts across party lines, and it is one in which administrators and employees of the Dispensary have a clear interest. We see no violation of existing state law in the efforts of the Dispensary outlined in your letter.

We hope the preceding has been responsive to your inquiry. If you have any further questions or concerns on this matter, please contact the undersigned directly.

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INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Yours truly,

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

PMT/jas

February 6, 1986

The Honorable Mark Ricks  
Senate Majority Leader  
Idaho State Senate  
STATEHOUSE MAIL

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

Dear Senator Ricks:

In your letter of January 8 you pose the two following questions regarding the Farm Foreclosure Review Board recently established by the Governor:

1. What is the statutory basis for this program?
2. Can the farm foreclosure board take effective action to avert or prevent foreclosure proceedings?

The Farm Foreclosure Review Board was created by Executive Order No. 85-28, a copy of which is attached. The executive order does not specify any statutory basis for the establishment of this board. A review of the statutes pertaining to agriculture and foreclosure proceedings fails to identify any specific statutory basis for creation of the board. However, because it appears from the executive order that the board has very limited authority and cannot affect the rights of third parties, acting essentially in an advisory capacity, there is probably sufficient authority for establishment of such board.

Idaho Code § 68-802 sets out the authority of the Governor to issue executive orders. It provides in pertinent part, as follows:

The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

perform those duties by issuing executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.

The statutory authorization to issue executive orders is stated in general terms. The statute authorizes the governor to issue executive orders "in order that he may exercise a portion of the authority so vested" by Idaho Const., art. IV, § 5. That constitutional section provides:

The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

The statute authorizes issuance of executive orders "to implement and exercise those powers."

All of the authorization language in the statute relates to exercise of the executive power. Thus, the governor may utilize executive orders to aid in carrying out constitutional or statutory duties of the executive branch. When so used, and when not in conflict with the constitution or statutes, executive orders have the force and effect of law for two years.

The fact that executive orders have the force and effect of law does not mean that they could be used to infringe upon legislative or judicial functions. Rather, they are limited to use in carrying out executive duties.

Executive Order 85-28 does not identify the specific statutory duties which are being carried out by the executive order. However, implementation of the executive order was delegated to the Department of Agriculture and presumably it was intended to aid in carrying out the executive duties of that department.

In this connection, Idaho Code § 22-103 imposes various duties upon the director of the department. For example, the following subsections of that section empower the director to:

- (4) Encourage and promote in every practical manner, the interests of agriculture, horticulture, apiculture, aquaculture, the livestock industries, poultry, and fowl raising, wool and fur-bearing animals and their allied industries.

\* \* \*

- (21) Assist in the improvement of country life, farm occupations, and to cooperate in effectuating equality of opportunity of those employed in agricultural pursuits in the state of Idaho.

While Executive Order 85-28 does not specifically identify the statutory authority upon which it is based, it is arguable that the order can be characterized as implementing the executive duties imposed by Idaho Code § 22-103. If the order purported to confer substantive authority to the Farm Foreclosure Review Board, including the

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

ability to impact third persons who are not a part of state government, it would likely be held to be an impermissible exercise of executive power. See, for instance, *Buettell v. Walker*, 59 Ill. 2d 146, 319 N.E.2d 502, 506 (1974). Since participation in board proceedings is strictly voluntary on the part of all parties and since the board's recommendations are not binding but merely advisory, it does not appear that establishment of the board is an impermissible exercise of executive power. Although it would be preferable for the order to identify the statutory authorization on which it is purportedly based, the order could be characterized as implementing the executive duties imposed by Idaho Code § 22-103.

The second question which you have proposed, i.e. whether the board can take effective action to avert or prevent foreclosure proceedings, has basically been answered above. The very factor which probably keeps the board from being an impermissible exercise of executive power — the fact that participation is voluntary and that the board has no power to affect the rights of third parties — prevents it from being able to take effective action to avert or prevent foreclosure proceedings. If a lender does participate in a mediation proceeding which results in a recommendation to pursue a course other than foreclosure, the board has no power to impose its recommendation and the lender has no obligation to accept it. While there may be merit in attempting to mediate such disputes, it should be made clear to parties seeking assistance from the board that its authority is so limited. Were it to be billed as a means of preventing or averting farm foreclosures, it could have the counterproductive effect of raising false hopes in those who desperately need assistance. If the idea were fostered that the board could take effective action to prevent foreclosures, those in danger of foreclosure might fail to take other actions, such as seeking the advice of legal counsel, which could be more effective in resolving their dilemma. Therefore, it should be made clear that the board's function is merely a mediation role.

Sincerely,

JIM JONES  
Attorney General

JTJ/tg

February 6, 1986

The Honorable Liz Allan  
Idaho State Representative  
STATEHOUSE MAIL

Re: H.B. 484

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

Dear Representative Allan:

By letter of February 3, 1986, you request our opinion regarding the constitutionality of H.B. 484. House Bill 484 has been commonly denominated the "Balanced



Treatment for Creation Science and Evolution Science in Public School Instruction Act.” For the reasons set forth below it is our conclusion that this bill is unlikely to survive a constitutional challenge.

**ANALYSIS:**

House Bill 484 is essentially identical to legislation enacted in the states of Arkansas and Louisiana. As in H.B. 484 both statutes enacted in those states did not mandate the teaching of creation science, but required, if evolution science were taught in the public schools, that creation science also be taught. Both the Arkansas and Louisiana Legislatures included in the legislative record and in their statements of purpose findings indicating that the purpose of the law was to give balanced treatment to creation science when evolution science was being taught in the classroom. Both legislatures also stated that there was no religious purpose behind the legislation. In *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (E.D. Arkansas, 1982) and *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985), each of these Balanced Treatments Acts was found to be unconstitutional.

While we have no doubt that the sponsors of this legislation as the sponsors of the corresponding laws, believe that no secular purpose is being served by promotion of the Balanced Treatment Act, the courts have not to date accepted that proposition. As stated by the *Aguillard* court:

We approach our decision in this appeal by recognizing that, irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief. Moreover, this case comes to us against a historical background that cannot be denied or ignored. 765 F.2d 1251 at 1253.

In framing the issue to be resolved the *Aguillard* court went on to state:

The sole issue for our resolution is whether the Balanced Treatment Act violates the first amendment of the United States Constitution. Although many affidavits have been filed by the state concerning the Act’s purpose and effect, it is not necessary to detail the factual record. Our disposition requires only that we consider one threshold question, whether the Act has a secular legislative purpose. *Id.* at 1254.

The court pointed out that there are three issues that must be resolved to determine whether or not the statute will survive a constitutional challenge: (1) whether the statute has a secular legislative purpose; (2) whether the principal or primary effect of the statute advances or inhibits religion; or (3) whether the statute fosters an excessive entanglement with religion. The court concluded that because the statute had a secular legislative purpose, a review of the statute under the additional criteria was unnecessary. The court stated:

Our decision is not made in a vacuum nor do we write on a clean slate. We must recognize that the theory of creation is a religious belief. We cannot divorce ourselves from the historical fact that the controversy between the proponents of evolution and creationism has religious overtones. We do not,

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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indeed cannot, say that the theory of creation is to all people solely and exclusively a religious tenet. We also do not deny that the underpinnings of creationism may be supported by scientific evidence. It is equally true, however, that the theory of creation is a theory embraced by many religions. Specifically, we must recognize that evolution has historically been offensive to religious fundamentalists because the theory cannot be reconciled with the Biblical account of the origin of man. Nor can we ignore the fact that through the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it. *Id.* at 1256.

The court proceeded to note that despite the fact that the legislative record reflected many statements by the sponsors and supporters of the Balanced Treatment Act disavowing any secular purposes, the theory of scientific creationism was so intertwined with religion as to make the theory impossible to distinguish. The court concluded by finding that the Act's intended effect was to discredit evolution by counterbalancing its teaching at every turn by teaching scientific creationism, which it found to be a religious belief. The statute, therefore, was found to be a law respecting a particular religious belief and therefore unconstitutional.

Because of the time constraints involved in our research, we have not had the opportunity to fully research whether or not this Act would also run afoul of the Idaho Constitution. However, it appears likely that art. IX, § 6, of the Idaho Constitution would likewise mandate a finding that this statute is unconstitutional. Art. IX, § 5, which is a collateral provision to § 6 has been interpreted by the Idaho Supreme Court in a stricter fashion than the federal constitution. See, *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), cert. denied 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). It is more than probable that our court would find H.B. 484 violates our state constitution. If we can be of any further assistance, please advise.

Very truly yours,

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

PJK/tg

February 6, 1986

The Honorable Dieter W. Bayer  
House of Representatives  
STATEHOUSE MAIL

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

Re: District Health Department Advertisements

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Dear Representative Bayer:

You have asked whether a particular advertisement placed in several high school newspapers in the Boise area by the local District Health Department appears to violate any provisions of the Idaho Code. Upon review of the advertisement in question and two potentially relevant Idaho code sections, it is our conclusion that there is no apparent violation of Idaho law.

### ANALYSIS:

The advertisement in question simply lists certain information and services available from the District Health Department in the Boise area, including: "contraceptive counseling and information"; "physical exams"; "pregnancy detection"; "teen services;" and "venereal disease screening." The advertisement states that "all information and services are confidential" and provides both the telephone number and address of the District Health Department. No other information is given and no statement is made that contraceptives or any care or treatment of venereal disease are available at the District Health Department.

Two sections of Idaho Code are potentially relevant. The first is Idaho Code § 39-701, which provides in relevant part that it is unlawful to refer by advertisement "to any person or persons from whom, or to any means by which, or to any office or place at which may be obtained any treatment or cure of syphilis, gonorrhea" and/or sexually related problems. The United States government, the State of Idaho, and any Idaho city are exempt from this prohibition by Idaho Code § 39-703. The advertisement only states that "venereal disease screening" is provided by the District Health Department, it does not state that any treatment or cure may be obtained at the District Health Department. Accordingly, the advertisement does not violate the precise prohibition of Idaho Code § 39-701. As a general rule, criminal or penal statutes such as this are strictly construed and are limited to cases clearly within the language used. *State v. Thompson*, 101 Idaho 430, 437, 614 P.2d 970 (1980).

Even if the advertisement had appeared to violate Idaho Code § 39-701, at least two other legal questions would arise. In view of our conclusion above, we offer no final guidance on these issues, but raise them for your information. The first is whether the District Health Department would be exempt by virtue of Idaho Code § 39-703. The District Health Department could possibly be exempt, even though it is not actually a part of federal, state or city government. District Health Departments did not exist in Idaho at the time the exemption was enacted and the legislature may have intended to exempt all governmental agencies attempting to address these kinds of problems. Moreover, by delegation or contract from the Department of Health and Welfare, the District Health Departments do perform various services, including communicable disease programs, on behalf of the State of Idaho.

A second legal question which would arise, even if there were an apparent violation and the District Health Department was not exempt, is whether Idaho Code § 39-701 is constitutional. At least one similar state statute has been found unconstitutional by a federal court as a restriction of speech protected by the First and Fourteenth Amendments of the United States Constitution. *Meadowbrook Women's Clinic v. State of Minnesota*, 557 F.Supp. 1172 (D. Minn. 1983).

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A similar analysis applies to the second section of the Idaho Code that is relevant to your question. Idaho Code § 18-603 provides that every person “who willfully publishes any notice or advertisement of any medicine or means . . . for the prevention of conception, or who offers his services . . . to assist in the accomplishment of such purpose, is guilty of a felony.” Physicians and licensed or registered health care providers acting under a physician’s direct supervision or medical orders are exempt. The advertisement states only that the District Health Department provides “contraceptive counseling and information;” it neither mentions any specific means or medicine for the prevention of conception nor offers a service to provide such means or medicine. Accordingly, by necessarily strict construction, Idaho Code § 18-603 does not appear to have been violated. As above, two additional legal issues would arise, even if an apparent violation had been found. First, the District Health Departments might possibly be exempt under this statute by acting under the direction or order of a physician. Second, as above, this statute would raise serious federal constitutional questions.

I trust this letter is responsive to your concerns. Please call if we can provide additional information or guidance.

Very truly yours,

CURT FRANSEN  
Deputy Attorney General

February 6, 1986

Representative Robert M. Forrey  
House of Representatives  
STATEHOUSE MAIL

Re: Real Estate Commission’s Rules on Education

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

Dear Representative Forrey:

The question appears to be whether the Real Estate Commission had authority to promulgate the rules they have made in connection with the instruction in real estate that aspiring salesmen and brokers must have before they may take the licensing exam. Please be aware that this analysis was made without any contact with the Real Estate Commission and therefore lacks a factual context which, if available, might have altered some of the conclusions.

There is no clear case authority in Idaho discussing the extent of an agency’s exercise of its delegated authority to make rules.

The cases in this area from other states interpret the general rule on delegation of rulemaking, i.e., that rules must be within the statutory authority, by examining the rule and the underlying statute. A rule is invalid if it exceeds the authority conferred by statute; by extending or modifying the statute, conflicting with the statute or having no reasonable relationship to the statutory purpose, *Ontario Community Foundation, Inc. v. State Bd. of Equalization*, 35 Cal. 3d 811, 678, P.2d 378 (1984); *Halford v. City of Topeka*, 234 Kan. 934, 677 P.2d 975 (1983); *Miller v. Employment Division*, 620 P.2d 1377 290 Or. 285, (1980); *Pacific Northwest Bell Telephone Co. v. Davis*, 43 Or. App. 999, 608 P.2d 547 (1979); *Cohen v. State Dep't of Revenue*, 197 Colo. 385, 593 P.2d 957 (1979); 1 Cooper *State Administrative Law*, pp. 250-263.

The Real Estate Commission was created and is governed by ch. 20, title 54, Idaho Code. Its administrative rulemaking power is couched in fairly broad terms: "The commission is expressly vested with the power and the authority to make and enforce any and all reasonable rules and regulations as shall by it be deemed necessary for administering and enforcing the provisions of this act." Idaho Code § 54-2027.

With respect to the prerequisites for a license, Idaho Code § 54-2029 provides that among the qualifications for salesman:

*the applicant . . . shall furnish to the commission proof that he has successfully completed a course of study consisting of at least thirty (30) classroom hours, or equivalent correspondence hours, or real estate courses . . . provided however, the commission may accept other courses in lieu of the above mentioned courses and may designate additional required courses.*

*A broker applicant must show that he has successfully completed a total of ninety (90) hours of classroom instruction, or equivalent correspondence hours.*

*Applicants for either license may submit a certification from any university, college or junior college, or from any privately owned school approved by the commission, that the applicant has successfully completed the prescribed courses to meet the training requirement. (Emphasis added.)*

The Real Estate Commission's rules in this area are too extensive to cite in detail but may be summarized. The Commission has established a six-member Idaho Real Estate Education Council whose purpose is to establish "real estate education policy and course content quality" for approved courses. Members of this Council are being reimbursed for travel and expenses. Forty-five hours of school are set as the minimum for salesmen. A system for "certification" of schools, courses and teachers is established, in detail. Accredited colleges and universities are the subject of several pages of rules, which include: 1) a requirement that all course prerequisites be met, 2) teachers must be "certified", 3) exams must be monitored, and 4) courses may be audited by Council representatives. Accredited colleges and universities must pay some unspecified fee to the Council for the administration of this rule.

The "certification" requirements for real estate schools, i.e., those not a part of an accredited college or university, are even more involved. Such schools cannot be used

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by brokerages as a recruiting medium for salesmen. If a school is located in the same building as a brokerage it must have a separate entrance and otherwise be distinguished from the agency. There are extensive rules on the financial responsibility and moral uprightness of school sponsors. Fairly rigid requirements are imposed for class attendance, record keeping, examinations, advertising, facilities, and even bonds by the school to protect the students. The school's certification may be cancelled if "just cause" is shown.

The courses offered in these schools must be submitted with all materials to be used including the exams, sixty days in advance, to the Commission. Certification may be refused if courses are not up to the Council's quality standards.

In addition to schools and courses being certified, so must be the instructors. No realtor who has had his license suspended or revoked within two years may instruct. Numerous qualifications are set for instructors, but these qualifications may be waived by the Council if another group of criteria are met. Instructors are also required to pay fees to the Council; and, like the schools, their certification may be withdrawn.

The "decertification" process is outlined briefly in the rules. Notice is given of deficiencies and if not corrected within 30 days, certification is withdrawn. The education director makes the allegation of deficiencies and also determines if compliance has been achieved. This decision may thereafter be appealed to the Council and then to the Commission.

Comparing the rule to the statute, very little is clearly or specifically authorized. The Commission is authorized by law to *approve* "privately owned schools" offering the courses listed in Idaho Code § 54-2029(C). The statute fails to set forth any guidelines as to the purpose, extent or manner of such "approval." The Commission's rules constitute full-scale regulation rather than simple criteria for approval or disapproval.

The administrative rules purporting to certify, regulate, and impose fees on real estate courses offered by universities, colleges, and junior colleges are not within the statutory authority of the Real Estate Commission. There is no language in the statute empowering the Commission to create, appoint, or reimburse a subsidiary council and delegate to such a body responsibility for making education policy. Neither the rule establishing the Council nor the rules relating to colleges relate to the subject matter for which the power to legislate has been delegated.

The rule requiring 45 hours of instruction for a salesman is within the agency's authority, due to the statutory language allowing "at least 30 classroom hours." The board would not be able to increase the classroom requirement for brokers because the statute in that case provides for a maximum of 90 hours.

That these school rules are beyond their statutory authority is made more apparent by contrasting the "approval" language in § 54-2029 with the schooling requirement for, e.g., barbers and cosmetologists. Idaho Code § 54-506 requires 1500 hours of schooling for an apprentice barber; Idaho Code § 54-805 requires 2000 hours of

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schooling to be a cosmetologist. Both barber colleges and cosmetology schools are extensively regulated by statutes which authorize clarifying rules, Idaho Code §§ 54-507, 54-521, 54-808, and 54-821. The rulemaking authority to regulate the *conduct* of these schools is express, and guidance is given in the statutes on the nature and extent of rulemaking authority. The longer period of time which must be spent in school would justify more regulation and the direction for rules in the statutes makes it plain what direction the rules should take.

The authority to approve or disapprove certain schools does not necessarily include the authority to certify teachers and require two extensive lists of qualifications for them to instruct. Nor does it appear "reasonable" to require that the school obtain a bond, or to establish that brokerage agencies may not set up schools and use them to recruit salesmen. The law sets out no guidelines to assist the agency in determining what the basis should be for approving schools, or for disapproving. On a pragmatic basis, these rules do not appear to be either reasonably within the standards prescribed or necessary under the statutory purpose.

There may also be constitutional problems with the rules. Specifically the decertification process for schools and instructors may be vulnerable to claims made on the basis of a deprivation of due process.

Sincerely,

FRED C. GOODENOUGH  
Deputy Attorney General  
Administrative law and  
Litigation Division

FCG/cjm

February 10, 1986

The Honorable Larry Echohawk  
House of Representatives  
Resources and Conservation Committee

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

Dear Mr. Echohawk:

Your question on the wolf depredation statute recently introduced by the House Resources and Conservation Committee has been referred to me for response.

**QUESTION PRESENTED:**

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Does a proposed statute, which allows individuals to destroy without criminal or civil liability wolves that are depredating livestock, conflict with any provisions of federal laws?

### BRIEF ANSWER:

The proposed statute could be in conflict with the Endangered Species Act and if so would not insulate a person from prosecution by the federal government.

### ANALYSIS:

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, requires that state law must yield where state and federal law conflict. Conflicts between state and federal law were recently discussed by the United States Supreme Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 104 S.Ct. 615, 78 L.Ed.2d 443 (1984):

[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress.

(Citations omitted.)

The Endangered Species Act, 16 U.S.C. §§ 1531 to 1543, was enacted by Congress in an attempt to conserve plant and animal species that are in danger of extinction. 16 U.S.C. § 1531. Under this act, it is unlawful for any person to take an endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). To “take” an endangered species “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Illegal taking of an endangered species carries civil and criminal penalties. Under 16 U.S.C. § 1540(a), a person who knowingly violates the act can be assessed a penalty of up to \$10,000 by the Secretary of Interior; under 16 U.S.C. § 1540(b), a person convicted of a knowing violation of the act can be fined up to \$20,000 and imprisoned for up to a year. Finally, 16 U.S.C. § 1535(f) discusses conflicts between state and federal laws and states that “[a]ny state law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined.”

The species of wolf present in Idaho is *Canis lupus*; this species is commonly referred to as the gray, timber, or Northern Rocky Mountain wolf. Historically, gray wolves roamed over much of Idaho but today survive only in small numbers in the central Idaho area. See generally T. Kaminski and J. Hansen, *Wolves of Central Idaho* 29 (1984). The gray wolf has been listed as an endangered species in Idaho since 1967. 32 Fed. Reg. 4001 (1967); 50 CFR §17.11 at 72.



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The bill in question, proposed I.C. § 25-2809, states that “[a]ny wolf which is threatening, tracking, pursuing, harassing, attacking or killing domestic livestock or poultry may be destroyed by anyone without criminal or civil liability.” Since the gray wolf is listed as an endangered species in Idaho, the proposed bill would probably be in direct conflict with the Endangered Species Act. According to the interpretation of the Endangered Species Act by federal fish and wildlife officials, the listing of the gray wolf as an endangered species prohibits the type of activity sanctioned by this bill. Therefore, the proposed statute could not shield a person from prosecution under the Endangered Species Act unless the taking were authorized under an exception to the Act.

The only exception that might permit the taking of a gray wolf is found in 16 U.S.C. § 1539(a)(1):

The Secretary [of Interior] may permit, under such terms and conditions as he shall prescribe —

(A) any act otherwise prohibited by section 9 [16 U.S.C. § 1538] for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); (B) any taking otherwise prohibited by section 9(a)(1)(B) [16 U.S.C. § 1538(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

An “experimental population” is defined as “any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.” 16 U.S.C. § 1539(j). Reintroduction of wolves into an area such as Yellowstone National Park would be considered an experimental population but taking them would be subject to strict regulation by the Secretary of Interior. *See* U.S. Fish and Wildlife Service, *Agency Review Draft Revised Northern Rocky Mountain Wolf Recovery Plan* 26 (1985). Even assuming this exemption may, under very strict restrictions, permit the taking of a wolf in an experimental population, it would not permit the taking of a wolf from a natural population.

Please do not hesitate to contact me if you have any further questions on this matter.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General  
Natural Resources Division

SJS/cjm

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 12, 1986

The Honorable Stanley Hawkins  
District 33 Representative  
STATEHOUSE MAIL

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

RE: 4½% Sales Tax To Balance Budget

Dear Representative Hawkins:

This is in response to your question as to the legality of using a one-half percent sales tax increase to eliminate the F.Y. 1986 revenue shortfall. The tax would begin March 1, 1986, and continue through F.Y. 1987.

It would not be possible to borrow funds now to fund F.Y. 1986 appropriations to be repaid from F.Y. 1987 revenues due to the debt limitation of Idaho Constitution, art. VII, § 1. However, the legislature can accomplish nearly the same result by adjusting the F.Y. 1986 and F.Y. 1987 appropriations as follows:

The F.Y. 1986 appropriation for public school support could be reduced by an amount sufficient to balance the F.Y. 1986 budget. The F.Y. 1987 appropriation for public schools could be increased by the amount of the F.Y. 1986 reduction. The F.Y. 1987 increase could be paid in July, 1986. The increase in the F.Y. 1987 public school appropriation could be financed by additional sales taxes.

Such legislation would affect the time when public schools receive their appropriation. The F.Y. 1986 reduction would be taken from the May 15, 1986, distribution which would otherwise occur pursuant to Idaho Code § 33-1009. The F.Y. 1987 increase could be distributed with the July 15, 1986, normal distribution.

While such legislation would delay school districts' receipt of the funds by two months, it would satisfy constitutional requirements if properly drafted. A similar approach was used to balance the F.Y. 1983 budget (ch. 4, 1983 Sess.L.). A copy of that act is enclosed. The reduced F.Y. 1986 appropriation and the increased F.Y. 1987 appropriation should be stated in specific dollar amounts to meet constitutional requirements. See, e.g., *Herrick v. Gallet*, 35 Idaho 13, 204 P. 477 (1922); *McConnel v. Gallet*, 51 Idaho 386, 6 P.2d 143 (1931).

Idaho Constitution, art. VII, § 11, restricts appropriations and expenditures to the amount of revenue applicable to the appropriations and expenditures. Idaho Constitution, art. VIII, § 1, provides a \$2,000,000 limit upon state debts and liabilities extending beyond a fiscal year without an election authorizing such debt. These provisions would not be violated by adjustment of the appropriations as discussed above.

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It should be noted that the proposal would pay additional funds to the public schools early in F.Y. 1987 and raise additional revenues to fund the appropriation after the schools are paid. This will result in additional internal or external borrowing within the 1987 fiscal year. Such borrowing funded by assessed but not yet collected taxes is statutorily authorized and the procedure has been upheld by the Idaho Supreme Court. *Black v. Eagleson*, 32 Idaho 276, 181 P. 934 (1919); *State, ex rel. Hall v. Eagleson*, 32 Idaho 280, 181 P. 935 (1919).

Sincerely,

DAVID G. HIGH  
Deputy Attorney General  
Chief, Business Affairs and  
State Finance Division

DGH/jas

Encl.

February 13, 1986

Representative Christopher R. Hooper  
Chairman, House  
Health and Welfare Committee  
Boise, Idaho 83720

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

Dear Representative Hooper:

Our office has received your request for legal advice on whether RS 12257 (copy attached) would be a valid law of general applicability.

### **CONCLUSION:**

As the proposed amendment to Idaho Code § 32-1008A would restrict its application solely to one part of the medicaid program it would probably not withstand scrutiny by a court of competent jurisdiction as to its being a law of general applicability.

### **ANALYSIS:**

The proposed amendments to Idaho Code § 32-1008A would delete a reference to medicaid recipients and add the language: "and such person's personal financial resources are insufficient to pay for the cost of his care in such facility and he requires state assistance to pay those costs. . . ." The deletion of the terms "medicaid" and "medicaid recipient" appears to follow one of the suggestions in Attorney General

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## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Opinion No. 84-7, page 5, paragraph 2 (copy attached). However, by the addition of the words “state assistance” the inference still clearly shows that this statutory section is aimed only at medicaid payments.

Attorney General Opinion No. 84-7 at page 6 found that the limitation of the program solely to medicaid recipients rendered § 32-1008A invalid as a “special” law:

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.

Footnote 2 on page 5 of that Opinion opined that the more generally worded § 32-1002 also would not pass the test of general applicability.

As a practical matter the person residing in a skilled nursing facility who would be seeking state assistance to pay for the costs of such care would have only the medicaid program open to them. Residents of nursing homes may be eligible for other public assistance programs such as AABD, SSI, etc. However, these programs are general assistance programs and are the vehicle by which an indigent person qualifies for categorical assistance thereby becoming eligible for medicaid. These other programs do not pay the cost of nursing home care as the medicaid program does that.

The proposed amendment does not remedy the defect in subsection (1) of Idaho Code § 32-1008A wherein it still refers to payments under the medical assistance program. Subsection (5) still provides that any amounts collected by the Department of Health and Welfare shall be deposited in the medical assistance account established by § 56-209b(2). The medicaid assistance account is strictly limited to contributions and payments to the medical assistance program of the state. Eliminating the words “medicaid” in subsection (1) of Idaho Code § 32-1008A does not cure the defect which still prevails by the continued use of the terms “medical assistance program” and “medical assistance account.”

Other than the medicaid program the only assistance programs to individuals in these types of facilities would be governed by the county medical indigency program. However, as the county medical indigency program is funded by county funds, it is clear that the proposed amendments would relate only to the state medicaid assistance program. Therefore, the attempted amendment does not remedy the defect that this is not a law of general applicability.

The apparent reason that the word “medicaid” was added to the original draft of Idaho Code § 32-1008A was to make it clear that this law was not aimed at non-med-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

icaid recipients so that nursing homes would not have to worry about non-medicaid patients being discouraged from entering their facilities. However, by satisfying the concerns of the nursing home industry, the inclusion of that language made it a law which is not one of general applicability. By including the words "state assistance" the same defect exists. If § 32-1008A is to be a law of general applicability and if such a law of general applicability could apply only to the cost of nursing home care, it would have to be a general support statute and apply to all residents of nursing homes at the very least. Common sense would dictate that under the principles announced in Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3, No. 3812 (February 1983), a program under a law of general applicability would have to extend beyond the parameters of the medicaid program. As the proposed amendments restrict the application of the relative responsibility program to only one part of the medicaid program, it is probable that it would not stand the test of general applicability in a court of competent jurisdiction.

The proposed amendments do not cure the defect as to whether or not patients in intermediate care facilities for the mentally retarded (ICF/MR) were included within the purview of § 32-1008A. If the legislative intent were to include ICF/MR's within this type of program, the statute should be amended to add "intermediate care facility, including intermediate care facility for the mentally retarded," in the first sentence of subsection (1).

In the administration of a relative responsibility program there are several other problems which will have to be dealt with before it can be a legally enforceable and cost effective program for the state. The most glaring problem pertains to collection efforts from non-resident responsible relatives. Idaho Code § 5-514 and § 32-1008A do not give the state the required authority to obtain jurisdiction over non-resident responsible relatives. See Official Attorney General Opinion No. 85-10, pp. 10-11 (copy attached). To meet the requirements of due process a long-arm statute would have to provide for reasonable minimal contacts with the state or some contractual undertaking by the non-resident relative. *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Without the constitutional ability to obtain jurisdiction over non-residents, the program would be faced by a substantial challenge from residents of the state as to equal protection of the law. This problem is aggravated by the fact that the bulk of the population in the state of Idaho resides within close proximity to the borders of other states, and a substantial number of responsible relatives of patients in Idaho's nursing homes live in the adjoining states.

The problems inherent in trying to collect and enforce the relative responsibility program as proposed by Idaho Code § 32-1008A can best be seen by looking at the history of the child support enforcement program. Several years ago the different states had substantial problems in trying to enforce their obligations in other states where the father was not a resident of the state of the mother and child. There was spotty and ineffective enforcement because the various states did not cooperate with one another and did not have a requirement to enter into reciprocal enforcement agreements. The federal government stepped into this area and adopted a Uniform Reciprocal of Enforcement Act which provides that each state must cooperate with one another and enforce their respective child support laws and judgments. If a relative responsibility program is to be viable in the medicaid program, it can only be done

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as a federal statute or federal regulation which requires all states to cooperate with one another in their collection and enforcement efforts. Without this an effective system that avoids these constitutional problems would be extremely difficult to obtain.

The ability of the states to adopt a relative responsibility program arose through Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3 No. 3812. This was a reinterpretation of the previous policy which declared that such a program was impermissible under the provisions of the federal social security act. This publication was not promulgated pursuant to the federal administrative procedures act. As it would impose fiscal liability upon a wide ranging class of people, it should have been promulgated as a regulation in order that it would have the force and effect of law. Such a medicaid manual transmittal is little more than a federal promise not to impose fiscal disallowances upon the state. However, such a hold harmless promise would not bar a federal court from enjoining the expenditure of federal funds under the medicaid program in an appropriate legal proceeding.

Medicaid Manual Transmittal H.C.F.A. Pub. 45-3 does not address the question as to whether or not the agency of the state which administers the medicaid program would also be permitted to be the agency which enforces the statute of general applicability imposing a relative responsibility program. The prohibition under the social security act, as reinterpreted by the transmittal, is that such liability could not be imposed as part of the state plan. As the Department of Health and Welfare is the single state agency that administers the medicaid program in Idaho, it would appear that this agency should not make these collections even under a statute of general applicability. Requests for clarification from the federal authorities on these various points have not resulted in any sort of definitive statement, especially as to what is or is not an acceptable law of general applicability. It must be noted that the federal agency funds about two-thirds of the total cost of the medicaid program and would receive two-thirds of the amount collected under a relative responsibility program. Quarterly Federal Report, H.C.F.A. No. 64. However, it would seem that the medicaid bureau could administer a relative responsibility program under a law of general applicability as the federal policy was contained in a medicaid action transmittal. As such, it would be highly inequitable for the federal funding agency to attempt to impose any fiscal disallowance or sanction for following the medicaid action transmittal; assuming, of course, that the state does have a law which the federal agency would determine to be a law of general applicability. However, a court could question the state medicaid agency's enforcing the state's relative responsibility program as to whether or not it was operating under a law of general applicability.

I hope this guideline has addressed your concerns with regard to Idaho Code § 32-1008A as proposed to be amended by RS 12257. If this office can be of further assistance, do not hesitate to contact us.

Sincerely,

MICHAEL DeANGELO  
Deputy Attorney General  
Chief of Legal Services  
Division

MD/jb

Enclosure

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 14, 1986

The Honorable Laird Noh  
Idaho State Senator  
STATEHOUSE MAIL

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

**Re: Constitutionality of Fish and Game Commission Appointment Requirements**

Dear Senator Noh:

In your letter of January 21, 1986, you requested our opinion as to whether Idaho Code § 36-102(d), taken with Idaho Code § 36-102(a)(b), required a commissioner to name a specific political party to which he or she belongs or whether a commissioner could declare himself or herself to be "independent" or belonging to no specific political party. My letter of January 28, 1986, advised you that these code sections do require the declaration of a specific political party to which a commissioner belongs. You have now requested advice as to the constitutionality of Idaho Code §§ 36-102(d) and 36-102(a)(b) in the following respects:

- (1) Does the requirement of § 36-102(d) of "a declaration as to the name of the political party to which such commissioner belongs" deprive citizens who do not in fact belong to any political party of a right or privilege protected by the Idaho or United States Constitution?
- (2) Is the requirement of a declaration of a political party in this instance unconstitutionally vague because there is no way to test it, considering that Idaho does not require a declaration of party affiliation when voting or registering to vote?

#### **ANALYSIS:**

Idaho Code § 36-102 creates and defines membership, and its requirements, of the Idaho Fish and Game Commission. Numerous qualifications are stated in § 36-102(b):

The selection and appointment of said members shall be made solely upon consideration of the welfare and best interests of fish and game in the State of Idaho, and no person shall be appointed a member of said commission unless he shall be well informed upon, and interested in, the subject of wildlife conservation and restoration. No member shall hold any other elective or appointive office, state, county or municipal, or any office in any political party organization. Not more than three (3) of the members of said commission shall at any time belong to the same political party. Each of the members of said commission shall be a citizen of the United States, and of the State of Idaho, and a bona fide resident of the district from which he is appointed as hereinafter set forth. . . .

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In addition, § 36-102(d) states that at the time the oath of office is taken “there shall be added a declaration as to the name of the political party to which such commissioner belongs, . . .”

The major constitutional issue raised by your first question is whether a citizen who in fact belongs to no political party is deprived of equal protection of the law by the fact that he or she could not be appointed a fish and game commissioner without declaring affiliation with an organized, recognized political party in the state.

Equal protection looks at any classification within a statute which impacts differently upon the categories of persons affected. The Idaho and United States Supreme Courts have articulated equal protection standards which differ according to the interests and nature of the rights affected. The most rigorous test is that of “strict scrutiny” which requires a classification to be justified by a compelling state interest. However, this test applies only to “suspect classifications,” such as those based upon race, and to classifications burdening “fundamental interests,” such as public access to the courts. See, e.g. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). This standard is not applicable because no suspect classes or fundamental interests are involved here.

The more restrained standard, commonly termed the “rational basis” test, appears to be the applicable test. Under this standard, a classification will be upheld if it is rationally related to a legitimate government objective. *Langmeyer v. State*, 104 Idaho 53, 656 P.2d 114 (1982). In *Langmeyer*, the question before the court was the constitutionality of a five year residency requirement to qualify for appointment to a county planning and zoning commission. Against an argument that a higher standard of review should apply, the court said:

While we acknowledge the important functions served by commissions appointed by governing bodies within this state, eligibility for appointment to one of these commissions cannot be equated with the franchise to vote or attain the same level as a “basic necessity of life.” Therefore, the statute is measured under the traditional equal protection test — whether the classification rationally furthers a legitimate state interest. (cites omitted.) *Langmeyer* at 56-57.

On the basis of this finding in the *Langmeyer* case, it is our conclusion that the equal protection standard would apply to the Fish and Game Commission, also an appointive commission.

The court next discussed the application of the rational basis standard. “The classification under the traditional basis test is not unconstitutional because it results in some inequality — mathematical precision is not required.” Later, in *Bint v. Creative Forest Products*, 108 Idaho 116, 120, 697 P.2d 818 (1985), a workman’s compensation case, the court held: “Under the ‘rational basis test,’ a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it.”

It has been found generally to be a legitimate governmental objective to politically balance an appointed commission as is required by Idaho Code § 36-102(b):



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The constitutionality of statutes providing that not more than a certain number or proportion of a certain class of public officers should be elected or appointed from a particular party, has, with some exceptions (cite omitted), been generally sustained. (cites omitted) 140 A.L.R. 471, 472 (1942).

The Idaho Constitution does not forbid a political test for holding public office. If it is legitimate to statutorily require a balanced commission, is it also allowable by the requirement of a declaration of party affiliation to, in effect, exclude an “independent”?

In researching the decisions of other states, we have found few relevant cases dealing with political qualifications for an appointive office. None of the cases found have been recently decided. In *State v. Sargent*, 145 Iowa 298, 124 N.W. 339 (1910), the Supreme Court of Iowa upheld a city ordinance that required a mayor, in cities having a population of more than 20,000, to appoint a board of fire and police commissioners from the two leading political parties. The court upheld the limitation of this requirement by saying:

The only point . . . is that it forces an elector, if he would stand any show of appointment to the board, to ally himself with one or the other of the two dominant parties, thus destroying his free agency in matters political. There is no merit, as we think, in this argument.

The court went on to say the requirement in question was a common legislative requirement. It also said:

True, an elector who did not ally himself with one or the other of the dominant parties could not be appointed to membership upon the board; but there is no such thing as a right to hold office. This is a mere privilege at all times within the control of the legislature, save where limited by some constitutional provision.

See also, *State v. Marion Circuit Court*, 225 Ind. 7, 72 N.E. 2d 225 (1947).

Cases based on particular state constitutional requirements, not found in Idaho's Constitution, have gone the other way in deciding issues in this subject area. See, e.g. *Attorney General v. Detroit*, 58 Mich. 213, 24 N.W. 887 (1885); *State v. Washburn*, 167 Mo. 680, 67 S.W. 592 (1902).

In analyzing the rationale behind the structure of the fish and game commission, it appears the purposes are to have knowledgeable, concerned commissioners and also to provide political balance and geographical representation on the commission. The statutory exclusion of an “independent” recognizes that, practically speaking, an “independent” exists only between elections. If one wishes to vote or otherwise participate in the formal political processes of the state, one usually must choose to do so through a recognized political party. The fish and game commission is an appointed commission subject to the political process. The excluding of an “independent” is rationally related to the legitimate purpose of having the officially recognized and organized political forces in the state as members of the commission. While the legislature

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could choose to amend the law to allow “independents” to become commissioners, it does not offend the equal protection clauses of the Idaho or United States Constitutions to exclude them under the rational basis test.

Regarding the issue of due process, in *Bint*, supra, at 823, the court said:

The applicable standard of analysis under a due process challenge is the same as under an equal protection challenge: whether the challenged law bears a rational relationship to a legitimate legislative purpose.

Hence, a due process challenge would find no liberty interest violated.

Recent cases decided by the Idaho Court of Appeals have discussed a new intermediate standard of review. In Idaho, this standard has been denominated as the “means focus test.” See, *State v. Reed*, 107 Idaho 162, 686 P.2d 842 (App. 1984), which discusses this test. While we believe some questions may remain as to the applicability of the basic rational relation test in this matter, we are unwilling to hypothesize as to the future reasoning of the Idaho Supreme Court.

Further, it is unlikely that there is a constitutional violation of art. I, § 2, of the Idaho Constitution regarding privileges and immunities which reads, “. . . and no special privileges or immunities shall ever be granted *that may not be altered, revoked or repealed by the legislature* (emphasis added).” This part of § 2 has been little used or cited in Idaho cases. Because the emphasized language qualifies a grant of a privilege or immunity, it is difficult to apply. In *Fisher v. Masters*, 59 Idaho 366, 378, 83 P.2d 212 (1938), it was said that the declaration of rights contained in this article guarantees “equal rights, privileges and immunities” to all persons within the bounds of the state, though the constitution containing it was adopted by a limited number of male citizens. The case, however, did not explain what “privileges and immunities” meant, nor add the limiting language of the constitution emphasized above. The ability to become a fish and game commissioner is not a privilege that “may not be altered, amended or repealed by the legislature.” It may be. Consequently, this constitutional issue appears not to be applicable here.

Finally, the statute, Idaho Code §§36-102, also is not unconstitutionally vague. The test for finding a statute void-for-vagueness on its face, and thereby in violation of due process, is whether the law is impermissibly vague in all of its applications. *State v. Newman*, 108 Idaho 5, 696 P.2d 855 (1985). In *Newman*, the court noted the three underpinnings of the vagueness doctrine. They are: (1) to give people a reasonable opportunity to know what is and is not prohibited conduct, (2) to avoid giving those charged with enforcing the law arbitrary and discriminatory enforcement standards, and (3) to avoid delegating basic policy matters to decision makers by giving them clear standards for judging innocence or guilt. *Newman* at 12.

The vagueness doctrine is not applicable here because the thrust of the vagueness doctrine is to prevent prosecution of innocent people under vague laws. Here, the statute is clear on its face and no prosecution would be involved. It requires a declaration as to which political party a commissioner belongs. It may be difficult to determine what this affiliation really is since a person is not required to declare it for voting or

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voter registration. However, the appointment is subject to confirmation by the senate. The senate committee may ask relevant, probing questions of a nominee before confirmation. The senate has the freedom to exercise its judgment in affirming a nomination and the confirmation process is not subject to censure by anyone. The vagueness issue is not applicable to the question presented because the statute is not vague on its face and not vague in its application since a nominated commissioner is required to make a declaration of his or her party.

We note, too, that a presumption of constitutionality attaches to a statute. *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975). When a court judges a statute, another principle of statutory construction was stated in *State v. Hanson*, 81 Idaho 403, 409, 342 P.2d 706 (1959):

The cardinal principle of statutory construction is to save and not destroy . . . and it is incumbent upon a court to give a statute an interpretation which will not nullify it if such construction is reasonable or possible.

Based on the grounds discussed above, it is our judgment that the statute is not unconstitutional as it presently stands.

Please contact me if you have further questions or concerns.

Very truly yours,

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

PJK/tg

February 25, 1986

The Honorable Ron J. Beitelspacher  
Idaho State Senator  
STATEHOUSE MAIL

The Honorable Larry Anderson  
Idaho State Senator  
STATEHOUSE MAIL

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

Re: Senate Bill 1325

Dear Senators Beitelspacher and Anderson:

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

This is in response to your questions regarding the constitutionality of Senate Bill 1325. In particular, you have asked:

1. Is Senate Bill 1325 an unconstitutional delegation of the legislature's power to tax? As proposed, Senate Bill 1325 will allow certain vehicles to elect between two different systems of taxation.
2. Is it constitutional for Senate Bill 1325 to originate in the Senate since it is apparent that it is a revenue raising measure? It is my understanding that revenue raising measures under the Idaho Constitution must originate in the House of Representatives.
3. Is Senate Bill 1325 unconstitutionally discriminatory based on the fact that proportionately registered vehicles must pay a registration fee whereas nonproportionately registered vehicles may elect to pay either a mileage fee or the registration fee as proposed in Senate Bill 1325?

### *Delegation of Legislative Power*

The bill would not result in an unconstitutional delegation of legislative power. Idaho Constitution art. III, § 1, vests the power to make laws in the Senate and House of Representatives. Accordingly, legislative power to make laws cannot be delegated to any other authority. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977); *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975).

However, the bill does not delegate to individuals the power to make laws. Rather, the bill defines the taxes and defines optional schedules. In this respect, it is similar to numerous state and federal tax statutes, which provide optional means by which taxes can be computed. Despite this common practice, we are aware of no state or federal cases holding that statutorily defined optional tax schedules result in an impermissible delegation of legislative power. Also, as the Idaho Supreme Court pointed out in *Idaho State Tax Commission v. Payton*, 107 Idaho 258, 259, 688 P.2d 1163 (1984), the Idaho Constitution accords the legislature substantial discretion in matters of taxation.

Thus, the use of statutorily defined optional tax schedules would not result in an unconstitutional delegation of legislative power.

### *Revenue Bills To Originate In The House.*

Idaho Constitution art. III, § 14, provides in pertinent part that “. . . bills for raising revenue shall originate in the house of representatives.” Section 2 of the bill raises the amount of the annual registration fee for proportionally registered vehicles.

Many state constitutions contain language similar to that of Idaho Constitution art. III, § 14. Many courts have interpreted the phrase “bills for raising revenue” as applicable only to general revenue measures rather than to charges imposed for which the citizen directly receives a benefit in return (e.g., use of state maintained high-

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ways). This legal question is analyzed in some depth in the enclosed legal guideline of February 24, 1983, to Senator Fairchild.

As the guideline points out, the Idaho Supreme Court has not directly considered the question. The guideline concludes that the more likely result is that such a bill may originate in the Senate. However, if it is practical to do so in the future, we would recommend that similar bills originate in the House to avoid the potential problem.

### *Discrimination Against Interstate Commerce.*

Generally, the commerce clause of the U.S. Constitution art. I, § 8, cl. 3, has been interpreted to prohibit state laws which directly discriminate against interstate commerce or which impose an undue burden upon interstate commerce. *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

In recognition of the fact that taxation is an essential function of state government, the U.S. Supreme Court has adopted special rules to determine whether state taxing statutes violate the commerce clause. In *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the U.S. Supreme Court set forth a four-part test to evaluate state tax statutes. State tax statutes do not violate the commerce clause if:

- (1) The activity taxed has a substantial nexus with the state;
- (2) The tax is fairly apportioned;
- (3) The tax does not discriminate against interstate commerce; and
- (4) The tax is fairly related to the services provided the state.

Based upon existing case law, it appears to be clear that S.B. 1325 satisfies parts one, two, and four of the test. The remaining discussion will focus upon the question whether the tax would violate part three of the test by discriminating against interstate commerce.

Occasionally, discrimination appears on the face of the taxing statutes in express terms (e.g., taxing only interstate vehicles). As to such statutes, the U.S. Supreme Court notes that a "virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

More commonly, the question is whether the impact of the tax falls exclusively or more heavily on out-of-state enterprises. *Boston Stock Exchange v. State Tax Commission* 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). As stated in *Maryland v. Louisiana*, *supra*:

A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name

may be, will in its practical operation work discrimination against interstate commerce.” (citations omitted) In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as a result of various tax credits and exclusions. 451 U.S. 756.

Thus, to determine whether S.B. 1325 violates the commerce clause, we must also determine if the practical operation of Idaho’s tax statutes will work discrimination against interstate commerce.

S.B. 1325 retains an annual registration and ton-mile fee schedule and retains the trip permit plus ton-mile fees. However, it also establishes an annual registration fee schedule based upon gross weight. The schedule is required for vehicles which are proportionally registered pursuant to Idaho Code § 49-127B, and optional for other vehicles. Idaho Code § 49-127B provides all fleet owners with the option of proportionally registering or paying the registration (or trip permit) plus ton-mile fees of Idaho Code § 49-127.

Reading the bill, together with Idaho Code § 49-127B, all motor vehicle owners would have the option of paying fees pursuant to either the registration/ton-mile fees of Idaho Code § 49-127 or the gross weight fees prescribed by Idaho Code § 47-127B. The statute is thus facially neutral and not subject to the virtual per se rule of invalidity. Therefore, the only remaining question is whether the practical operation of the statute will result in discrimination against interstate commerce.

It has been suggested to our office that the bill would result in discrimination against certain Idaho-based carriers engaged in interstate commerce, as discussed below.

A majority of states, including Idaho, operate pursuant to the “International Registration Plan” (I.R.P.). The I.R.P. is a reciprocity agreement among states which have agreed to grant reciprocity to proportionally registered fleets of interstate vehicles and certain other vehicles not eligible for proportional registration. The proportional registration formula of Idaho Code § 49-127B allocating Idaho tax according to mileage in Idaho versus elsewhere is the allocation formula called for by I.R.P. § III.A. The percentage representing state mileage for each state is multiplied by the total fees each state charges for full registration to determine the fee of each state.

Pursuant to the I.R.P., the registrant must purchase a “base plate” from a “base jurisdiction.” The “base jurisdiction” is a state in which the registrant has an established place of business, where mileage is accrued by the fleet and where operational records are maintained or can be made available. I.R.P., § II.C.1.

The registrant files an application for proportional registration only in the base jurisdiction and receives from the base jurisdiction registration plates and cab cards. The cab cards list the jurisdictions in which the vehicles are proportionally registered. The above procedure minimizes filing requirements and results in payment of roughly the equivalent of one allocated registration fee.

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We are not aware of any state which mandates proportional registration. However, if a registrant based in an I.R.P. state desires to proportionally register in the I.R.P. states, he must file an application for proportional registration in a base state. (Certain exceptions exist due to specific reciprocity provisions, e.g., a registrant based in a non-I.R.P. state could file in the member state in which the most miles have been operated.)

With the foregoing in mind, we consider the applicability of S.B. 1325 to three interstate carriers. Each operates in Oregon, Idaho, and Utah. Idaho, Inc., has an established place of business (base jurisdiction) only in Idaho; Oregon, Inc., has an established place of business only in Oregon; and Tri-State, Inc., has an established place of business in all three states. They are all competitors. They all will pay the least amount of fees if they proportionally register in Utah and Oregon and pay ton-mile tax in Idaho, pursuant to Idaho Code § 47-127.

Oregon, Inc., and Tri-State, Inc., will be able to accomplish their objective by proportionally registering in the base state of Oregon (or Utah) and paying ton-mile tax in Idaho. Idaho, Inc., however, will not be able to proportionally register in Utah and Oregon unless it applies for proportional registration in Idaho, since it must file its application for proportional registration in a base state. I.R.P., § IV.A.1. Thus, Idaho, Inc., must either forego the benefits of proportional registration in Utah and Oregon or pay the higher (in this example) proportional fee in Idaho.

Circumstances such as described above are probably rare. Nevertheless, a carrier in Idaho, Inc.'s, situation might argue, based upon cases such as *Maryland v. Louisiana*, supra, that the statute "will in its practical operation work discrimination against interstate commerce." However, it is difficult to predict how the courts would deal with the situation since it is so different from that which is normally encountered. Normally, such cases arise because of alleged discrimination "against interstate commerce in favor of local interests." *Maryland v. Louisiana*, supra.

In the example above, the discrimination, if any in a legal sense, is against solely locally-based carriers doing interstate business. Also, it is not Idaho's statutes in themselves which would cause the locally-based carrier possible competitive problems with out-of-state-based interstate carriers. Rather, the problem would result from Utah and Oregon's application of the I.R.P. to the situation. See, e.g., *Kidd v. Alabama*, 188 U.S. 730, 23 S.Ct. 401, 47 L.Ed. 699; *Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299 (1935), which arguably provide no basis for an attack upon Idaho's statute.

Finally, Idaho could argue that to the extent the solely locally-based interstate carrier may pay more than out-of-state-based carriers, the addition is fairly related to a justifiable difference in the operations of the carriers — namely, that carriers with a sole base of operation in Idaho have a higher proportion of operational contact with Idaho than the out-of-state carriers.

The potential challenge to S.B. 1325 could be avoided by amending the bill to allow proportional registration utilizing either the schedule of Idaho Code § 49-127 or Idaho Code § 49-127A.

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It should be noted, however, that if all persons have the option of paying tax under the old schedule or the new one, persons opting the new schedule presumably will be doing so to reduce their fees. As a result, state revenues would necessarily be reduced.

Sincerely,

DAVID G. HIGH  
Deputy Attorney General  
Chief, Business Affairs and  
State Finance Division

DGH/jas

### **ADDENDUM**

February 24, 1983

Honorable Roger Fairchild  
Senator, State of Idaho  
STATEHOUSE MAIL

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

Dear Senator Fairchild:

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

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

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

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

There is a line of authority, however, which indicates that this bill may not be "for raising revenue." That line of cases is summarized by Annotation, Application of



Constitutional Requirement that Bills for Raising Revenue Originate in Lower House, 4 A.L.R. 2d 973 at 980, as follows:

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

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

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

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

\* \* \*

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

In *Mikell v. Philadelphia School Dist.*, 359 Pa. 113, 58 A.2d 339 (1948), a special property tax was levied to pay for extraordinary school expenses. The court indicated that such a tax was not for raising revenue. A similar conclusion was reached in *Opinion of the Justices*, 233 A.2d 59, 62 (Del. 1967), in which the court stated:

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

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

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

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

With the exception of *State ex rel. Parsons v. Workmen's Compensation Exchange*, 59 Idaho 256, 81 P.2d 1101 (1938), the only cases which have been decided on this issue by the Idaho Supreme Court have involved taxes of general applicability which are to be paid to the state's general fund. It is my impression that were this issue to come before the Idaho Supreme Court, it would be inclined to follow the authority which holds that SB 1044 is not "for raising revenue." Although such a result is not required by Idaho case law, I believe the court would adopt this conclusion based upon a reading of the above cases in conjunction with *Dumas* and cases cited below. In *Dumas* the court held that the measure in question should have originated in the house, stating:

It provides for levying a direct tax against all property in the state, for governmental purposes. . . . This is truly a tax levied for governmental purposes as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of art. III, § 14 of the constitution.

35 Idaho at 566.

As can be seen, the court was careful to demonstrate that the act in question did fund general governmental purposes. Although the court did not decide specifically that such a requirement must be met before a measure will be considered to be "for raising revenue," by implication, the conclusion that such a purpose was required would appear to be sound. Accordingly, if SB 1044 can be viewed properly as not in support of general governmental purposes, it may not fall within the prohibition of art. III, § 14 of the Idaho Constitution.

A similar provision to SB 1044 was considered by the New Jersey Superior Court in *Raybestos-Manhattan, Inc. v. Glaser*, 144 N.J. Super. 152, 365 A.2d 1 (1976). There a senate bill which became law levied a tax on any employer who ceased doing business in the state of New Jersey. The amount of tax was to be equal to the total value of non-vested pension benefits for employees who had been employed by the employer ceasing business for fifteen years or more. The statute further provided that employees with at least fifteen years of experience with the employer could file a claim to be paid the equivalent of their non-vested pension benefits. Quoting *Mickell, supra*, the

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court held that the tax was not “for raising revenue” because it was not used for “general governmental purposes.” Rather, the bill constituted a tax on the employer for the benefit of the employees, just as SB 1044 provides.

It is quite possible that an Idaho court could reach the same conclusion. Reference to Idaho Code § 72-1302 indicates that the purpose of the Employment Security Act is “to [e]ncourage employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. . .” It should be noted that the money accumulated under the provisions of the Employment Security Act is placed not in the general fund, but in a special employment security fund established by Idaho Code § 72-1346. This fund may not be used for any purpose except as allowed by the Employment Security Act. In this regard, the fund is in the nature of a trust fund which is not available for general governmental purposes but rather may be used only to provide unemployment compensation for the covered workers. See *Totusek v. Department of Employment*, 96 Idaho 699, 535 P.2d 672 (1975).

Indeed, at least one justice of the Idaho Supreme Court has indicated that the unemployment tax is not one “for raising revenue.” In *In re Gem State Academy Bakery*, 70 Idaho 531, 542, 224 P.2d 529 (1950), Justice Givens stated:

The intent and purpose of both the state and national governments in enacting the unemployment compensation statute was not to raise money for revenue purposes, but to raise money to do away with unemployment. . .

Although this statement was made in dissent, the issue was not one contrarily decided by the court nor in fact even addressed by the majority opinion.

Finally, in *State ex rel. Parsons v. Workmen's Compensation Exchange*, 59 Idaho 256, 81 P.2d 1101 (1938), the court faced a challenge to an amendment to the workmen's compensation law which provided that if a worker should be killed in an accident covered by the workmen's compensation act and if that worker had no dependents, the employer should pay \$1,000 to the State Industrial Administration Fund. The bill was challenged on the grounds that it raised revenue yet originated in the senate. Even though the act required taxpayers to pay money to the state, the court indicated that it was not a measure for revenue raising. This demonstrates at least one example in which the court has avoided invalidating an act which does not place revenue into the general fund.

There is some disturbing dicta in *Parsons*, 59 Idaho at 260, to the effect that “the provision in question is neither a license nor an excise tax.” Further, the court commented: “It can make no difference with the validity of the law, for what purpose the state uses the fund.” 59 Idaho at 262. I assume the court made the latter statement under the rationale that since the payment in question was not revenue its use was immaterial. The first statement, however, is somewhat bothersome because it seems to infer that excise taxes are for raising revenue and the Idaho Supreme Court has stated in another context that the unemployment compensation tax is an excise tax. See *Employment Security Agency v. Joint Class “A” School Dist.*, 88 Idaho 384, 400 P.2d 377 (1965). Because the comment in *Parsons* is of such a passing nature and is

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clearly dicta in the case, it should not be relied upon to hold that SB 1044 must not originate in the senate. In fact, when the whole issue is considered, it is probably of marginal relevance. Further, it should be pointed out that at least one court has refused to adopt the "general governmental purposes" test, without comment. See *Glasgow v. Aetna Ins. Co.*, 284 Ala. 177, 223 So. 2d 581 (1969).

Just as the workmen's compensation statute was deemed by Justice Givens not to be revenue raising, and as the courts found the taxes in *Parsons* and *Raybestos* not to be revenue raising, the court certainly could conclude that SB 1044 is not "for raising revenue." If not for the concerns stated in the previous paragraph I would be quite confident that SB 1044 could originate in the senate. Given these concerns, however, the conclusion is somewhat less clear. Although the court could decide not to apply the "general governmental purposes" test, or could find in this instance that the tax is an excise tax and, thus, is for raising revenue, in my estimation, it probably would be inclined to characterize the increased levies as not in furtherance of general governmental purposes, not revenue raising, and hence not in violation of art. III, § 14 of the Idaho Constitution although, again, this conclusion cannot be stated with absolute certainty.

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

Sincerely,

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

KRM/bc

February 27, 1986

The Honorable Steve Antone  
Chairman, Revenue and Taxation Committee  
STATEHOUSE MAIL

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

Re: Amending Revenue Bills

Dear Representative Antone:

This is in response to your question whether the Senate can amend revenue bills to impose additional taxes not included in a house bill, and whether different revenue measures can be included in one bill.

Idaho Constitution, art. III, § 14, provides:

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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.

The question of the Senate's ability to amend revenue bills to add additional taxes was decided by the Idaho Supreme Court in *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974). In that case, the House Bill had changed the date of reference to the Internal Revenue Code from January 1, 1971, to January 1, 1972, had made various reductions in individual income tax rates, and made other minor changes. Senate amendments eliminated the provision allowing individuals to deduct federal income tax liability from Idaho taxable income and added a provision increasing the tax rate applied to corporations.

The Court upheld the Senate amendments which increased taxes stating:

To prohibit the Senate from amending House originated revenue bills would be an obstruction to the legislative process. Article 3, § 14 must be read to require that revenue bills originate in the House, and that the Senate is permitted to amend such bills. [96 Idaho at 179].

Thus, it is now clear that the Senate may amend House revenue bills to add additional taxes. The House, in turn, can review the Senate amendments when the bill returns to the House.

You have also asked whether one bill could contain more than one local option tax provision. Such a bill would not violate Idaho Constitution, art. III, § 16, as interpreted by the Idaho Supreme Court. Idaho Constitution, art. III, § 16, provides:

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

The "one subject" requirement has been considered by the Idaho Supreme Court in a number of early cases, the most recent of which is *ALF v. Langley*, 66 Idaho 763, 168 P.2d 831 (1946). Therein, the Court defined the "one subject" requirement as follows:

To comply with Article 3, Section 16, the statute must disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim.

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

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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; \*\*\* [66 Idaho at 768-769]

Thus, numerous provisions may be included in one act provided they are all germane to the general subject. The general subject of a bill might be providing local option taxing authority to cities and counties. So long as the various provisions of the bill are germane to that subject, the various provisions of the bill could be included in one bill.

If you have any questions regarding this letter, please let me know.

Sincerely,

DAVID G. HIGH  
Deputy Attorney General  
Chief, Business Affairs and  
State Finance Division

DGH/jas

February 28, 1986

The Honorable Terry Sverdsten  
Chairman, Senate Education Committee  
Idaho State Senator  
STATEHOUSE MAIL

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

Re: Constitutionality of House Bill No. 523

Dear Senator Sverdsten:

Your letter requests guidance concerning the constitutionality of House Bill No. 523. The bill prohibits:

any employee of a school district, to teach during the employee's working hours in the school district, that the manifestation of sexual desire toward a member of one's own sex or that erotic activity with a member of one's own sex is a normal or acceptable form of behavior.

As a sanction, the bill provides:

Violation of the provisions of this section may be grounds for immediate discharge. For certified professional personnel, discharge shall be accom-

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plished as provided in section 33-513, Idaho Code. Discharge pursuant to this section may also be grounds for revocation of a certificate by the state board pursuant to section 33-1208.

Your inquiry raises a basic constitutional question:

Is the prohibition against teaching that homosexuality is normal or acceptable behavior so overbroad and vague as to violate the first amendment's prohibition against restraint of free speech?

You also request our comments concerning problems of vagueness and due process raised by the bill.

Although the state may properly regulate conduct in the classroom, including presentation and content of curriculum, the prohibitions imposed by House Bill No. 523 address an area of law as yet unsettled by the courts. It is virtually certain that the bill would be the subject of protracted and costly litigation.

### ANALYSIS:

House Bill No. 523 prohibits teaching during working hours that homosexual conduct is normal or acceptable behavior. The legislation is clearly designed to regulate speech since, by its terms, it outlaws advocating a specific point of view. The U.S. Supreme Court consistently holds that the espousal of a point of view, whether political or social, constitutes speech in its purest form. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

The context in which the right of speech is exercised is as important as the content of the speech. The Supreme Court addressed the question as it relates to public schools and teachers in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). The Court there recognized that teachers do not lose their first amendment rights when they go through the schoolhouse door, but at the same time noted that "the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. Therefore, the Court indicated that there can be circumstances when it is permissible to control the speech of school teachers.

The Court stated that the situation requires balancing the right of the teacher to free and unfettered expression granted by the first amendment against the right of the state, in this case the school district, to properly function. The balancing test includes the following factors: whether the teacher's or employee's action disturbs the orderly school administration, upsets the curricular policies of the institution, makes sexual advances towards the students, or otherwise engages in unprotected conduct or speech. *Pickering*, 391 U.S. at 570.

The school teacher's first amendment right to free speech in the classroom has often been labeled "academic freedom." Although academic freedom is not an enumerated right of the first amendment, the courts have emphasized that "the right to

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teach, to inquire, to evaluate and to study is fundamental to a democratic society.” *Parducci v. Rutland*, 316 F.Supp. 352, 355 (M.D. Ala. 1970). This court further stated that:

the safeguards of the First Amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers.

*Parducci* at 355.

But, as *Pickering* instructs, this right is not absolute and must be balanced against the competing interests of society. State and local school districts have the obvious authority to control what goes on in the public schools including regulation of employee conduct, and course content or curriculum. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). “A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the state has a vital concern.” *Shelton v. Tucker*, 364 U.S. 479, 485, 81 S.Ct. 247, 250, 5 L.Ed.2d 231 (1960). Thus, “free speech does not grant teachers a license to say or write in class whatever they may feel like. . . .” *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971).

[Any] conduct [by a teacher] in class or out of it, which for any reason — whether it stems from time, place or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969).

It follows that teachers do not have an absolute first amendment right to teach controversial subjects in the classroom. *See, Adams v. Campbell County School District*, 511 F.2d 1242 (10th Cir. 1975). Nor can a teacher teach in a manner that contravenes the valid dictates of the employer. *Ahern v. Board of Education of the School District of Grand Island*, 456 F.2d 399 (8th Cir. 1972). Although academic freedom as part of the first amendment is recognized, course content may be controlled by the state or the school district. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).

In short, the time, place, manner, content, context and age of the student(s) must be considered. Several examples should clarify the importance of these factors.

A teacher was dismissed for cause in a Mississippi school district after taking time out from a spelling lesson to discuss the meaning of the word “queer.” *United States v. Coffeeville Consol. School District*, 365 F.Supp. 990 (D. Miss. 1973). The incident occurred in a class of eighth grade boys. One boy asked, “What is a queer?” The teacher wanted the student to be quiet and drop the subject, but was again asked and other boys joined in asking the question. The teacher then began a discussion of ho-



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homosexuality which was dispassionate, without foul words and without reference to any personal experience. The discussion was a one-time occurrence. The court held that in no way was the conduct or content repulsive to minimum standards of decency appropriate to that particular classroom. Thus, the teacher could not be discharged.

Other courts have used the balancing test factors, with varying results. In the *Keefe* case mentioned above, a teacher could not be dismissed simply because a vulgar word was used in an article assigned to the class to read. However, in *Pyle v. Washington County School Board*, 238, So.2d 121 (Fla. App. 1970), the court held it was proper to dismiss a high school band instructor for making reference to sex, virginity and pre-marital sex, which had no relationship to the course content. See, also, *Brubaker v. Board of Education*, 502 F.2d 973, cert. den. 421 U.S. 965, 95 S.Ct. 1953, 44 L.Ed.2d 451 (7th Cir. 1974).

The uncertainty clouding our response to your question is best illustrated by the outcome of the closest case that has yet come before the federal courts. In *National Gay Task Force v. The Board of Education of the City of Oklahoma City*, 33 FEP Cases 1009 (No. CIV-8-1174-E, issued June 29, 1982), the U.S. district court for the Western District of Oklahoma upheld the constitutionality of a statute proscribing "public homosexual conduct," which the Oklahoma Legislature had defined as:

advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; . . .

On appeal, the Tenth Circuit Court of Appeals reversed the district court and held that the statute was unconstitutionally overbroad, in violation of the first amendment's guarantee of free speech. *National Gay Task Force v. The Board of Education of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984).

The U.S. Supreme Court, in a one-line 4-4 decision, affirmed the holding of the Tenth Circuit. Justice Powell did not participate and there is no way to predict how his tie-breaking vote will be cast when a similar issue again presents itself to our highest court.

It will suffice to review the opinions of the district and circuit courts in the *National Gay Task Force* case to show the continuing level of constitutional uncertainty that attends this issue. The uncertainty is not over the legal principles, but over the way they are applied.

For example, both the district and the circuit courts agreed on the test to be applied in judging whether the Oklahoma statute infringes upon constitutionally protected speech. The district court, relying on the *Tinker* case mentioned above, stated:

[T]he crucial question is whether the expression contemplated by the statute substantially or materially interferes with the operation of the school. Only when substantial disruption is present is the employee's right of free expression outweighed, and therefore not constitutionally protected.

33 FEP Cases at 1011-12. The district court found that the Oklahoma statute did *not* violate this standard and thus did not “affect any speech protected by the First Amendment.” *Id.* at 1012.

The Tenth Circuit measured the statute against much the same standard:

[A] teacher’s First Amendment rights may be restricted only if “the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee.”

729 F.2d at 1274, quoting from *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). Applying this same test, however, the Tenth Circuit concluded that the statute *was* unconstitutional because the Oklahoma City school board had not succeeded in showing that the statutory prohibitions were necessary to prevent disruption of school functions.

Similarly, the district and circuit courts both agreed on the legal principle that if the Oklahoma statute would “chill” the free speech of teachers, it would be unconstitutional. The district court ruled that “the only ‘chilling’ is caused by unreasonable fear.” 33 FEP Cases at 1012. The Tenth Circuit disagreed and held that:

[T]he deterrent effect of [the statute] is both real and substantial. It applies to all teachers, substitute teachers and teachers’ aides in Oklahoma. To protect their jobs they must restrict their expression.

729 F.2d at 1274.

Both the district and circuit courts also agreed that finding the Oklahoma statute facially unconstitutional for overbreadth would be “strong medicine” that should be used “sparingly and only as a last resort.” Citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The district court concluded that the statute was *not* overbroad because the offensive expression was only one factor in determining whether a teacher was “unfit.” 33 FEP Cases 1013. The Tenth Circuit, on the contrary, held that the statute was overbroad because its prohibitions might ban “statements which are aimed at legal and social change [and which] are at the core of First Amendment protection.” 729 F.2d at 1274.

In discussing the federal court opinions in the *National Gay Task Force* case, it is important to note that the Oklahoma statute was quite different from House Bill No. 523. Both the district and circuit courts alluded to the difference between the Oklahoma statute and the Idaho bill but reached opposite conclusions as to what the difference would mean. The Tenth Circuit struck down the Oklahoma statute at least partly because “the statute does not require that the teacher’s public utterance occur in the classroom.” 729 F.2d at 1275. The implication was that the appellate court might have sustained the constitutionality of a statute limited solely to speech in the classroom.

By contrast, the district court expressly held that a statute such as House Bill No. 523 would likely prove unconstitutional:

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My study of this statute convinces me that many of plaintiff's fears are unwarranted. The Act does not, for example, allow a school board to discharge, declare unfit or otherwise discipline:

- a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;
- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocates of gay rights;
- d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality; or
- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals.

If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster.

33 FEP Cases 1017. Thus, the debate comes full circle. The district court, which upheld the constitutionality of the Oklahoma statute, would likely rule that House Bill No. 523 is unconstitutional. The Tenth Circuit Court of Appeals, which struck down the Oklahoma statute, seems inclined to look more favorably upon a statute limited to regulation of speech in the classroom. The debate is presided over by an as yet equally divided U.S. Supreme Court. Given this state of affairs, our opinion must obviously be that the constitutionality of House Bill No. 523 is uncertain. The only certainty is that litigation could surely follow in the wake of its passage.

Your letter also asks us to comment on whether House Bill No. 523 contains elements of vagueness. Two areas of concern are present. First, the bill refers to the conduct of "any employee" who would "teach" in the proscribed manner. It is not clear whether this proscription is limited to classroom teachers, substitute teachers, and teachers' aides, or whether it would extend to school administrators, guidance counselors, clerical help and other school employees, many of whom are "certified professional personnel." Failure to identify the target class may cause a court to strike down the statute as void for vagueness.

Similarly, the questions of the Oklahoma district court are troubling. Does the proposed bill reach the classroom conduct of:

- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocate of gay rights; . . .
- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals?

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

33 FEP Cases 1017.

A court will look at the language contained within a statute and consider the vagueness and overreaching effects of the prohibition as well as the limiting language of the statute. If the court determines that the language is too far reaching in its deterrence of protected speech or if it is vague as to its application, the statute could be struck down as unconstitutional. *Broadrick v. Oklahoma, supra*. This could occur in a situation where other statutes are on the books or there are other less onerous alternatives to control the behavior addressed in the questionable statute. Such alternatives and standards are provided by Idaho Code §§ 33-515, 33-1208, and 33-1209, and *The Code of Ethics of the Idaho Teaching Profession* adopted and approved by the Idaho State Board of Education.

Finally, you have asked if House Bill No. 523 violates the due process clause of the U.S. Constitution. The bill provides that a school employee who teaches that homosexual activity is a normal and acceptable form of behavior may be subject to immediate discharge pursuant to the procedures set forth in Idaho Code § 33-513. Similarly, a certificated employee guilty of this offense could have his or her certificate revoked pursuant to the procedures set forth in Idaho Code § 33-1208. Each of the statutes guarantees full due process to a teacher threatened with discharge or certificate revocation. Thus, the proposed bill is not constitutionally infirm as regards its sanctions.

House Bill No. 523 attempts to regulate the speech of school district employees during their working hours. In addition, the bill attempts to define a standard of conduct, a violation of which may result in serious sanctions. While House Bill No. 523 raises serious constitutional and practical questions which will almost certainly result in litigation, we cannot conclude that a court would strike down House Bill No. 523 because of the unsettled nature of the area of law addressed in the bill.

Cordially,

JOHN J. McMAHON  
Chief Deputy

March 7, 1986

Carl L. Dunbar  
Mayor  
City of Spirit Lake  
P.O. Box 309  
Spirit Lake, ID 83869

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

Re: Residency/Vacancy/City Council

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Dear Mayor Dunbar:

You have asked for our advice in regard to the residency requirement for a member of the city council, and whether by virtue of a change in residency a councilmember's position would be vacant.

Idaho Code § 50-702 provides that, "any person shall be eligible to hold the office of councilman of his city who is at the time of election, and remains a qualified elector under the constitution and laws of the state of Idaho." Municipal election laws are set forth in chapter 4, title 50 of the Idaho Code. Section 50-402(c) defines a qualified elector as, "any person who is 18 years of age, is a United States citizen and who has resided in the city at least 30 days next preceding the election at which he desires to vote, and who is registered within the time period provided by law." In addition, in order to remain a qualified elector, one must remain a resident. Thus, in order to serve as a member of the city council, a person must be a resident of the city.

The foregoing is supported by the law on resignations and vacancies found in title 59, chapter 9. Section 59-901 states that:

[E]very civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office as follows; . . .

\* \* \*

5. His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected. . . .

Under the provisions of this section and § 50-702, the council member's office would become vacant when he ceased to be a resident of the city. Thus, the question is, at what point does an individual cease to be a resident of the city so as to create a vacancy?

The definition of residency for these purposes is found in Idaho Code § 50-402(d). It states that:

[R]esidence for voting purposes shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of the absence. In determining what is a principal or primary place of abode of a person, the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, and motor vehicle registration . . .

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## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

3. A qualified elector who has left his home and gone to another area outside the city, for a temporary purpose only, shall not be considered to have lost his residence.
4. If a qualified elector moves outside the city, with the intention of making it his permanent home, he shall be considered to have lost his residence in the city.

The facts set forth in your letter indicate that the council member has taken employment at a ranch ten miles outside the city and in another county. According to your letter, one of the conditions of employment was that the council member reside on the ranch. In addition, the position is a permanent one from which the councilman has expressed no intention of resigning; the councilmember has moved his family to the place of employment and has enrolled his children in school there; he receives his mail at his new place of residence. On the other hand, he still owns his former residence in the city, is making his house payments and intends some day to return to that residence. Based on the foregoing facts and law, it is our opinion that the councilmember is no longer a resident of the city, and thus his position on the council is vacant.

Idaho Code § 50-704 provides that when a vacancy on the council exists, it "shall be filled by appointment made by the mayor with the consent of the council, which appointee shall serve only until the next general city election, at which such vacancy shall be filled for the balance of the original term." There is no provision under the law that the person who garnered the second highest total in the balloting for the particular council seat is entitled to be appointed. It is within your discretion as mayor to appoint anyone you choose and after an affirmative vote of the council that person shall hold the office of councilmember.

Although we believe the foregoing to be a true statement of the law, we must caution you that it is merely our opinion, and does not have the force and effect of a court judgment. Thus, if the incumbent councilmember does not choose to voluntarily vacate the office, it will be necessary for you to contact the city attorney and take such legal procedures as are necessary to have a competent court of law declare the office vacant. We suggest that such action be taken before another person is appointed to the office.

If we may be of further assistance please contact us.

Sincerely,

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

RGR/cp

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 14, 1986

The Honorable Janet S. Hay  
Idaho State Representative  
STATEHOUSE MAIL

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

Re: House Bill No. 580

Dear Representative Hay:

In your letter of March 7, 1986, you requested our guidance concerning House Bill No. 580. Specifically, your questions are as follows:

1. Would House Bill 580 allow a tax credit against expenses incurred in the operation of a home school?
2. Would House Bill 580 allow a tax credit against expenses for computers, field trips and foreign travel, microscopes, cameras, encyclopedias, tape recorders, video recorders, etc., used for the education of students in public, private or home schools?

House Bill No. 580 provides:

A tax credit against taxes . . . shall be allowed to a taxpayer who has made payment to others for tuition, textbooks and transportation of each dependent attending a school situated in Idaho, wherein a resident of this state may legally fulfill the state's compulsory attendance laws . . . As used in this section, "textbooks" mean books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects commonly taught in public schools in this state. . . .

The bill also prohibits credits for payments for instructional books and materials of a sectarian nature and prohibits credits for transportation costs for extracurricular activities.

Under the proposal, for an expenditure to qualify for a tax credit, it must be a payment to "others," paid as tuition for textbooks, or for transportation; and the payment must be for the purpose of legally fulfilling the compulsory attendance law. As the bill does not further define "others" it would appear that House Bill 580 could allow a tax credit for textbook and instructional equipment and materials expenses incurred in the operation of a home school if the expenditures would otherwise meet the remaining two requirements.

In response to question No. 2, expenses for computers, microscopes, cameras, encyclopedias, tape recorders and video recorders could qualify for the tax credit as long as they were used for educational purposes, and relate to subjects commonly and

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

usually taught in the public schools. However, it is unlikely that field trips or foreign travel would qualify for the tax credit under the transportation provision of the bill. Field trips and foreign travel would probably constitute extracurricular activities which do not qualify for the tax credit.

I hope this is helpful to you. Please advise if I can be of further assistance.

Very truly yours,

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

PJK/tg

March 20, 1986

The Honorable Vearl Crystal  
Idaho State Senator

The Honorable John T. Peavey  
Idaho State Senator

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

Dear Senators Crystal and Peavey:

On March 17, 1986, the Office of the Attorney General received your request for an opinion regarding S.B. 1430. The request raised issues of constitutionality for two sections of the proposed telecommunication deregulation bill.

1. Proposed § 62-606 sets forth a procedure by which a deregulated telephone corporation could be reregulated by the Idaho Public Utilities Commission. The question is raised whether the reimposition of regulation over a previously deregulated telephone corporation, or any part thereof, constitutes a taking of private property by the State of Idaho requiring the payment of just compensation pursuant to art. I, § 14, of the Constitution of the State of Idaho.

It is our opinion that such action does not constitute a taking that would require just compensation. The United States Supreme Court has recently issued an opinion in *John L. Connolly et al. v. Pension Benefit Guarantee Corporation*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986). In this case the Court outlines the test for identifying a "taking" forbidden by the fifth amendment, identifying three factors of particular significance: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.



Regarding the nature of the governmental action, in this bill as in the *Connolly* case, the government does not physically invade or permanently appropriate any assets for its own use. In *Connolly*, the Court found that the subject legislation safeguarded participants in multi-employer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. The Court found that this interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and thus, under the court's three-part test, does not constitute a taking requiring government compensation.

Likewise, the reregulation of a telephone corporation would occur under S.B. 1430 only if 10 percent or more of the customers of the corporation complained that the telephone corporation had allowed its noncompetitive services exempted from regulation to deteriorate or that rates for basic local exchange service or message telecommunication service had risen to a level that impaired the availability of universal telecommunication services. Thus, the proposed legislation safeguards the public interest by providing a mechanism for reregulation in the event anticipated results of the legislation are not realized. This falls into the category of a public program adjusting the benefits and burdens of economic life to promote the common good and would not constitute a taking requiring compensation. The reregulation of a utility service is no more a taking than the initial regulation of that service was.

2. Section 62-614 of S.B. 1430 grants a limitation of liability to a telephone corporation deregulated pursuant to the provisions of title 62. Your letter points out that not all telecommunications corporations doing business in the State of Idaho at this time are certified by the Public Utilities Commission. The Commission's jurisdiction does not extend to municipal or cooperative telephone corporations. Therefore, those entities would not be able to elect deregulation under the proposed title 62. Consequently, they would not benefit from the provisions of 62-614 by being immune from liability for damages arising from any interruption of service or delay or failure to provide service or facilities in the absence of gross negligence or willful misconduct. A question is raised whether the existence of this limitation of liability constitutes an impermissible denial of equal protection because not all telephone corporations will benefit from it.

It is our opinion that there is no denial of equal protection to allow only the class of previously regulated telephone utilities to enjoy that benefit without allowing the never regulated telephone companies to enjoy such a benefit. The present distinction between investor-owned and cooperative and municipal telephone service providers has never been seen as an equal protection problem. One must assume that the legislature had a valid reason for distinguishing between those types of companies and that a continued differentiation is likewise based on valid considerations.

The United States Supreme Court has recognized that states have a considerable amount of latitude in developing legislation in the areas of economic and social welfare. The Court has stated:

A state does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some "rea-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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sonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

*Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

The classification between the regulation and deregulation of the investor-owned utilities and the municipal and cooperative utilities does not appear to be one that has ever been considered arbitrary in the past. We conclude that it would not be considered arbitrary if this question were to arise in the future.

Additionally, there does not appear to be an equal protection problem for telephone corporations entering the state to do business after the effective date of the bill. Section 62-605 of the proposed legislation divides telephone corporations into two groups, those providing basic local exchange service and those that do not provide basic local exchange service. A telephone corporation not providing basic local exchange service may apply to the Commission to be subject to the provisions of this chapter. Section 62-605(5). If its application were granted, it would then also benefit from the liability exclusion language of § 62-614.

It is possible that a new telephone corporation may come into the state to do business to provide basic local exchange service. The election provided for in the bill in § 62-604 states that any telephone corporation operating under the provisions of title 61, Idaho Code, on June 30, 1986, may apply to relinquish its certificate or apply to amend its certificate to exclude from regulation any of its services. Because a telephone corporation that would enter the state after June 30, 1986 would not have a certificate of public convenience and necessity before that date, it appears that it may elect to be subject to the provisions of the bill. See § 62-605.

While the legislation is not clear how the situation should be handled, it appears that no equal protection problem exists. The United States Supreme Court upheld an ordinance of the City of New Orleans that excepted from its prohibition against vendors selling food stuffs in certain areas those vendors who had continuously operated the same business in that area for eight or more years prior to January 1, 1972. See *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). The Court stated:

When local economic regulation is challenged solely on violating the equal protection clause, this court consistently defers to legislative determination as to the desirability of particular statutory discrimination. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

Id. at 303, 96 S.Ct. at 2516-7. Thus it appears that even if a new telephone corporation were to come into Idaho to provide local exchange service and were not allowed to elect for deregulation because it did not have a certificate of public convenience and necessity on June 30, 1986, there would still be no equal protection problem involved.

3. The final question in the request for a formal opinion asks whether a limitation of liability such as that in § 62-614 of S.B. 1430 constitutes special legislation in violation of art III, § 19, of the Idaho Constitution.

The Idaho Supreme Court has found that "a statute is general and not special if its terms apply to and its provisions operate upon all persons and subject matters in like situations." *School District No. 25 v. State Tax Commission*, 101 Idaho 283, 291, 612 P.2d 126 (1980). Section 62-614 of S.B. 1430 would apply to all investor-owned telephone corporations that are deregulated under the other provisions of the proposed title 62. Therefore, it does not appear to be special legislation prohibited by the Idaho Constitution.

While art. III, § 19, does prohibit legislation "releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or corporation in this state, or any municipal corporation therein" the language appears to speak in terms of already existing debt, liability or obligation. The provisions limiting liability in S.B. 1430 does not extinguish any existing liability, but rather restricts the future liability of a telephone corporation covered under the proposed title 62.

If you desire further clarification of this matter, please contact me.

Cordially,

JOHN J. McMAHON  
Chief Deputy

JJM/lh

June 6, 1986

Blake G. Hall  
Deputy Prosecuting Attorney  
Bonneville County  
585 North Capitol  
Idaho Falls, ID 83402

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

**Re: Building and Construction Activities of County and Public Officials**

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Dear Blake:

You have asked a number of questions concerning what building and construction activities the county and public officers and employees may engage in on behalf of the various county officers, agencies and districts. The following paragraph from the dissent in *Oregon Short Line R.R. v. Berg*, 52 Idaho 499, 514, 16 P.2d 373 (1932), sets the broad underlying principles which control the counties and other public agencies in this regard:

It is to be noted that the Idaho Constitution contains no provision requiring that taxes be levied for a public purpose, or anything of similar import. That, however, is necessarily implied, as the very foundation of the power to tax is the presence of a public purpose to be subserved by the expenditure for which the taxes are raised. (1 Cooley on Taxation, 4th ed., p. 381, sec. 174.) As concerns municipal taxes, in addition to being delegated for public purposes only, they can only be delegated for corporate purposes. That is to say, a municipality can only levy taxes which subserve a municipal, public purpose. (6 McQuillin on Municipal Corporations, 2d ed., p. 292, sec. 2532.)

A number of Idaho cases have dealt at length with this subject. Among them are *Village of Moyie Springs, Idaho v. Aurora Manufacturing Company*, 82 Idaho 337, 346, 353 P.2d 767 (1960); *Hansen v. Kootenai County Board of County Commissioners*, 93 Idaho 655, 660, 471, P.2d 42 (1970); *Boise Redevelopment Agency v. Yick Kong Corporation*, 94 Idaho 876, 878, 499 P.2d 575 (1972); and *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 501, 531 P.2d 588 (1974).

In summary, any construction or building to be done should be for a public purpose related to the public agency involved.

Chapter 10, title 31, Idaho Code, gives the county power to erect public buildings as necessary. Chapter 17, title 50, Idaho Code, gives generalized power to build and construct many things through local improvement districts. Title 40, chapters 6, 9, and 13, Idaho Code, give power to construct highways and bridges. Article VIII, section 3, Idaho Constitution, and chapter 19, title 31, Idaho Code, limit county use and availability of funds to the funds on hand in any year or else require election, bonding and provision for repayment. When the public purpose doctrine and the above statutes are considered together, they delineate the answers to your first and second questions. Counties have only such powers as are expressly or impliedly conferred on them by statutes, *Prather v. Board of County Commissioners*, 22 Idaho 598, 127 P. 175 (1912).

In answer to your third question, generally, all anticipated expenditure for construction by the county must be listed in the county's annual budget, but internal changes may be made within the road and bridge fund by the county commissioners. Idaho Code § 31-1606 provides that:

The estimates of expenditures as classified in each of the two (2) general classes, "Salaries and wages" and "Other expenses," required in section 31-1602, as finally fixed and adopted as the county budget by said board of

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

county commissioners, shall constitute the appropriations for the county for the ensuing fiscal year. Each and every county official or employee shall be limited in making expenditures or the incurring of liabilities to the respective amounts of such appropriations. Provided, in the case of road and bridge appropriations, other than "salaries and wages," any lawful transfer deemed necessary may be made by resolution formally adopted by the board of county commissioners at a regular or special meeting thereof, which action must be entered upon the minutes of said board; provide, further, that no salary may be increased during the ensuing year after the final budget is adopted, without resolution of the board of county commissioners, which resolution shall be entered upon their minutes.

As we understand your fourth question, you ask whether Bonneville County departments can contract with other public entities such that those entities would construct or maintain public works for the county (or vice-versa).

As to roads, specifically, Idaho Code § 40-604 states that:

Commissioners shall:

(5) Have authority to make agreements with any incorporated city, other county, a highway district, the state, or the United States, its agencies, departments, bureaus, boards, or any government owned corporation for the construction, reconstruction, or maintenance of the county's highway system by those entities or for the construction, reconstruction, or maintenance of the highway systems of those entities by the county's highway organization. The county shall compensate or be compensated for the fair cost of the work except as otherwise specifically provided in this title.

Thus, at least as to highways, the answer to your fourth question is yes.

There is no clear authority as to other public works, however, Idaho Code § 31-1001 states that county commissioners "must cause to be erected" necessary public buildings. The section does not say whom they may "cause" to do this, however. Under Idaho Code § 67-2332, public agencies may contract with other public agencies "to perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform, including, but not limited to joint contracting for services, supplies and capital equipment." (Idaho Code §§ 67-2326 to 67-2333 set forth various limitations of such agreements.)

The problem with reliance upon Idaho Code § 67-2332 is that it seemed, from its wording and context, to refer to "joint" agreements, in which two or more public entities together contract with a private party, which is not what you ask about. On the other hand, the policy behind Idaho Code § 67-2332 is to allow cooperation among public agencies. Idaho Code § 67-2326. Thus, perhaps, the section should be liberally construed.

Your next question asks whether there is a dollar limit on public works contracts between entities. We have not found such a limitation. Thus, the value of a project is only limited by the size of the budget.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

As to your sixth question, cities, county officers, county departments, and highway districts are all required to conform to bidding laws. Counties and cities are required to advertise and take bids for any projects over \$5,000 or for purchase of equipment over \$10,000. Idaho Code §§ 31-4003 and 50-341. Idaho Code § 40-906 and other provisions of chapter 9, title 40, Idaho Code, require bidding in all contracts for road or bridge work over \$5,000 or for equipment over \$10,000.

In answer to your seventh question, the Idaho bidding laws provide that the public entity must advertise for bids in all situations above the monetary limits, but may find that it can do the work more cheaply itself and may then reject all bids and carry out the work not using a contractor. The bidding procedure must be followed before the public entity has the ability to go ahead on its own. Under Idaho Code § 40-913 as to highway construction, the bidding procedure must be carried out twice before doing it without contract.

In answer to question eight, the provisions of Idaho Code § 67-2309 appear to be quite plain. That section reads as follows:

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

The statute states that bidders may be required to make a deposit. Bid specifications must set out such requirements. If the county is a bidder, it would have to comply with the bid specifications, just as any other bidders have to. Also of interest in regard to this question is Idaho Code § 54-1218. It requires that the plans mandated by § 67-2309 must be drawn by a licensed engineer.

In regard to your next question, public agencies are exempt from the public works contractors license law under Idaho Code § 54-1903.

In answer to your tenth question, private contractors must be licensed under the public works contractors license law for any public works of a value over \$1,000. However, again, public entities are exempt from the operation of this law.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The answer to your next question, whether performance bonds are required, is generally dependent upon the situation. If a public entity is doing its own job, after it has advertised for bids and rejected them, the answer would be, no. If a public agency has successfully bid on another public agency's project, such a performance bond could be required by the bid specifications. In this regard see Idaho Code §§ 40-904 and 31-4006.

In answer to your next question, generally it is good practice for public agencies to require performance bonds; although this may not be required by law in every case.

In answer to your thirteenth and fourteenth questions, single projects should not be split. Any public officer who does so to avoid bidding laws is subject to fine under the terms of Idaho Code § 59-1026. Within the terms of the previous answers, there is no particular dollar value of public works construction that a county may or may not do itself. If the construction is over \$5,000, the county must first seek bids, reject them, and then determine to do the work itself.

As to your fifteenth question, there seems to be no limit to the dollar value of construction that a county can do for itself. However, as discussed above, if a project has a value of over \$5,000, bidding procedures must be followed.

In answer to your last two questions, whenever public officers have engaged in practices which are outside of or contrary to state law, as spelled out herein and as set forth in the Idaho Code, they may be subject to civil and/or criminal penalties. Their failure to follow state law may also cause the public entity, and the individual officers themselves, to be subject to actions for damages and other penalties provided for by law. See chapter 41, title 19, Idaho Code, which provides for removal of officers from office, and the sections concerning omission and neglect of duty, Idaho Code §§ 18-315, 18-316, and 31-855.

Sincerely,

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

Sincerely,

**WARREN FELTON**  
Deputy Attorney General  
Local Government Division

WF/cjm

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

June 20, 1986

A. Kenneth Dunn, Director  
Idaho Department of Water Resources  
STATEHOUSE MAIL

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

Dear Mr. Dunn:

You have requested guidance on whether the Idaho Dam Safety Act, I.C. §§ 42-1710 to 1721 ("Act"), applies to impoundment structures of waste water treatment and/or storage facilities which meet the literal statutory definition of a "dam" under the Act.

#### **CONCLUSION:**

The Act applies to impoundment structures of waste water treatment facilities that come within the definition of dam in I.C. § 42-1711(b).

#### **STATUTORY ANALYSIS:**

A "dam" is broadly defined by I.C. § 42-1711(b) as:

[A]ny artificial barrier, together with appurtenant works, constructed for the purpose of storing water or that stores water, which is ten (10) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum water storage elevation, or has or will have an impounding capacity at maximum storage elevation of fifty (50) acre feet or more.

A determination of whether this statute encompasses impoundment structures of waste water facilities must be guided by established principles of statutory construction. First, the literal wording of the statute must be examined. If the language is unambiguous, then the plain meaning controls. If, on the other hand, the statute is ambiguous, then 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" will be considered. *Local 1494 of the International Assoc. of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346 (1978), citing *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).

The statutory language appears to be clear and unambiguous, and to comport with the basic legislative directive that "[a]ll dams . . . in the state are jurisdiction of the department of water resources." I.C. § 42-1710 (emphasis added). Section 42-1711(b) is not limited to structures within a stream channel or watercourse.



Further, the definition of a dam in I.C. § 42-1711(b) excludes only certain structures: “No obstruction in a canal used to raise or lower water therein or divert water therefrom and no fill or structure determined by the department to be designed primarily for highway or railroad traffic shall be considered a dam.” In a case such as this, the statutory construction rule of “*expressio unius est exclusio alterius*” is applicable; this means that where a statute specifies certain things, the designation of such things excludes all others. *Local 1494*, 99 Idaho at 639; *Peck v. State*, 63 Idaho 375, 120 P.2d 820 (1941). Therefore, under the “*expressio unius*” rule, the listing of specific exceptions to the definition of a dam means that there are no other exceptions to the general definition.

Our conclusion — that the Dam Safety Act applies to waste water impoundment facilities — is bolstered by considering the purpose of the Act, which is to provide public safety from the dangers of dams that are improperly built or maintained. I.C. § 42-1710 provides as follows:

It is the intent of the legislature by this act to provide for the regulation of construction, maintenance and operation of all dams, reservoirs and mine tailings impoundment structures exclusively by the state to the extent required for the protection of public safety. *All dams, reservoirs and mine tailings impoundment structures in the state are under jurisdiction of the department of water resources.* The department of water resources under the police power of the state, shall supervise the construction, enlargement, alteration, repair, maintenance, operation and removal of dams, reservoirs and mine tailings impoundment structures for the protection of life and property. (Emphasis added).

This purpose supports a broad rather than a narrow definition of a dam. There is nothing in the Act or elsewhere to suggest that impoundment structures of waste water facilities that meet the statutory definition of a dam are not potentially dangerous to the public and are therefore not intended to be regulated by the Act.

The sparse legislative history of the Act does not suggest any interpretation other than the plain meaning. No legislative history is available for the original Act in 1969; and the 1974 amendments made only technical changes related to the reorganization of the department of water resources. Idaho Session Laws, ch. 20, § 11, p. 533.

In 1978, the “mine tailings impoundment structure” language was added to the Act. Idaho Session Laws, ch. 309, § 3, p. 785 (1978). Representative Chatburn had stated that “regulatory authority for unit farm construction standards, maintenance inspection or long term maintenance responsibility for these [tailings] ponds does not exist.” House State Affairs Committee Minutes, March 9, 1978. The sponsor for the mine tailings amendments, Representative Ingram, later echoed the same sentiments. House Resources and Conservation Committee Minutes, March 11, 1978. Therefore, these tailings impoundments are now expressly included in the Act. These comments suggest that the legislative understanding of the Act was that the definition of dam is not as broad as is suggested by the language in the statute. However, this statement could also mean that the legislature was concerned with long-term maintenance of tailings dams since a dam at an inoperative or spent mine is more like-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

ly to be abandoned than a dam at an irrigation reservoir. Furthermore in 1978, the language "constructed for the purpose of storing water or that stores water" was added to I.C. § 42-1711(b), apparently broadening the definition of dam to include anything that stores water. Thus, the two amendments offset one another and do not add to the interpretation of the statute.

The original 1969 Act was modeled after an early draft of the Model Law for State Supervision of Safety of Dams and Reservoirs (1968), drafted and published by the United States Committee on Large Dams of the International Commission on Large Dams ("Model Act"). The introduction to the Model Act says nothing about the kind of impoundments it was designed to apply to other than stating that "[t]he definition of a dam subject to jurisdiction . . . is expected to vary, state by state, to meet each state's individual needs." Model Act at II. Thus, this Model Act does not assist in the interpretation of the Act either.

It is therefore our opinion that if a structure is (1) an artificial barrier that (2) was constructed to store water, or stores water, and (3) meets the minimum size requirements, it is under the jurisdiction of the department of water resources regardless of what kind of water it impounds.

Please do not hesitate to contact me if you should have any further questions on this matter.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General  
Natural Resources Division

SJS/paw

June 27, 1986

Mr. Bruce Balderston  
Legislative Auditor  
STATEHOUSE MAIL

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

Dear Mr. Balderston:

You have asked whether Idaho Code § 56-450 gives the department of health and welfare legal authority to account, within the special health and welfare trust account, for state employee monies derived from bake sales, yard sales, donations, and profits from pop and candy machines utilized by state employees.

It is our conclusion that Idaho Code § 56-450 does not provide for the use of the health and welfare trust account for the deposit of employee funds.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Idaho Code § 56-450 requires the director of health and welfare to deposit into the special health and welfare trust account, all funds and/or the proceeds from the sale of any items "*donated, bequeathed, devised or . . . granted*" to the department of health and welfare. The funds thus deposited are then to be invested by the state treasurer in the manner provided for idle *state monies* under Idaho Code § 67-1210.

It is clear that the special health and welfare trust account was established to assist the department in accomplishing its intended purpose or mission. The use of this trust account for non-state monies was not intended by the legislature when it enacted § 56-450. The wording used to identify the source of the funds clearly indicates that the framers intended that the grantors, devisees or testators relinquish their rights, interest or title in the property donated, and that their rights, title and interests vest in the state department of health and welfare.

By contrast, the funds at issue here belong to the state employees, whose efforts generated them, and for whose benefit they are intended. Nowhere is there any indication that the funds in question actually "belong" to the department of health and welfare, or that their intended use is designed to further the department's purpose or mission. Rather, it appears that the monies in question here are intended for the sole benefit of the department's employees.

To allow department employees to benefit from the administration of the trust account, in the form of reduced costs and fees, would result in the taxpayers of the state paying for such administration costs.

Since the statute itself does not specifically authorize the director to utilize the trust account in the manner described, it is clear that the director lacks any other discretionary authority to so utilize the trust account as a repository for funds (1) whose purpose is not to further the department of health and welfare's purpose or mission and (2) whose rights, title, and interest have not all been vested in the department of health and welfare.

Therefore, in light of the foregoing, it is our opinion that the special trust account is not the appropriate repository for employee funds. In other state agencies, such funds are routinely held by a trusted employee within the department or division. This arrangement has the drawback of causing security problems and losing interest on funds, but it avoids the problem of commingling private and public funds. It is our experience that this is a general practice throughout state government; it appears to be the most convenient alternative.

Very truly yours,

PATRICK J. KOLE  
Chief Legislative and  
Public Affairs Division

PJK/tg

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INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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July 2, 1986

Mr. Martin L. Peterson  
Administrator  
Financial Management  
STATEHOUSE MAIL

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

Dear Mr. Peterson:

You have asked this office to research the following two questions:

1. Does Idaho Code § 59-509 limit compensation of the board and commission members only to those days the board or commission actually met?
2. If the answer to question 1 is no, should the per diem rates set out in § 58-509 be converted in hourly rates based upon an assumed eight-hour day?

I.

It is my understanding that your inquiry was caused by actions taken by the Outfitters and Guides Board. Members of the board spend several hours a week individually working on board activities and when one has accumulated eight hours of work, application is made for the \$35 per diem rate provided for by statute. The statute in question is Idaho Code § 59-509 which reads in pertinent part:

The members of part-time boards, commissions, and councils shall receive for each day spent in the actual performance of duties, an honorarium, compensation, or expense provided in the following schedule:

\* \* \*

In order to answer your first inquiry one must ascertain what the legislature intended by the words "actual performance of duties." There is no legislative history and our research has revealed no appellate court decision interpreting the statute in question.

There is one very old Idaho Supreme Court case that an appellate court may look to for guidance on this subject. The case, handed down in 1895, interpreted a statute concerning the compensation of county commissioners. *Rankin v. Jauman*, 4 Idaho 394, 39 P. 1111 (1895). A now repealed statute provided that if a public official charged and collected for illegal fees, the court could fine the individual \$500 and remove him from office. A member of the Ada County Commissioners was charged under this statute. The commissioner had collected a per diem allowance for 96 days, although the board had only met for 14 days. The commissioner also submitted a bill for traveling a little more than 61 miles for each day the board met even though the commissioner lived only one-half mile from the board meeting place.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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In 1895, the compensation statute for commissioners read as follows:

County commissioners of each county shall receive the sum of six dollars for each day actually engaged in transacting county business, and twenty cents per mile for each mile necessarily traveled in transacting county business. (Laws, 1891, p. 179)

*Id.* at 397. The court construed the statute very narrowly and held that “county business” could only be conducted if the full board was in session. In holding that the commissioner violated the statute by accepting illegal fees, the court stated:

But it is claimed by counsel for the respondent that if the services were actually rendered, a mere irregularity in the account would not be construed into a corrupt extortion. The board of county commissioners are an entirety; they can only act collectively, and as empowered by law. They are only engaged in “transacting county business,” as that term is used in § 5 of the Act of 1891, when acting as a board; and it is only while so acting that they can legally charge only per diem or mileage. It needs no authority to support this proposition. Should the board see fit to employ one of its members to perform certain services for the county, permissible by law to be performed by such officer, such member would act, not as a member of the board of county commissioners, but as an individual, and must present his claim for such services and is subject to the same rules as any other individual presenting a claim against the county.

*Id.* at 400.

For several decades, the case was often quoted whenever a public official was charged under the statute which penalized public officials for illegally accepting fees. *See, Miller v. Smith*, 7 Idaho 204, 61 P. 824 (1900). *Robinson v. Huffaker*, 23 Idaho 173, 129 P. 334 (1912). The Idaho Supreme Court might apply the logic of the *Rankin* case to Idaho Code § 59-509.

Most state boards have their powers and duties enumerated by statute. The statutory duties of the Idaho Outfitters and Guides Board are provided for in Idaho Code § 36-2107. Listed among the powers and duties of the board are the following: Conduct examinations to ascertain the qualifications of applicants; prescribe and establish rules of procedure and regulations to carry into effect the provisions of the act; to conduct hearings; to cooperate with federal government agencies.

As one can tell from the above-listed examples, the powers and duties of the Outfitters and Guides Board seem to demand full board action. An Idaho court could construe Idaho Code § 59-509 narrowly and hold that board members are entitled to compensation only when the full board is in session.

On the other hand, because the *Rankin* decision was interpreting a now repealed statute concerning compensation for county commissioners instead of state board members, it is difficult to determine how much weight the courts would give to the decision in attempting to discern the intent of the legislature in passing Idaho Code §

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

59-509. First of all, the facts left no doubt that the Ada County Commissioner of 1895 was abusing the system and taking advantage of the tax payers. Under these circumstances, it is easy to understand why the court felt compelled to narrowly construe the statute.

More importantly, however, the language of the two compensation statutes is not the same. The compensation statute for county commissioners in 1895 provided that each commissioner receive \$6 per day while "conducting county business." The court reasoned that only the board and not an individual board member could conduct county business. Thus, the board must be in session to conduct county business.

By contrast, the compensation statute for state board members provides that board members shall be paid for each day spent in "actual performance of duties." It is conceivable, and even likely, that an individual board member may perform actual duties without the full board being in session. For example, the chairman of a state board may be asked to address a legislative committee; or a state board could direct one of its members to attend a meeting pertinent to the business of the state board. The board member would be entitled to compensation even though the full board was not in session. It seems reasonable to expect that there would be numerous instances where a board member would be performing actual duties beyond actual attendance at a board meeting and that the legislature intended to pay board members the per diem allowance on the occasions when these extra duties should arise.

It very well may be more economical for the board to empower one of its members to act on its behalf. For instance, the Outfitters and Guides Board is empowered to reach cooperative agreements with federal agencies. The board could deputize or empower by resolution one board member to meet with the federal agency to work out the details of the agreement. Once the details of the agreement have been finalized, the full board could meet to ratify the agreement. It would seem reasonable that such efficient use of manpower would have been contemplated or expected by the legislature when passing Idaho Code § 59-509.

A board or commission should only deputize one of its members to carry out *board or commission* duties. As the *Rankin* court explained, no per diem compensation could be allowed for board members conducting activities that would normally be the function of an employee of the board. In order for a member of a board or commission acting in an individual capacity to qualify for per diem compensation, the member must not be simply furthering the work of the board or commission but representing the board or commission in an official capacity.

In summary, the law on this subject is scant and offers little guidance. Without more legal authority, it is impossible to provide a definitive answer. However, it is the opinion of this office that the more likely intent of the legislature was that, under proper circumstances, compensation of board or commission members should not be limited to only those days the board or commission meets. To avoid impropriety, the board or commission should specifically authorize or deputize one of its members to carry out the statutory duties or powers of the board or commission when it is reasonable for an individual member to do so.

II.

You have also asked whether the per diem rates set in Idaho Code § 59-509 should be converted to hourly rates. There is also no legislative history or appellate court decision that gives any guidance as to whether per diem rates set out in § 59-509 should be converted to hourly rates based upon an assumed eight-hour day. Members of the Outfitters and Guides Board are paid a per diem in accordance with Idaho Code § 59-509(g). It reads as follows:

Members shall receive the sum of thirty-five dollars (\$35.00) per day and shall be reimbursed for actual and necessary expenses, subject to the limits provided in § 67-2008, Idaho Code.

Neither the statute nor any legislative history gives any guidance as to what the legislature meant by “day,” whether a day constitutes 24 hours, 12 hours, eight hours, or two hours.

There is no doubt that if the full board is in session, they are not required to spend eight hours in session before being entitled to their per diem. A board could conceivably meet for four hours, and be entitled to the full per diem compensation. This same reasoning, however, does not necessarily apply to an individual member who chooses to perform two hours of actual duties in one day.

No Idaho Supreme Court case has ever decided the issue of whether a county commissioner or a state board member may total up their hours worked on individual days of a week in order to collect a statutory per diem rate for one day’s work. Many courts, however, have addressed the issue of how many hours a person must be engaged in performing actual duties in one day in order to collect the per diem rate. Almost all unanimously hold that the individual need not spend a full eight-hour day in order to collect the full per diem rate. *See*, Annot. 1 ALR 276 (1919).

Our research revealed one case that did address the issue of whether hours may be accumulated. *Hoffman v. Lincoln County*, 118 N.W. 850, 137 Wis. 325 (1908). A Wisconsin statute provided that when a probate judge was required to hear criminal matters, he should be compensated at the rate of \$5 per day for each day actually engaged in criminal examinations. Often, the judge would only be engaged in criminal matters for perhaps one hour per day. The judge would keep track of his time and when he had accumulated six hours, would submit a bill to the county for the per diem rate of \$5. In holding the procedure proper, the court stated:

It has sometimes been held that, under statutes allowing a per diem compensation to officers for certain services, a day could not be split up, and that the officer was entitled to a full day’s pay if any time was occupied in the service, although the whole day was not consumed. (citations omitted) We are not inclined, however, to give this construction to the law before us. The words “for each day he shall be actually engaged” in the matter seem to us clearly indicative of the intention only to allow for the time actually consumed. This construction necessitates a splitting up of days and a charge by the hour, and a charge by the hour necessitates the establishment of some arbitrary num-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

ber of hours as a day's work. In this case six hours was considered a day's work, and no contention is made that a longer time should have been fixed.

*Id.* at 852.

This reasoning seems equally applicable to Idaho Code § 59-509. It does not seem reasonable that the legislature would have intended that members of boards not be paid for time "spent in the actual performance of duties." It seems equally unreasonable that the legislature intended members of state boards to voluntarily work for two hours in one day and receive the full per diem compensation. The most reasonable construction is that if an individual member performs actual duties while the board is not in session, the compensation for those actual duties should be converted to an hourly rate.

Just as in the Wisconsin case, an arbitrary number of hours must be set in order to establish a work day. Since state employees are paid for an eight-hour day, this number seems to be the most logical. This construction of Idaho Code § 59-509 could lead to abuse in certain individual cases. However, it is the opinion of this office that such individual abuse may be addressed on a case-by-case basis whenever it arises. In addressing a similar statute concerning county commissioners, the Supreme Court of Pennsylvania stated:

It is difficult to determine exactly where the line should be drawn to secure the proper service of the interest and convenience of the public, on the one hand, and to guard against an abuse of the office on the other. Each case must depend upon its own facts, and the necessity of attendance must be left largely to the discretion of the commissioners themselves. They are public officers, presumably acting in good faith, and the presumption is in favor of the correctness and regularity of all their official acts. Their conduct and their discretion as to attendance are subject to review on an appeal, such as this; where there is any evidence of an abuse for the purpose of an unfair increase in the emoluments of their office, the question is for the jury.

*Mansel v. Nicely*, 34 A. 793 (Penn. 1896).

In summary, it is the opinion of this office that board or commission members are probably entitled to compensation when performing actual duties even though the board or commission is not in session. Furthermore, converting the per diem rates to hourly rates in such a situation seems to most correctly comply with legislative intent.

Sincerely yours,

STEVEN L. ADDINGTON  
Deputy Attorney General  
Natural Resources Division

SLA/jas



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 21, 1986

Marvin D. Gregersen, Chief  
Bureau of Occupational Licenses  
2404 Bank Dr., Rm. 312  
Boise, ID 83705

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

Dear Mr. Gregersen:

You have inquired whether the "Price Guaranteed Funeral Service Contract," a copy of which is attached, may be lawfully sold in Idaho. Based on the information provided, it is our preliminary opinion that the contract is unlawful.

The contract is intended to be used between a Purchaser and a Seller. The Purchaser agrees to finance the contract by obtaining a policy of whole life and/or annuity insurance from and paying premiums to American Guaranty Life. The Seller, who must be a "funeral home," agrees to provide various goods and funeral services upon the death of a Beneficiary named by the Purchaser. The "funding vehicle" for this pre-paid funeral service plan is the insurance policy under which the Purchaser assigns all rights to policy benefits over to the Seller. The contract contains provisions that American Guaranty Life is not a party to the contract, is not responsible for its validity and is held harmless for all payments made under it.

The "professional services" to be provided by the funeral home upon the death of the beneficiary include:

- First call — no additional charge within a 50 mile radius
- Preparation of necessary papers
- Securing legal certificate and permits
- Memorial record booklet
- Acknowledgement cards
- Insurance forms and government forms
- Receive, identify and display floral offerings
- Arrange music
- Complete embalming and preparation
- Professional, technical restoration work
- Cosmetology and hair dressing
- Funeral coach
- Flower car
- Limousine
- Transportation of necessary equipment for church services
- State room or reposing room
- Chapel
- Religious and fraternal paraphernalia

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The Purchaser agrees to pay the Seller a “gross amount” for these funeral goods and services, as well as for “merchandise” (i.e., a casket and vault) and for a “contingency fund” to “defray additional expenses for services and merchandise not provided by SELLER funeral home.” A “discount” is then applied to arrive at the “net cash price.”

The goods and services to be provided by the Seller “upon the death of the beneficiary” are quite plainly within the statutory language defining “mortician services.” Idaho Code § 54-1102. That definition includes:

- (1) Caring for or preparing dead human bodies for burial disposal.
- (2) Disinfecting or preparing dead human bodies by embalming, or otherwise, for funeral service, transportation, burial or disposal.
- (3) Directing or supervising the burial or disposal of dead human bodies.
- (4) Arranging for funeral services for dead human bodies.
- (5) Selling funeral supplies to the public.
- (6) Conducting, directing or supervising a funeral service.
- (7) Arranging for or selling mortician services to the public.

Under Idaho Code § 54-1103(A), it is unlawful “for any person to perform, offer to perform or hold himself out as performing mortician services or any of the acts of a mortician, unless he shall first obtain a mortician license or resident trainee license as provided in this act; . . .” Thus, it would clearly be unlawful for any person to contract to provide the package of goods and services outlined in the Price Guaranteed Funeral Service Contract unless that person were a licensed mortician. Anyone offering to provide such services who is not a licensed mortician would be guilty of violating the Mortician Act and could be enjoined by the local district court from engaging in such conduct. Idaho Code § 54-1127.

Assuming that the Seller offering to provide funeral services under the Price Guaranteed Funeral Services Contract is a licensed mortician, the contract must still comply with the provisions of the statutes governing “advance funeral agreements.” Idaho Code §§ 54-1122 to 1125. Two important provisions of the statute appear to be violated by the contract you have submitted for analysis.

First, Idaho Code § 54-1122 provides that “all money paid, directly or indirectly thereto, shall be held in trust for the purpose for which it was paid until the obligation is fulfilled according to its terms; . . .” The “trustee” of such money must be a “bank, trust company or savings institution in the State of Idaho insured with the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation; . . .” Idaho Code § 54-1123. According to the contract, the agreement is funded by paying premiums on the underlying insurance policy with American Guaranty Life Insurance Company. No provision is made for depositing such premium payments in the trust with a “trustee” authorized to act as such under Idaho Code § 54-1123.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Second, Idaho Code § 54-1124 provides cancellation rights to the beneficiary as follows: “the said agreement shall further provide that the beneficiary or his duly appointed guardian may, in writing, demand the return of the money, together with accrued interest, if any, less costs incurred in the operation of such trust. . . .” The contract you have provided does not comply with this requirement. On the contrary, if a Purchaser cancels the contract after the first thirty (30) days, “an amount up to the legal limit representing liquidated damages may be retained by ‘Seller/Assignee’.” The “legal limit” of these “liquidated damages” is not specified; neither is there any express provision for accruing of interest or for payback of accrued interest to the beneficiary upon demand.

It is our preliminary opinion, therefore, that the Price Guaranteed Funeral Services Contract violates the “advance funeral agreements” provisions of the Idaho Code, which provisions have been expressly upheld by the Idaho Supreme Court in *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964). Our opinion is preliminary because we have not been provided with a copy of the underlying insurance policy or seen the full package of signed documents (including, perhaps, additional written modifications as provided for under section 9 of the contract).

Assuming that the legal principles outlined above have in fact been violated, the board may take disciplinary action against any licensed mortician or funeral director, under Idaho Code § 54-1116. That section provides that the board may suspend or revoke the license of any mortician or funeral director who engages in “unprofessional conduct,” which is defined to include:

(3) Solicitation of dead human bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs before death or after death;

(4) Employment by the licensee of persons known as “cappers,” or “steerers,” or “solicitors,” or other such persons to solicit or obtain agreements with the public for the performance of mortician services;

\* \* \*

(6) The direct or indirect payment, or offer of payment, of a commission by the licensee, his agents, assistants, or employees for the purpose of securing business;

\* \* \*

(10) Violation of any of the provisions of this act;

\* \* \*

(15) Violation of any statutes of any state having to do with prearrangement or prefinancing of mortician services or funeral supplies.

The contract in question here might also violate the particular prohibition in Idaho Code § 54-1116(15) against “solicitation or acceptance, directly or indirectly, or a request, before need to provide mortician services or funeral supplies at a price less than

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

that offered by such person to others at time of need; . . .” We have not been provided with sufficient detail to make such a judgment at this time. Nor have we analyzed the Price Guaranteed Funeral Services Contract for possible violations of the Idaho Consumer Protection Act or of applicable insurance laws.

In addition to the disciplinary actions available to the board against licensed morticians and funeral directors, the Mortician Act also provides more stringent remedies. Whether licensed or not, individuals who knowingly violate the law may be charged criminally under Idaho Code § 54-1128. Finally, injunctive relief against continuing violations is available from the local district court. Idaho Code § 54-1127.

If our office can be of further assistance, please contact us.

Sincerely,

JOHN J. McMAHON  
Chief Deputy

JJM/tkg

September 3, 1986

Mr. Tom Moss  
Prosecuting Attorney for  
Bingham County  
75 East Judicial  
Blackfoot, ID 83221

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

**Re: Legality of Individual Appearing on Ballot as Candidate for District and  
Magistrate Judge**

Dear Mr. Moss:

You have requested our advice regarding the legality of an individual appearing on the ballot as a candidate for both district and magistrate judge. For the reasons set forth below, it is our conclusion that Idaho law does not forbid an individual from seeking both offices.

We begin our analysis by noting that where no statutory prohibition exists, there are two clear lines of authority directly opposed to each other in this area. Under the “New York” cases and their progeny, the courts have held that a candidate cannot appear on the same ballot twice:

Prohibition of a dual nomination is not a denial of the right of the electors to nominate persons of their own selection nor does it constitute interference

with the functioning of the Election Law respecting nominations. Such a ruling is not disfranchisement yet that is exactly what would happen whenever electors vote for a candidate who may not legally qualify, if elected, to take and hold both offices to which he had been nominated. County Law, § 411. An election under such circumstances would be illusory and sham if not an actual fraud upon the electorate and should not be permitted.

*Burns v. Wiltse*, 303 N.Y. 319, 102 N.E.2d 569 at 572 (Ct. App. N.Y., 1951).

The opposing line of authority, exemplified by the “Illinois” line of cases, holds that:

We know of no rule of law which prohibits a man’s becoming a candidate or being voted for at the same election for two incompatible offices, but undoubtedly, if he should be elected to both, he would be incapable of discharging the duties of both offices and would be compelled to elect which to accept.

*Velazquez v. Soliz*, 141 Ill. App. 3d 1024, 490 N.E.2d 1346 (1986). Our research indicated that of the courts reviewing this issue, the states are evenly divided as to which line of authority they follow. Further, no Idaho decision on point exists. Our conclusion, therefore, is but our best guess of what an Idaho court would do when confronted with this issue.

Under prior Idaho law, a direct prohibition existed in Idaho Code § 39-904 preventing a candidate’s name appearing on the ballot more than once. The prohibition was repealed in 1970 as part of the rewrite of the entire election law. Generally, legislative history in Idaho is poor. In this case, however, a detailed committee report was prepared. See, *Idaho Legislative Council Research Publication No. 11, November 1968*. While not directly explaining why the prohibition was removed, the report indicates that title 9 of chapter 34 was modeled after Nevada law. In checking with the Nevada Secretary of State, they indicated that their corresponding statute has been interpreted to permit a candidate to run for more than one office. Further, the Idaho Secretary of State’s office has interpreted our statute consistent with Nevada’s. It is well settled that the interpretation of a law by the agency charged with its administration is an important construction aid in identifying legislative intent. *State v. Kleppe*, 417 F.Supp. 873 (D. Idaho 1973).

Historically it is important to note in at least three recent elections, candidates for district and magistrate judgeships have appeared on the same ballot. Our research also shows that no policies or guidelines of the Administrative Office of the Idaho Courts nor the Canons of Judicial Ethics adopted by the Idaho Supreme Court prohibit the practice. Finally, it is important to note that the perceived evil justifying the “New York” rule, that of a popular candidate securing two offices and then permitting another individual to be appointed through a partisan process to one of the positions, does not exist here. The appointive process is, by statute, non-partisan upon a vacancy occurring in either office.

I hope this information is helpful. Please advise if we can be of further assistance.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Very truly yours,

**PATRICK J. KOLE**  
Chief, Legislative and  
Public Affairs Division

PJK/tg

September 16, 1986

Bruce O. Robinson  
Prosecuting Attorney  
Boundary County  
P.O. Box 1148  
Bonners Ferry, ID 83805

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

Re: Use of Unused Funds at End of Fiscal Year

Dear Mr. Robinson:

We understand from recent telephone conversations and from your letter the Boundary County Prosecuting Attorney's Office wishes to contract for additional legal secretarial services with unused 1985-1986 "B" budget funds before the year ends. You have requested from our office all statutory and case law that will aid and assist you in obligating present unused budget funds for secretarial services on behalf of the Boundary County Prosecuting Attorney's Office.

Idaho Code § 31-1502, among other things, provides that when funds have been accumulated for a special purpose and the fund shall have become inoperative, it shall be lawful for the Board of County Commissioners to transfer the remaining monies to such fund as the county commissioners deem best.

Idaho Code §§ 31-2608 through 31-2610 provide for employment of county stenographers by the County Commissioners. Idaho Code § 31-3107 provides generally for employment of deputies and assistants for county officers. Idaho Code § 31-816 provides that county commissioners may fix the compensation of all county officers and provide for the method of payment of the same.

Idaho Code § 31-1606 provides that expenditures are limited to the amount of the county budget as finalized through the budget proceedings, but then it goes on to make exceptions for road and bridge funds and another exception is made for salaries. The section provides that no salaries may be increased during the year after the final budget is adopted without resolution of the Board of County Commissioners, which resolution shall be entered in the county commissioners' minutes. This provision

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

means that existing salaries may be increased during the year by resolution of the Board of County Commissioners.

After considering this matter carefully, it is our advice that you should prepay "B" budget items this year, then next year have the commissioners take action to increase salaries under Idaho Code § 31-1606.

Statutes which may be of use to you to consider are Idaho Code § 31-1608 which authorizes expenditure of funds in emergency situations and Idaho Code §§ 31-1502 and 31-1607 which authorize the district courts to determine expenditure of funds.

An Idaho case that may be of use to you is *McNeel, Inc. v. Canyon County*, 76 Idaho 74, 227 P.2d 554 (1954), where it was held that the courts can order payment of a contract, although the contract is not provided for by the county budget.

You might also look at the wording of Idaho Code § 31-1608 in regard to the prosecuting attorney's office and the use of extra or emergency funds. This section allows the use of funds to pay for settlement of approved tort claims (approved claims for personal injuries or property damages) or to meet mandatory expenditures required by law or to investigate and prosecute crimes punishable by death or life imprisonment. In effect, the section means all of the above things qualify as emergency situations. The use of this section requires a unanimous resolution by the Board of County Commissioners.

We hope that these possible methods of use of the funds remaining in your budget will be of aid to you.

Sincerely,

WARREN FELTON  
Deputy Attorney General  
Intergovernmental Affairs

WF/mkf

September 16, 1986

Robert Thackery, Chairman  
Gooding County Board of County Commissioners  
Post Office Box 417  
Gooding, ID 83330

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

Dear Commissioner Thackery:

Ten questions have been presented for our response. These fall into essentially three groups:

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

1. May the real and personal property (including accounts receivable) of a county hospital be sold, leased, or otherwise transferred to a newly-formed hospital district?
2. What consideration, if any, must the county receive in exchange for said property?
3. What effect would transfers of hospital property have on certain existing legal and contractual obligations of the county hospital?

### CONCLUSIONS:

The questions posed are complicated by the fact that the real property on which the county hospital is located is state general fund land, leased pursuant to an uncodified act of the Idaho legislature, 1967 Idaho Sess. Laws 121, ch. 58. Nonetheless, we conclude that the real property of the county hospital can be assigned or sublet to the district, with the state's consent. Also, the personal property of the hospital can be sold or leased. Such sales or leases can be for any consideration, or none at all, with the possible exception of accounts receivable. Finally, the hospital's license can be transferred, but the hospital's obligations under the Hill-Burton Act will continue after the property is transferred. The effect that transfer of hospital property to the district has on contractual relations depends on the terms of the contracts involved. No generalization as to this is possible at this time.

### FACTUAL BACKGROUND:

In 1967, the Idaho Legislature reserved certain land in Gooding County from sale so long as that land was "used for a hospital or other public purposes and maintained by a public authority." 1967 Idaho Sess. Laws 121, ch. 58, § 1. Section 2 of that act states that:

The State Board of Land Commissioners is hereby authorized to lease the land described in Section 1 hereof for a hospital or other public purposes, upon such terms and conditions as the Board may determine best in the interests of the State or to exchange said lands for other lands of a tax-supported agency or unit of the State of Idaho or the United States, in accordance with law.

Pursuant to this Act, on January 1, 1968, the Board of Land Commissioners leased the land to Gooding County for a term of 99 years with an annual rent of \$175. The lease allows the land to be used only as a county hospital, and states that "This lease is not assignable by the lessee, nor may it be sublet."

In 1984, Gooding County and the Gooding County Memorial Hospital board sublet a portion of the property to St. Benedict's Hospital for the purpose of establishing an alcohol treatment center. The term of the St. Benedict's lease is 25 years. Prior to entering into this sublease, the county obtained the written consent of the Idaho State Board of Land Commissioners to the sublease.

On May 27, 1986, the voters of Gooding County approved the creation of a county-wide hospital district under Idaho Code §§ 39-1319 *et seq.*



**ANALYSIS:**

You first ask whether the hospital property can be sold, leased, or otherwise transferred to the hospital district.

Since the county is leasing the hospital land from the state, it would be impossible for the county to transfer title in fee. However, Idaho Code § 31-836 allows counties to lease property, and Idaho Code § 31-3515 specifically allows leases of county hospital property to hospital districts. The county's lease from the state is "property" under Idaho Code § 55-101, which defines real property as including possessory rights to land, and thus it can be leased.

Since a leasehold is "property," it could also be sold under Idaho Code § 31-808. (A "sale" of a lease would be more properly called an assignment.) Also, Idaho Code § 67-2322 allows transfers of property between governmental units. That section states that:

In addition to any other general or special powers vested in counties . . . [and] . . . hospital districts . . . said units of government shall have the power to convey or transfer real or personal property to another such unit . . . with or without consideration.

Thus, the lease from the state could be assigned, either with or without consideration.

If the lease is assigned, the county would transfer all of its rights under the lease from the state to the hospital district, for the remainder of the 99-year lease from the state. If the hospital land is sublet, the sublease would either be for the remainder of the 99-year lease, or the county would reserve some reversionary interest. *See Fahrwald v. LaBonte*, 103 Idaho 751, 653 P.2d 806 (App. 1982) (distinguishing between assignment and sublease).

A sublease could be for any term up to the remainder of the original lease, under Idaho Code § 31-836, which states that:

The board of county commissioners may lease any property belonging to the county and not necessary for its use . . . to any hospital district organized under title 39, chapter 13, Idaho Code, for use in furthering the purposes of said district. Such lease may be for any term not to exceed ninety-nine (99) years. . . .

The lease from the state forbids the county from assigning or subletting. Before proceeding, the county must therefore obtain an agreement from the Idaho State Board of Land Commissioners allowing an assignment or sublease, as was done with the St. Benedict's sublease.

An assignment or sublease to the hospital district would not violate the original statute establishing the tract as hospital land. That statute only requires that land be "used for a hospital or other public purposes and maintained by a public authority." 1967 Idaho Sess. Laws 121.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

An assignment or sublease might create unwanted liability for the county. In either an assignment or a sublease, the assignor or original tenant remains liable to the landlord (the state) and to its subtenant (St. Benedict's), absent an agreement among the parties to the contrary. 51C C.J.S. *Landlord and Tenant*, §§ 45(2), 47. It may be desirable for the county to enter into such agreements (known as novations) with the state, St. Benedict's, and the district.

In summary, if the state agrees, nothing prevents the county from assigning or subleasing the hospital land to the hospital district.

You next ask whether the personal property of the county hospital may be sold, leased, or otherwise transferred to the hospital district.

You have informed us that unlike the hospital real property, the hospital personal property is owned by the county, and thus the county would be free to sell, give, or lease the property to the district, assuming it has the statutory authority to do so.

Under Idaho Code § 31-808, counties are empowered to sell personal property. Under that section, sales of property worth more than \$50 must be by public auction. Idaho Code § 31-3616A deals specifically with sales of hospital personal property. That section provides that hospital property worth \$5,000 or less need not be sold at auction. That section also provides that hospital personal property need not be sold at auction if the hospital board determines that selling particular items at auction would pose a danger to public health and safety.

As previously noted, Idaho Code § 67-2322 allows transfers of property between governmental entities. Such transfers can be for no consideration, and thus the county could, under Idaho Code § 67-2322, transfer the hospital personal property to the district.

Finally, Idaho Code § 31-836 allows leases of hospital property and equipment to hospital districts for terms of up to 99 years. That this section allows leases of personal as well as real property is made clear by the fact that the section refers to leases of hospital "equipment," and by the fact that Idaho Code § 73-114(1) states that the term "property" in the code refers to both real and personal property.

In summary, the personal property of the county hospital could be sold, leased, or given to the hospital district.

In your third question, you ask whether the hospital board may transfer its debts and accounts receivable to the hospital district.

As personal property, receivables can be disposed of under Idaho Code § 31-3616A. As discussed previously, Idaho Code § 31-3616A exempts disposal of hospital board property from the procedures of Idaho Code § 31-808, so long as the property is worth less than \$5,000. (The "threat to public safety" exemption of Idaho Code § 31-3616A would not apply to receivables.) Also, receivables could be transferred under Idaho Code § 67-2322.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Even though accounts receivable are personal property, the fact that they represent debts owed to the county hospital board may restrict the board's ability to dispose of them. County officers are under a duty to account for debts owed to the county. *See Naylor v. Vermont Loan and Trust Co.*, 6 Idaho 251, 55 P.297 (1898).

It follows that if the hospital's accounts receivable can be sold at all, they would probably have to be sold at market value.

In your fourth question, you ask whether the hospital district must ratify or accept any transfer of property from the county. There are no Idaho statutes specifically dealing with acceptance of property transfers in this situation. Idaho Code §§ 67-2322 to 67-2325, which govern transfers of property between governmental entities, require that all transfers of property must be approved by two-thirds of the governing body of each unit. Idaho Code § 67-2324. However, Idaho Code § 67-2324 only applies to conveyances pursuant to Idaho Code §§ 67-2322 to 67-2325. If the county proceeds pursuant to some other statutory authority, majority acceptance by the hospital district board would still probably be required. Hospital districts have a separate corporate existence. *See* Idaho Code § 39-1331. One of the powers of the hospital district board is to acquire property for the district. Idaho Code § 39-1331(d). Since the power to acquire property is reserved to the district board, it could not be forced to accept property. Instead, approval of at least a majority of the district board would be required. *See* Idaho Code § 73-112 (authority given to three or more public officers is construed as being vested in a majority of them). Thus, no transfer of property to the district would be valid without the approval of at least a majority of its board.

In your fifth question, you ask whether transfers of property from counties to hospital districts must be for fair market value. There are two statutes dealing with this problem. Idaho Code § 31-808 requires that sales of county real and personal property of a value over \$50 must be by public auction. However, Idaho Code § 31-3616A exempts personal property of county hospitals from the procedural requirements of Idaho Code § 31-808, if the property involved has a value of \$5,000 or less.

On the other hand, Idaho Code § 67-2322 states that:

*In addition to any other general or special powers vested in counties, [and] . . . hospital districts, . . . said units of the government or districts shall have the power to convey or transfer real or personal property to another such unit. . . . Such conveyance or transfer may be made without consideration or payment when it is in the best interest of the public in the judgment of the governing body of the granting unit. [emphasis added]*

Since the authority conferred by this section is "in addition to" other powers of counties, the auction requirements of Idaho Code §§ 31-808 would not apply to a transfer under Idaho Code § 67-2322.

Thus, the consideration for a transfer of county hospital property could be either the highest bid at auction, if the county acts pursuant to Idaho Code § 31-808 (subject to the exceptions in Idaho Code § 31-3616A), or the consideration could be any

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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amount agreed upon by the county and the district, under Idaho Code § 67-2322, and the exceptions to Idaho Code § 31-808. Finally, the transfer could be gratuitous.

In your sixth question, you ask whether the county hospital's license will remain in effect after the hospital facilities are transferred to the newly-formed hospital district. Chapter 13 of title 39 of the Idaho Code governs licensing of all hospitals, including government-operated hospitals. Idaho Code § 39-1305 states that:

Each license shall be issued only for the premises and persons or governmental units named in the application and shall not be transferable or assignable except with the written approval of the licensing agency.

Thus, in order for the hospital to remain licensed after the transfer of facilities, consent must be obtained from the department of health and welfare, the "licensing agency." Idaho Code § 39-1301(h).

Your seventh question asks about the effects of a transfer of hospital facilities on the county's obligation under the Hill-Burton Act, 42 U.S.C. §§ 291 et seq. 42 U.S.C. § 291i(a) provides that the United States can sue to recover Hill-Burton funds, if facilities built or modernized with such funds are sold or transferred to any entity not qualified to receive such funds.

Recovery can be from the transferor or transferee, and the precise amount of liability is determined according to 42 U.S.C. § 291i(c). Since hospitals built with Hill-Burton funds can only be transferred to hospitals that would be eligible for Hill-Burton funds, the county's current obligations would continue after the transfer of facilities to the hospital district.

It should be kept in mind that the restriction of 42 U.S.C. § 291i(a) only applies for 20 years after construction or modernization funded by Hill-Burton.

Also, 42 U.S.C. § 291i(a) only permits transfers to transferees approved by the state agency that administers the Hill-Burton program. In Idaho, that agency is the division of health facilities survey and construction, of the state department of health and welfare. Idaho Code § 39-1403.

Your final questions ask about the effect that transfers of hospital property would have on accreditation, charitable groups involved with the county hospital, and contracts with medical staff.

We do not have available the information to answer these questions specifically, nor would it be appropriate for us to do so. However, the following general information is provided. As for accreditation, you should consult the accrediting agencies involved. To determine the impact on charities, you should consult those groups and also examine their charters and by-laws. Finally, as to the medical staff, you have provided us with a copy of by-laws of the county hospital staff. In those by-laws, "hospital" is defined as Gooding County Memorial Hospital. This definition would have to be amended to refer to the new district's hospital.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In general, the effects of a transfer of hospital property on current contracts depends on the terms of each contract involved. Unless a contract states that it binds the county's successors in interest, it would be necessary to assign the county's interest. If a given contract forbids assignment, it will be necessary to obtain a waiver of that prohibition. As with the assignment of the hospital land lease, to avoid continuing liability under existing contracts, the county may want to enter into negotiations with the hospital district and the parties with whom the county has contracts.

Finally, in your letter you mention that there is a "satellite" clinic in Wendell operated by the county hospital board. So far as we can determine, the real property upon which the clinic is located is owned in fee by the county, and thus it could be transferred in fee to the hospital district. With that difference, the foregoing analysis would control the transfer of the clinic property to the district.

**PATRICK J. KOLE**  
Deputy Attorney General  
Chief, Intergovernmental Affairs

September 22, 1986

Thomas Katsilometes  
Bannock County Commissioner  
Bannock County Courthouse  
Pocatello, ID 83201

Re: Sixth Judicial District Public Defender

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

Dear Commissioner Katsilometes:

On Friday, September 19, 1986, I received a phone call in our office from the Bannock County Commissioners concerning the appointment of a Sixth Judicial District public defender. It was related to me that a meeting is to be held on Friday, September 26, 1986, at which time the eighteen county commissioners who comprise the commissioners for the Sixth Judicial District will meet to consider the appointment of a public defender for the entire district.

Specifically, it was requested that a representative from our office attend the meeting on Friday to guide the commissioners in the review process of applicants in order to meet the legal requirements for such an appointment. Unfortunately, this office will not be able to attend that meeting due to the circumstances which have been brought to our attention.

From the information our office has received, it appears that there are potentially serious legal defects in the process that has been used in seeking the appointment of a district-wide public defender. I will outline these problems briefly and advise that you

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

contact your local county prosecuting attorney for advice concerning the implementation of the process.

1. **JOINT POWERS AGREEMENT** — From the information given to our office, it appears that there is no joint powers agreement in effect to implement the district-wide public defender system. Although counties may establish a joint office of public defender to defend indigent persons from more than one county, Idaho Code § 19-859(3)(b), in order to effectuate the system, it is necessary for those counties participating to follow the mandate of Idaho Code § 67-2328, which provides for a joint powers agreement. Before counties can pursue a district-wide public defender system, it is necessary to have the contractual agreement adopted and in place by resolution of *each* Board of County Commissioners prior to the appointment of a public defender. From the information that this office has received, it appears that has yet to be accomplished and thus, any agreement to hire a public defender for the judicial district would not be effective. Before pursuing this matter any further, it is our *strong* recommendation that the counties meet this requirement before attempting to select a public defender.
2. **SIX-COUNTY PARTICIPATION** — There is no indication that the budgetary process has been met with respect to the appointment of a public defender for the Sixth Judicial District. This would require the adoption of a budget by each county based upon the joint powers agreement, to support the public defender and staff and provide for the compensation required by law. If this process has not been met, then any contractual agreement under the joint powers act would be ineffective. Furthermore, from press accounts, it appears that two and possibly three counties already have appointed the firm of Zollinger and McDermott, of Pocatello, as their public defender. It is not clear to us whether these counties continue to show any interest in the district-wide public defender system or whether they are going to pursue the public defender on a county-by-county basis. We believe this matter *must* be resolved at the same time that the joint powers agreement is resolved.
3. **OPEN MEETING LAW** — Finally, it appears there may not have been compliance with the Idaho Open Meeting Law found at Idaho Code §§ 67-2340 to 67-2347. This law affects the creation of the joint powers agreement as well as the budgeting and selection process for the public defender. Until the requirements of this law are met, the actions of the commissioners in creating the district-wide public defender remain suspect and are subject to possible judicial invalidation.

This is, by no means, an exhaustive list of potential problems with the process. Obviously, the entire process should be reviewed by the prosecuting attorneys of each of the counties, with advice rendered to the Boards accordingly. It should be noted that our office has received a substantial number of complaints concerning the process used in the Sixth Judicial District. As soon as there is compliance with the statutes involving the joint powers agreement, the open meeting law and the other questions raised, this office will be able to assist you.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Sincerely,

DANIEL G. CHADWICK  
Deputy Attorney General  
Intergovernmental Affairs

DGC/mkf

September 24, 1986

The Honorable Denton Darrington  
State Senator, District 24  
Route 1  
Declo, ID 83323

Re: Tax Incentives for the Production of Gasohol, Idaho Code §§ 63-2401(7) and  
63-2405

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

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Dear Senator Darrington:

This is in response to your request for guidance, dated August 25, 1986. Specifically, you asked two questions concerning the constitutionality and applicability of the statutes. I will first discuss the constitutionality of the statutes and then the application of the statutes to out-of-state producers of gasohol.

### QUESTIONS PRESENTED:

1. May Idaho constitutionally apply a reduced fuels tax to gasohol only if it is blended from alcohol manufactured in the State of Idaho from agricultural or forest products grown in the State of Idaho?
2. Assuming that Idaho Code §§ 63-2401(7) and 63-2405 are found by a court to be unconstitutional under the Commerce Clause, will the court invalidate the entire statute, thus eliminating the tax reduction for all producers of gasohol, or sever the unconstitutional language and extend the tax reduction beyond Idaho's borders to all producers of gasohol?

### CONCLUSIONS:

1. Idaho's fuels tax statutes which extend favorable tax treatment only to gasohol manufactured in Idaho from Idaho products would not withstand a challenge under the Commerce Clause of the United States Constitution.
2. It is our opinion that an Idaho court would likely remove the limitation of the availability of the favorable tax treatment as it applies to Idaho producers and extend the tax reduction to gasohol produced outside of the State of Idaho. While the possibility exists that the court could remove the favorable tax treatment entirely, this result is unlikely because it would not comport with the legislative intent of the Idaho legislature.

### DISCUSSION:

Idaho Code § 63-2401(7) defines "gasohol" as a motor fuel containing a mixture of at least ten percent (10%) blend anhydrous ethynol manufactured in the State of Idaho from agricultural or forest products grown in the State of Idaho or wastes from those products. Idaho Code § 63-2405 provides that gasohol shall be taxed at \$0.04 per gallon less than the amount of the excise tax imposed on other fuels. The purpose of these two statutes clearly is to give an economic incentive to Idaho producers of gasohol and to open up additional markets for Idaho forest and agricultural products.

However, the United States Supreme Court consistently has ruled that under the Commerce Clause of the United States Constitution, no state may impose a tax which discriminates against interested commerce by providing a direct commercial advantage to local business. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). If a state law constitutes a simple economic protection measure, the Supreme Court will find that the statute per se is unconstitutional. *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In *Archer Daniels Midland Co. v. State*, 315 N.W.2d, 597 (Minn. 1982), the Minnesota Supreme Court considered a statute substantially similar to the Idaho statutes. The Minnesota court found that the result of the statute was to tax gasohol produced in states other than Minnesota at a higher rate than gasohol produced within the borders of Minnesota. As a result, the court ruled that the statute was invalid under the Commerce Clause because it represented "simple economic protectionism." A similar result can be expected if the Idaho statutes are challenged in court.

Your next question asks whether a court will extend the tax reduction provisions beyond Idaho's borders and apply the reduction to all producers of gasohol or rather would eliminate the reduction benefit entirely. Generally, Idaho courts follow the rules of construction favoring the validity of a statute and presume that the legislature intended to enact a constitutionally valid law. Thus, in some cases, the Idaho Supreme Court has chosen to extend the benefits of a statute to an improperly excluded class rather than deny the benefits to all classes. *Murphy v. Murphy*, 103 Idaho 720, 653 P.2d, 441 (1982). Further, the factor given the greatest weight in the court's view is carrying out the intent of the legislature.

Here, contrary to the record before the Minnesota Supreme Court in the *Archer Daniels Midland Co.* case where the court decided that legislative intent would be entirely frustrated by opening up the reduction to both interstate and intrastate producers of gasohol, history of Idaho's statute reveals a legislative intent to offer the tax reduction benefit to all producers of gasohol. In testimony presented to the Senate Transportation Committee on March 13, 1986, State officials acknowledged that the "home grown" rule was not being enforced and all gasohol is receiving the credit. See Minutes of Senate Transportation Committee, pg. 3.

While the original intent behind the 1981 enactment may have been to open up intrastate markets for only Idaho forest and agricultural products, subsequent legal developments and the legislative history regarding the extension of the reduction would likely preclude an Idaho court from invalidating the entire statute.

The legislature may want to consider clarifying this provision in the next session. Among other options, it could consider taking an approach similar to that found in the Colorado statutes. Prior to the Minnesota court case, Colorado had a statute substantially similar to both the Minnesota and Idaho tax reduction statutes. After consideration of the Minnesota Supreme Court's holding, Colorado redrafted its fuels tax statute to provide favorable tax treatment only to gasohol produced from facilities having a design production capacity of 17 million gallons or less per year. This revised statute was challenged in the case of *Archer Daniels Midland Co. v. State*, 690 P.2d, 177 (Colo. 1984). The revised statute was challenged on the grounds that all Colorado producers of gasohol had production capacities of less than 17 million gallons, while the majority of out-of-state producers had production capacity in excess of 17 million gallons. The Colorado statute narrowly survived a Commerce Clause challenge because the court found that it treated both in-state and out-of-state gasohol producers equally. However, the legislature should keep in mind that the United States Supreme Court has not yet addressed this specific question.

If we can be of further assistance concerning this matter, please do not hesitate to contact us.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Very truly yours,

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

PJK/mkf

October 16, 1986

Mr. Lynn R. Nelson  
Gooding County Prosecuting Attorney  
P.O. Box 86  
624 Main Street  
Gooding, ID 83330

Re: Juvenile Violators of the DUI Laws

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

Dear Mr. Nelson:

You have requested legal guidance as to whether minors charged with DUI violations under Idaho Code § 18-8004 must be prosecuted within the provisions of the Youth Rehabilitation Act [hereafter "YRA"], Idaho Code §§ 16-1801 through 16-1837, or whether they may be tried as adults. For reasons that are stated below, we conclude that the provisions of the DUI statute, as well as those within the YRA, give prosecutors sufficient discretion to proceed against juveniles charged with DUI either as minors or as adults.

In analyzing the provisions of the YRA regarding this question, Idaho Code § 16-1803 of that Act specifically states that juvenile courts have exclusive jurisdiction over crimes committed by minors when:

1. The crime was prohibited by state or local law by reason of minority only; or
2. The crime was a violation of state or local law which would have been a crime if committed by an adult, except traffic, watercraft, and fish and game violations.

Idaho Code § 16-1803 goes on to further exclude juvenile violations involving beer, wine, or other alcohol or tobacco laws from the exclusive jurisdiction of juvenile courts.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

It should be noted and emphasized that in excluding certain violations from the exclusive grant of jurisdiction juvenile courts have over crimes committed by minors, the legislature specifically mentioned one exclusion — traffic offenses. The YRA does not define exactly what the term “traffic violation” refers to, nor does the Idaho Code contain a definition of that term. For illustrative purposes, the Idaho Driver’s Manual (1985) does define the term “moving traffic violation” as “a violation of any law or ordinance affecting the use of streets or highways that regulate the safe movement of vehicles and pedestrians.” While this language is less than a direct legislative definition of the term involved, it is helpful in illustrating what violations may be considered to be traffic violations under the exception contained in Idaho Code § 16-1803 of the YRA.

The provisions of the YRA must be read in conjunction with the DUI statutes in resolving this question. Within Idaho Code § 18-8005(7), the legislature stated that a minor may be prosecuted for a DUI violation under title 16 of the Idaho Code (the YRA). While admittedly Idaho Code § 18-8005(7) could have been more explicit in spelling out how the legislature expected to see minors charged with DUIs prosecuted, it is sufficiently clear to resolve the above questions. The operative word, “may,” within Idaho Code § 18-8005(7) gives a prosecutor the option of referring a case involving a minor charged with DUI to a juvenile court or retaining jurisdiction and trying the minor as an adult.

As can be seen from an examination of the two statutes involved in this question, neither the DUI statute nor the YRA specifically state under which provisions juveniles charged with DUI violations are to be prosecuted. While the YRA does exclude the category of “traffic violations” from its grant of exclusive jurisdiction over crimes committed by minors, DUI statute Idaho Code § 18-8005(7) specifically states that minors may be prosecuted within title 16 of the YRA. If that is viewed as a conflict, then the DUI statute containing Idaho Code § 18-8005(7) should be considered overriding as it was adopted after the implementation of the YRA.

On that basis, we have come to the conclusion that the DUI statute language in Idaho Code § 18-8005(7) gives prosecutors sufficient discretion in charging minors involved in DUI violations either as adults or within juvenile court. With this statutory discretion, prosecutors should carefully consider the facts and circumstances of each individual case before deciding in which forum to proceed. The important point to be made is that neither the provisions of the DUI statutes nor the YRA prohibit prosecutors from proceeding under either of those statutes in prosecuting minors for DUI violations.

Nothing in this opinion is intended to evidence a favoritism toward proceeding against minors charged with DUI violations under either title 18 or title 16. This is a decision each prosecutor must make based on the facts and circumstances of the particular case at hand. Neither have I discussed equal protection violations, if any, that are inherent in prosecutorial discretion in choosing to proceed against minors as adults versus within the juvenile court system.

If you have any further questions please feel free to contact me.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Sincerely,

DAVID R. MINERT  
Deputy Attorney General  
Criminal Justice Division

DRM/jas

November 21, 1986

Mr. Jim Witherell  
Legislative Management Analyst  
Office of the Legislative Auditor  
STATEHOUSE MAIL

Re: Supersaver Airfares

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Witherell:

The Attorney General has asked me to respond to your inquiry regarding the use of so-called "supersaver" airfares by state agencies. As you correctly note, in order to take advantage of the substantial savings of the supersaver rates, it is usually necessary for the traveler to spend a weekend at the destination. You indicate that it is the policy of state departments to grant employees travelling on supersaver fares a per diem allowance and expense reimbursement for the weekend. You question the propriety of this practice since the employee is not literally engaged in state business on the weekend stayover.

A random sampling of state agencies has revealed no instance where a state employer compelled an employee to engage in supersaver travel as a requirement of the job. If a state employee is mandated to spend the weekend at a given location as a condition of employment, it is likely that the employee would be entitled to normal or overtime compensation in addition to the per diem and cost reimbursement. *See*, Idaho Code § 67-5302(17); § 67-5326, et seq. However, our informal survey indicates that state supersaver travel is, at least from a legal perspective, voluntary on the part of the employee. The remainder of our analysis incorporates the assumption that employee participation is volitional.

You question whether the state can lawfully reimburse the weekend expenses of an employee who agrees to travel on a supersaver fare. You mention that there is "no mechanism to make such gratuities to employees." We agree that there is no specific statutory authorization for the reimbursement of supersaver travelers' weekend expenses. However, we feel that common sense and fiscal rationality dictate a conclusion that these cost reimbursements are appropriate.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The State Board of Examiners has adopted the following general outlines for official travel:

### *Regulation 5. Mode and Route of Travel*

Employees shall use the most economical and practical mode of travel, from the standpoint of time and expense and shall utilize the most standard route of travel. When unusual circumstances preclude following this regulation, departmental directors may allow an exception.

### *Regulation 6. Travel by Public Transportation*

Reimbursement for travel by common carrier shall be limited to the normally lowest cost passage unless it is not available. . . .

Travel Regulations, Procedures, and Policies — State of Idaho, p. 4.

The Board of Examiners has mandated that official travel should be arranged by the most economical method available. As you acknowledge in your letter, utilization of supersaver fares often results in a substantial savings for the state. When air travel is necessary, supersavers are generally the least expensive means available. Since, as mentioned above, state agencies do not compel their employees to travel under the terms of supersavers, the employees' cooperation is necessary if the state is to achieve the significant savings available through these reduced rates. The cost reimbursement and per diem allowance serve as incentives to encourage the employee to travel on a supersaver and thereby allow the state to take advantage of the reduced fares. If the reimbursement policy was terminated, the employee incentive to cooperate, in many cases, would evaporate. An agency could not then avail itself of this economical means of travel unless it ordered its employees to spend a weekend at the destination; this would reduce the net benefit because the state would be required to pay the employee for the weekend, perhaps at "overtime" rates, in addition to paying the per diem and reimbursing costs.

Although there is no specific authorization for weekend cost reimbursements, they play a major role in allowing the state and its agencies to achieve substantial savings on employee travel and are consistent with the general state travel policy.

You close your letter with a suggestion that cost reimbursements may have tax implications for employees. Although we certainly cannot speak for the Internal Revenue Service, it seems that these payments are merely reimbursements of otherwise deductible, business travel expenses and would have no impact on a state employee's tax liability.

Thank you for your inquiry.

Sincerely,

WARREN FELTON  
Deputy Attorney General  
Intergovernmental Affairs

PK/WF/mkf

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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November 26, 1986

A. Kenneth Dunn  
Director  
Department of Water Resources  
450 W. State St.  
Boise, ID 83720  
STATEHOUSE MAIL

Re: Debt Limitations on Municipalities

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Dunn:

In your letter of October 6, 1986, you refer to the issue of debt limitation on municipalities. Specifically:

Do loans by municipalities for energy conservation measures on buildings or facilities [owned by municipalities] come within the "ordinary and necessary" expense exception to Article VIII, section 3, of the Idaho Constitution, allowing the indebtedness to extend over a period of years without approval by the electorate?

In this reply, I assume that the program is structured in conformity with applicable federal rules and regulations, and address only its compliance with Idaho law.

Article VIII, § 3, of the Idaho Constitution provides in essence that no local government entity may incur any indebtedness which will exceed its revenue in any given year without a vote of the people. The only exceptions are those obligations which are found to be "ordinary and necessary" expenses or those which fall within the "special fund" classification, i.e., those paid solely out of revenues from the operation of the facility or works.

An expense is "ordinary" if in the ordinary course of the transaction of municipal business, or the maintenance of municipal property, it may be and is likely to become necessary. *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921). "Ordinary" means "regular; usual; normal; common; often recurring; . . . not characterized by peculiar or unusual circumstances"; "necessary" means "indispensable"; an expense may be "ordinary and necessary" even though it does not arise frequently and at regular intervals. *City of Pocatello v. Peterson*, 93 Idaho 774, 778, 473 P.2d 644 (1970). An expenditure need not be required by law to be ordinary and necessary. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975).

. . . It is one of the incidents of the ownership of property that it must be kept in repair . . . if the property is to be useful and serve its purpose. The making of repairs may, however, only occur at infrequent intervals, and still be an ordinary and necessary expense.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

*Hickey v. City of Nampa*, 22 Idaho 41, 45-46, 124 P.280 (1912).

Based upon these interpretations, it is likely that our court would find that energy conservation measures on public buildings or facilities would meet the ordinary and necessary expense exception of art. VIII, § 3, of the Idaho Constitution; i.e., no election is necessary to authorize such expenses even if they constitute an "indebtedness or liability" of the municipality. *Hanson v. City of Idaho Falls*, 92 Idaho at 514, 446 P.2d at 636.

Although not addressed in your letter, you have also asked whether a city or municipality is authorized to act as a lending agent of *Exxon* case funds (for energy conservation measures) to private individuals. We do not have sufficient information to provide a detailed analysis of this program and must again assume that it complies with applicable federal rules and regulations. If the municipal corporation acts as a guarantor of energy conservation loans to private individuals, it is quite likely that a court would strike down the arrangement as a violation of art. XII, § 4, of the Idaho Constitution which prohibits a municipal corporation from lending or donating its credit to private entities. *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969); *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972). However, if the city is merely a pass-through agency, not required to guarantee the loans, then it is unclear what a court would do if faced with a challenge to the city's conduct.

If our office can be of further assistance, please let us know.

Sincerely,

DANIEL G. CHADWICK  
Deputy Attorney General  
Intergovernmental Affairs

DGC/mkf

December 30, 1986

William R. Meiners, Chairman  
Idaho Outfitters and Guides Board  
1365 N. Orchard, Room 372  
Boise, Idaho 83706

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

Dear Mr. Meiners:

QUESTION PRESENTED:

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Can an individual be criminally prosecuted for both outfitting without a license and guiding without a license in violation of title 36, chapter 21, Idaho Code, without violating constitutional or statutory provisions against double jeopardy?

### CONCLUSION:

Illegal outfitting and guiding appears to be one act so that double punishment is prevented by Idaho Code § 18-301. Because this statute provides a basis for resolving the double jeopardy issue, the question of constitutional double jeopardy is not analyzed.

### ANALYSIS:

A problem has arisen with the prosecution of individuals who are both outfitting and guiding without a license. It has been held in an Idaho district court that to convict a person of both outfitting and guiding, based on the same sequence of events, would subject a person to double jeopardy because the individual would be punished twice for what is essentially one crime. This problem arises because of the last sentence of the definition of a guide found in Idaho Code § 36-2102(c): "Any such person [who is guiding] must be employed by an outfitter and anyone offering or providing such [guiding] services who is not so employed shall be deemed to be an outfitter." This sentence seems to "telescope" the offenses together so that guiding and outfitting are the same offense.

Two aspects of the legal concept of "double jeopardy" must be reviewed. The first aspect is the constitutional one. The fifth amendment of the United States Constitution provides in relevant part that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This clause prevents a person from being convicted twice for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Martinez*, 109 Idaho 61, 66, 704 P.2d 965 (1985). The double jeopardy clause of the fifth amendment has been made applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In determining what constitutes the "same offense," the United States Supreme Court has held that where the same act or transaction constitutes a violation of two distinct statutory provisions, it must be determined whether each crime requires proof of an additional fact which the other crime does not require. *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Art. I, § 13, of the Idaho Constitution similarly states that "[n]o person shall be twice put in jeopardy for the same offense; . . ." In interpreting this provision, Idaho courts have followed the *Blockberger* ruling. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).

The second aspect is the statutory one. The Idaho legislature has codified the constitutional protection against double jeopardy and expanded its protection. Idaho Code § 18-301 states:

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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and sentence under either one bars a prosecution for the same act or omission under any other.

The constitutional provisions discussed above refer to jeopardy for the “same offense” and do not prohibit convictions for multiple charges so long as each charge has at least one element not common to the others. *State v. Sensenig*, 110 Idaho 83, 714 P.2d 52, 53 (Ct. App. 1985). In contrast, Idaho Code § 18-301 refers to an “act or omission” and prohibits the multiple punishment of a defendant regarding crimes committed within the same act regardless of whether those crimes required proof of differing elements and therefore enlarges the scope of the constitutional provisions. *State v. Werneth*, 101 Idaho 241, 611 P.2d 1026 (1980). If a defendant’s single action creates liability under two criminal statutes, that defendant can only be punished under one statute. *Horn*, 101 Idaho at 197.

It is necessary to understand the statutory distinction between a “guide” and an “outfitter” before applying the double jeopardy analysis. A guide is defined by Idaho Code § 36-2102(c) as:

[A]ny natural person who, for compensation or other gain or promise thereof, furnishes personal services for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions, except any employee of the state of Idaho or the United States when acting in his official capacity. Any such person must be employed by an outfitter and anyone offering or providing such services who is not so employed shall be deemed to be an outfitter.

An outfitter is defined by Idaho Code § 36-2102(b) as:

[A]ny person who, in any manner, advertises or holds himself out to the public for hire providing facilities and services, for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions and maintains, leases or otherwise uses equipment or accommodations for such purposes. Any firm, partnership, corporation or other organization or combination thereof operating as an outfitter shall designate one (1) or more individuals as agents who shall conduct its operations and who shall meet all of the qualifications of a licensed outfitter.

These definitions overlap to some degree. The distinction is that the guide is the person who provides the personal service for conduct of the outdoor recreational activity, i.e., the one who actually accompanies and directs the client during the hunting or boating trip; the outfitter is the person who obtains the client through advertising and provides the services for the recreation. The distinction between “services” in Idaho Code § 36-2102(b) and “personal services” in Idaho Code § 36-2102(c) is not clarified in the Act, presumably “services” would include “personal services” as well as other non-personal services.

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The conceptual distinction between outfitters and guides becomes blurred when one individual is acting as an outfitter and guide without a license and performs all of the activities required to provide a client with an outdoor recreational activity. It is difficult to segregate the different elements of outfitting and guiding in such a context, so that the entire sequence of events is viewed as "one act." Also, the last sentence of Idaho Code § 36-2102(c) seems to merge the two activities into one act. Therefore, attempting to punish an individual for both illegal outfitting and illegal guiding would be viewed as an attempt to punish an individual twice for the same act, in violation of Idaho Code § 18-301.

Since Idaho Code § 18-301 provides a basis for finding that prosecutions for illegal outfitting and guiding would present double jeopardy problems, constitutional double jeopardy will not be discussed.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General  
Natural Resources Division

SJS/paw





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