

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
AND
SELECTED INFORMAL
GUIDELINES**

FOR THE YEAR

1987

Jim Jones
Attorney General

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Jim Jones
Attorney General

INTRODUCTION

April 20, 1988

This book contains the official opinions issued by the Office of the Attorney General during calendar year 1987. It also contains a selection of what I judge to be the most relevant informal guidelines written by the office last year.

During each of the last five years we have endeavored to improve the quality of our product, as well as the professionalism of the Attorney General's office in general. I believe good progress has been made. Official opinions go through a rigorous review process before they are released for public consumption. We have made increasing efforts to insure this type of professionalism and quality control with regard to all other work done in the office.

During the last five years we have significantly increased the salaries paid to deputy attorneys general and, consequently, have been able to attract more experienced candidates. We have conducted in-house continuing legal education programs so that deputies can keep their skills sharp while obtaining basic CLE requirements within the office. Controls have been implemented so that there is better assurance of uniformity among the agencies and high quality legal work throughout the system.

This past year an in-house appellate practice program was implemented to insure a superior work product before the appellate courts. All appellate briefs are reviewed by supervisory personnel before being filed. Moot courts are conducted for the majority of cases presented on behalf of the state before our appellate courts.

The goal is to insure that the state is represented not only by the largest law firm but one with the highest standards. I think our endeavors to increase quality and professionalism have paid off and are reflected in these opinions and guidelines. If our readers have thoughts or comments regarding our opinions or ways we can improve on their preparation or presentation, we would be glad to hear from you.

JIM JONES
ATTORNEY GENERAL

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1987

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Lois Hurless — Office Administrator
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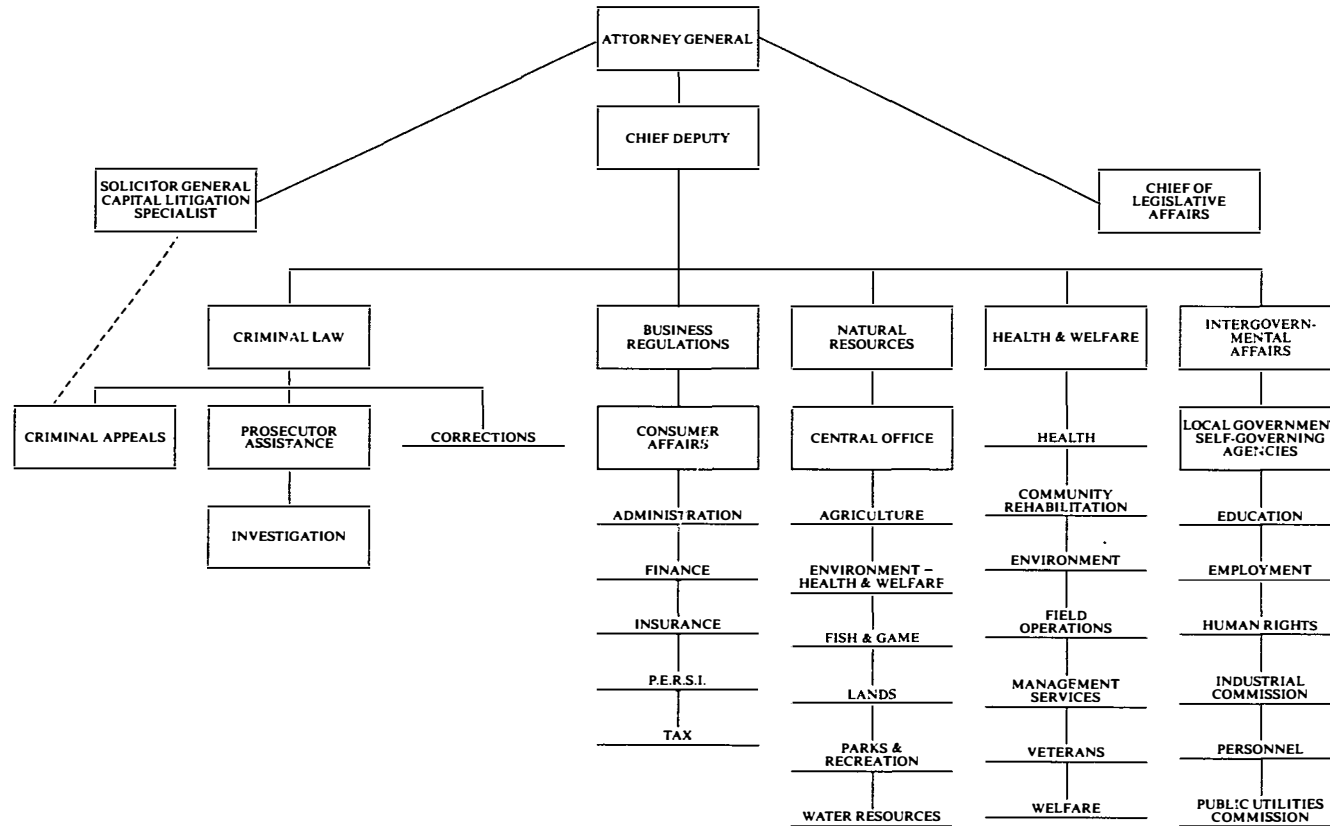
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Allan J. Cerialo Richard T. LeGall Gary L. Carr

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ORGANIZATION CHART – Office of the Attorney General



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1987**



Jim Jones
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 87-1

Richard L. Harris, Esq.
Canyon County Prosecutor
P. O. Box 668
Caldwell, ID 83606-0668

Request for Attorney General's Opinion

RE: Certification of Peace Officers in Idaho

Dear Mr. Harris:

QUESTION PRESENTED:

On behalf of the Canyon County Commissioners, you have asked for legal guidance regarding the meaning and implementation of Idaho Code § 19-5109(b) relating to certification of peace officers in the state of Idaho.

CONCLUSION:

It is our conclusion that the individual "officer," the law enforcement agency that employs him and the political subdivision of the state where the agency functions may all encounter grave consequences by ignoring the certification statute where such employee continues to carry out peace officer duties without the statutorily required training and certification. The officer may incur criminal liability; the cases the officer takes to court may be dismissed or the officer's evidence excluded; the public officials of the political subdivision that authorizes payment of his salary may be guilty of a constitutionally defined felony; and the individual, the agency, and the political subdivision may incur civil liability to persons upon whom such an employee exercises power given only to duly qualified and appointed peace officers.

ANALYSIS:

Your letter refers to a situation in the sheriff's office where a sworn full-time deputy exercising all of the powers of a peace officer for prevention and detection of crime continues to serve in such capacity for more than one year after such employment without ever becoming trained and certified pursuant to Idaho Code § 19-5109(b).

The policy of our legislature is clear that there shall not be 44 different standards of competence for peace officers throughout Idaho counties but a uniform standard to be set by the law enforcement professionals who comprise the council for Peace Officer Standards and Training (hereafter "POST"). No individual sheriff or county, police chief or city shall set the standards or qualifications for peace officers; but these are entrusted to POST Council.

Title 19, ch. 51, Idaho Code, establishes POST Council and prescribes its duties, powers, and composition. The law requires certification by POST of all persons who carry out the function of peace officer, such certification to be completed within one year of employment by a law enforcement agency as a peace officer.

The requirements of certification apply to all persons who are full-time employees of a police or law enforcement agency that is a part of or administered by the state or any political subdivision. Idaho Code § 19-5101(d). A law enforcement agency means an agency whose activities pertain to crime prevention or reduction and includes police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency. Idaho Code § 19-5101(c). Certification is required of all whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic, or highway laws of this state or any political subdivision.

The intent of the legislature is clear from the wording of the law. There are no ambiguities and the exceptions to certification are narrow and clearly defined in Idaho Code § 19-5109(a):

It shall be the duty of and the council shall have the power:

(1) To establish the requirements of minimum basic training which peace officers *shall complete in order to be eligible* for permanent employment as *peace officers*, and the time within which such basic training *must* be completed.

(2) To establish the requirements of minimum education and training standards for employment as peace officers in probationary, temporary, part-time, and/or emergency positions.

(3) To establish the length of time a peace officer may serve in a probationary, temporary, and/or emergency position.

* * *

(7) *To certify* peace officers as having completed all requirements established by the council *in order to be eligible* for permanent employment as *peace officers* in this state. (Emphasis added)

It is clear that the legislature has given broad authority to POST to supervise the training and standards of peace officers throughout the state. The legislative grant of authority cannot be viewed as a hollow commission. The language of the statute giving power to POST is mandatory not precatory; it is an effective grant of power to POST Council to establish, supervise and enforce standards for peace officers throughout the state.

Likewise, the legislature has clearly mandated that in order for a person to have peace officer status and power, that person *must* comply with the standards and training which ch. 51, title 19, Idaho Code, places under the auspices of POST Council:

After January 1, 1974, any peace officer as defined in § 19-5101(d), Idaho Code, employed after January 1, 1974, except any elected official, any city police chief, the superintendent of the Idaho State Police, and those peace officers whose primary duties involve motor vehicle parking and animal control pursuant to city or county ordinance, *shall be certified* by the Council within one (1) year of employment. (Emphasis supplied).

Idaho Code § 19-5109(b).

While the statute is silent as to who has the responsibility to enforce certification, the remainder of our analysis will set forth several ways in which it can be enforced, and will also describe the untoward consequences that may flow from ignoring the statute.

In the first instance, it is apparent that POST Council itself would have standing to seek compulsory process against an uncertified "officer," or against a sheriff or county which hires such an individual. A writ of prohibition may lie to arrest the actions and proceedings of a sheriff and an uncertified deputy "where such proceedings are without . . . the jurisdiction of the . . . person." Idaho Code § 7-401. Conversely, a writ of mandate may also be available to insure compliance with the certification law since such an extraordinary writ may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." Idaho Code § 7-302.

Moreover, ignoring the certification statute by refusing to fulfill the training required by POST puts the supposed peace officer in violation of criminal statutes. A person who exercises police functions without the authority of law is guilty of a criminal offense:

Every public officer or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

Idaho Code § 18-703.

A sheriff and his uncertified deputy and other county officers must also consider the consequences of Idaho Code § 18-711 entitled "Unlawful exercise of functions of peace officers." This section makes it a felony offense for any person in this state to "*unlawfully exercise or attempt to exercise the functions of . . . a deputy sheriff.*" A person who does not become certified by POST within one year of becoming employed by a sheriff as a peace officer is exercising the functions of a deputy sheriff unlawfully. Idaho Code § 19-5109(b). Any sheriff who retains an uncertified deputy may also be a party to the violation of the law and may be prosecuted. Idaho Code § 18-204.

On another plane, a law enforcement agency hiring an uncertified deputy may find that in processing certain criminal cases the doors of the criminal justice system are closed. It is well established that courts have by judicial implication inherent power to exclude evidence obtained in violation of law. *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 108 (1961). Courts have found it appropriate in contexts analogous to the present to exclude evidence where admission of the evidence would put the court in the unseemly position of acquiescing in unlawful conduct.

A court of record of this state could, therefore, refuse to accept the work product or testimony of a person who is not certified as required by the statute. It has come to our attention that some courts of our state have disallowed and suppressed the testimony

of a person claiming to be a peace officer but who had not been certified as required by statute. Likewise, it has come to our attention that courts in our state have dismissed criminal complaints filed by persons who represented themselves to be peace officers, but who were not in compliance with the certification statute. Courts within your jurisdiction could employ similar procedures.

In like manner, the prosecuting attorney could properly refuse to proceed with cases in which an uncertified officer figures as an indispensable part of the presentation of the state's case. Pursuant to his broadly accorded prosecutorial discretion (*see*, Idaho Attorney General Opinion No. 81-7 and 1983 legal guideline of the Attorney General's Office, p. 168), a motion for dismissal would be a fitting, albeit unfortunate, sanction to shield the prosecutor from confederacy in this type of recalcitrance.

The Board of County Commissioners also has the power to require a county officer to comply with the law (*see*, Idaho Attorney General Opinion 86-10). The Board exercises general supervisory authority over the other county officers. Idaho Code §§ 31-801, 802, 828. The county commissioners' powers include the setting of the budget for and the acceptance of claims for expenditures by county officials. Idaho Code § 31-1605. The Idaho Constitution entrusts the county commissioners with the power to supervise the hiring of deputies by the sheriff and the power to set compensation for the sheriff's deputies. Art. XVIII, § 6, Idaho Constitution. The Constitution also prohibits use of public funds for purposes which violate the laws passed by the legislature. "The making of profit, directly or indirectly, out of state, county, city, township, or school district money, or *using the same for any purpose not authorized by law*, by any public officer, shall be deemed a felony." Art. VII, § 10, Idaho Constitution. Under the very broad wording of this section, the county commissioners would be justified in refusing to allow a claim for payment of services of a person employed to fill a peace officer position in the sheriff's office, but who is not properly certified and empowered to act as a peace officer. Indeed, payment of such a claim would expose the Commissioners themselves to criminal liability.

In addition to the above, county officials must be vigilant to avoid the civil liability a county or a sheriff's office might incur by having a person functioning in the capacity of a peace officer who, in fact, lacks such training and authority. The potential consequences are grave under both federal code and state statute if a person who has not been properly trained and supervised is entrusted with peace officer power and abuses that power.

In conclusion, it is clear that a sheriff does not have the power to retain a deputy with full peace officer powers beyond one year of such deputy's full-time employment without the deputy becoming trained and certified by POST. Disregard of a statute requiring certification would be unlawful in view of the deleterious consequences, civil and criminal, which may affect the individual "officer," the sheriff, the county commissioners and the residents of said county.

AUTHORITIES CONSIDERED:

Art. VII, § 10, Idaho Constitution

Art. XVIII, § 6, Idaho Constitution

Idaho Code § 7-302

Idaho Code § 7-401

Idaho Code § 18-204

Idaho Code § 18-703

Idaho Code § 19-5101(d)

Idaho Code § 19-5109(a),(b)

Idaho Code §§ 31-801, 802, 828

Idaho Code § 31-1605

Title 19, ch. 51, Idaho Code

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 108 (1961)

Smylie v. Williams, 81 Idaho 335, 341 P.2d 457 (1959)

Weeks v. U.S., 232 U.S. 383, 345 S.Ct. 341, 58 L.Ed.652 (1914)

Idaho Attorney General Opinion No. 81-7

Idaho Attorney General Opinion No. 86-10

Idaho Attorney General 1983 Legal Guideline, p. 168

DATED this 22nd day of January, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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

ATTORNEY GENERAL OPINION NO. 87-2

TO: The Honorable Elizabeth Allan-Hodge
Idaho State Representative
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Do the exclusive franchise provisions of proposed Idaho Code § 62-616 of the 1987 House Bill 149 violate art. 11, § 13, of the Idaho Constitution?

CONCLUSION:

No. The exclusive franchise language of House Bill 149 can be read in a manner that is not at odds with the Idaho Constitution and a court would be inclined to read the language in this manner to preserve its presumed constitutionality.

ANALYSIS:

Your inquiry of February 20, 1987, seeks our opinion on two separate issues regarding the telephone deregulation bill. Your first inquiry regarding the bill concerns art. 11, § 13, of the Idaho Constitution. Your second set of inquiries concerns policy issues that relate to the entire deregulation bill. Within the time available, we have endeavored to research and give you our best advice regarding the constitutional issue. However, the second set of inquiries goes beyond legal issues. As such, it is not possible for our office to answer those questions.

1. The Language of the Constitutional Provision Itself.

Article 11, § 13, has two parts. The first provides: "Any. . . corporation. . . shall have the right to construct and maintain lines of telegraph or telephone within the state, and connect the same with other lines;. . ." The second provides: "[T]he legislature shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

The first part of this section grants rights to telephone companies to construct, maintain and connect telephone lines. From this unqualified language, it could be argued that the framers of the Idaho Constitution intended to prohibit any direct grant of exclusive telephone franchises. However, the right conferred on telephone companies to construct, maintain and connect lines is subject to the retained police power of the legislature to pass general laws providing for "reasonable regulations" giving effect to the right. As we shall see below, both principles have been respected in Idaho since statehood.

2. Judicial Construction of this Section in Neighboring States.

The Idaho Supreme Court has not provided any authoritative judicial construction

of this section addressing the question presented. The only Idaho cases construing the section — *Mountain States Telephone and Telegraph Company v. Kelley*, 93 Idaho 226, 459 P.2d 349 (1969), cert. denied, 297 U.S. 42, 90 S.Ct. 816, 25 L.Ed.2d 44 (1970), and *State v. Idaho Power Company*, 81 Idaho 47, 346 P.2d 596 (1957) — address other issues.

The fact that the Idaho courts have not construed art. 11, § 13, forces us to look for judicial guidance elsewhere. Both the Montana and Washington Constitutions of 1889 contained provisions nearly identical to art. 11, § 13, of the Idaho Constitution of 1890. Both were construed within a generation of their adoption. The courts, in each instance, affirmed that the constitutional provisions were not self-executing and would lay dormant till given vitality by legislative enactment. In each instance, the early challenges occurred when the legislature gave cities the power to regulate rights-of-way over which telephone companies proposed to erect lines.

In Montana, the state legislature enacted a uniform, general law allowing telephone companies to erect lines. The City of Red Lodge demanded that Rocky Mountain Bell Telephone Company install its lines underground in traversing the city. The Montana Supreme Court stated that the statute allowing erection of overhead telephone lines was “a general law, enacted in obedience to a command of the Constitution, and to provide *means of enjoying a privilege originating with that instrument.*” *State v. Mayor of City of Red Lodge*, 76 P. 758, 760 (1904) (emphasis added). The court held that the city’s insistence on underground transmission lines would interfere with the telephone company’s constitutional right to construct telephone lines.

A year later, the Montana legislature enacted a law strengthening the hand of cities to regulate telephone lines crossing their boundaries. The Montana Supreme Court struck down the new law on the ground that it failed to give effect to the constitutional privilege granted telephone companies to construct and maintain lines:

The command in section 14, art. 15 of the Constitution, above, to the legislature, is to pass a general law of uniform operation, with reasonable provisions, which will enable the telephone business to be conducted in this state as it was generally conducted through the country in 1889; that is, access to the business centers—the cities and towns—must be granted, and any law which falls short of this does not comply with the constitutional provision above.

State ex rel. Crumb v. Mayor of City of Helena, 85 P. 744, 745 (1906).

The Supreme Court of Washington considered its analogous constitutional provision in the case of *State ex rel. Spokane & B.C. Telephone & Telegraph Co. v. City of Spokane*, 63 P. 1116 (1901). In that case a long-distance telephone company providing service from the Canadian border to Spokane applied to the city of Spokane for permission to construct its own telephone lines within the city. Permission was denied. Suit was brought, and the Supreme Court of Washington considered art. 1, § 12, of its constitution, containing language similar to art. 11, § 13, of the Idaho Constitution.

The Supreme Court of Washington upheld the city council’s action on the ground that a local municipality is a “competent authority” to determine when the saturation

point is reached and when additional utility lines would interfere with public access to streets and highways.

The result was that municipalities were free to regulate construction of telephone and telegraph lines in public rights-of-way. However, the Washington Supreme Court expressly noted that the municipality could not have awarded an exclusive franchise to a single utility:

The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in [citation omitted]. . . . If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. (Emphasis added.)

63 P. at 1118.

The Montana and Washington decisions on their face reach opposite results. In Montana, the state supreme court held that municipalities could not refuse to allow the construction of telephone lines in city limits. In Washington, such conduct was allowed but only with the proviso that municipalities could not expressly grant exclusive privileges either by ordinance or by contract.

The cases can be reconciled by returning to first principles. The relevant constitutional provisions grant any corporation the right to construct, maintain or connect telephone lines. However, the same provisions authorize the legislature to pass general laws providing for “reasonable regulations” to give effect to this section. Thus, a fact-finding body of competent authority may grant or withhold the right to establish a telephone company or to connect to the network if it finds that construction of the telephone system would “incommode the public.” *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 530, 346 P.2d 596 (1959).

3. *The Public Utilities Commission Era in Idaho.*

The most comprehensive legislative enactment of uniform laws providing “reasonable regulation” of telephone utilities in Idaho is the Public Utilities Law of 1913. While the precise relation of that law to art. 11, § 13, has not been spelled out by the Idaho Supreme Court, the court has over the past seven decades laid down the fundamental principles guiding interpretation of all such laws.

The landmark case interpreting the Public Utilities Law was decided only one year after its passage. In *Idaho Power & Light Company v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914), the Idaho Supreme Court addressed the same question at issue here, namely, whether the legislature could forbid competition and duplication of services by granting an exclusive franchise to a single regulated monopoly. The Idaho Supreme Court answered the question in the affirmative:

There is nothing in the constitution that prohibits the legislature from enacting laws prohibiting competition between public utility corporations, and

the legislature of this state no doubt concluded. . . that free competition between as many companies or as many persons as might desire to put up wires in the streets is impracticable and not for the best interests of the people.

26 Idaho at 241. While the *Blomquist* court expressly addressed only the electric utility industry, its principles apply to all natural monopolies. Indeed, in the same paragraph quoted above, the court referenced a classic text on telephone deregulation.

Even as it announced this Magna Carta of regulation of utility monopolies, the Idaho Supreme Court was careful to leave open the door to competition when the public convenience and necessity might so require:

The public utilities act merely declares the will of the people as expressed through the legislature, to the effect that *competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand it*, . . . (Emphasis added.)

Id. at 248. And, again:

The policy of said act is not to permit a duplication of plants where it is not for the welfare, convenience and necessity of the people, and under said act the body first to determine that question is the public utilities commission. (Emphasis added.)

Id. at 259.

Only one year later, in 1915, the Public Utilities commission made clear its own understanding of the *Blomquist* principles. The Commission granted an exclusive franchise to Idaho Light & Power Company on the grounds that it had pioneered service in the field, was rendering adequate service, charged cheap rates and, in general, that the point of saturation had been reached in the service territory. Under such circumstances, the commission held:

The decision of the law is that the utility shall be protected within such field; *but when any one of these conditions is lacking, the public convenience may often be served by allowing competition to come in*. (Emphasis added.)

In re Idaho Light & Power Co., P.U.R. 1915A 2.

By 1931, the battleground had shifted to the gas industry. The Public Utilities Commission granted a certificate of convenience and necessity to a natural gas company to serve the city of Pocatello, despite the fact that a utility providing manufactured gas already had a certificate to serve that city and had been providing adequate service for 20 years. The Idaho Supreme Court upheld the decision of the P.U.C. to allow competition on the ground that the natural gas industry was a superior technology which appeared destined to replace the manufactured gas industry in providing service to the public:

If the new service offered has no advantage over the old from the public

viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting and the utility in the field would be entitled to protection against duplication and unwarranted competition. However, if an applicant can and does in good faith offer a better or a broader service a different question is presented. In such case the applicant is offering the public more than sheer competition. In reality it is offering a different service.

McFayden v. Public Utilities Consolidated Corporation, 50 Idaho 651, 657, 299 P. 671 (1931).

The fact that the manufactured gas utility had a large investment in its facilities and, generally speaking, had a right to protection against competing utilities was of no avail:

Protecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service to the public.

Id. Thus, the certificate of public convenience and necessity does not provide an "exclusive franchise" in the sense of perpetual protection against competitors with superior technologies. As the court in *McFayden* stated:

A service that is inferior is not adequate. The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which is proposed to carry on for the service of the public.

Id.

In the 1970's, mobile radio paging systems appeared in the major metropolitan areas of Idaho. Such systems were found to be "telephone corporations" under Idaho Code § 61-121 and were required to obtain certificates of public convenience and necessity from the P.U.C. It was immediately obvious, however, that the mobile radio paging business was not a natural monopoly and that the public would best be served by allowing competition within the certificated service territories. Competing and overlapping certificates were the norm. By 1983, it had become clear that competition was the best regulator of mobile radio paging systems and the mobile telephone business was deregulated by the Idaho legislature.

Beginning in 1981, the Public Utilities Commission repeatedly heard complaints of poor service by the Silver Star Telephone Company during rate proceedings initiated by the company. After repeated failures by the company to remedy the problems, the P.U.C. initiated a proceeding to withdraw the certificate of public convenience and necessity enjoyed by Silver Star. After improvements were made, the Commission allowed Silver Star to retain its certificate. Nonetheless, the proceeding stands for the unquestioned right of the P.U.C. to cancel a certificate if a utility fails to provide adequate service to its customers.

Finally, in 1984, the Public Utilities Commission was faced with two competing

utilities each desiring to serve a handful of customers living at the base of Hells Canyon. The customers actually lived within the certificated area of Cambridge Telephone Company, but that utility had no lines in the canyon. A neighboring utility, Pine Telephone, had lines nearby. The P.U.C. removed the canyon area from the certificated area of Cambridge and awarded the area to Pine. The Idaho Supreme Court upheld the commission decision against the claim that a certificate of public convenience and necessity is perpetual and exclusive in nature:

Despite the prior granting of a franchise to one company, therefore, it may not be assumed that the franchise is permanent and exclusive for the indefinite future when circumstances require reassessment.

Cambridge Telephone Co. v. Pine Telephone System, Inc., 109 Idaho 875, 879, 712 P.2d 576 (1985) (quoting approvingly from *Empire Elec. Ass'n v. Public Service Comm'n*, 604 P.2d 930, 933 (Utah 1979)).

The *Cambridge Telephone* case brings us back full circle to *Blomquist* and its central holding that the P.U.C. can award an exclusive certificate of public convenience and necessity to a single utility in a natural monopoly situation where duplication of services would lead to economic waste. We must assume that the Idaho Supreme Court was familiar with art. 11, § 13, of the Idaho Constitution and its provision that “Any . . . corporation . . . shall have the right to construct and maintain lines of telegraph and telephone within the state, . . .” Clearly, the court could not have allowed the P.U.C. to award the exclusive certificate to *either* Cambridge *or* Pine if the Idaho Constitution mandated unfettered competition at all times and in all circumstances.

The lessons to be learned after seven decades of enactments by the legislature, decisions by the P.U.C. and review by the Idaho Supreme Court are clear. If the telephone business at issue is not a natural monopoly (as in the case of mobile phones), then exclusive franchises will not be granted. In the more common situation, certificates of public convenience and necessity do grant exclusive franchises to regulated utilities. Such exclusive franchises are valuable property rights protected by due process rights of the holder. Nonetheless, exclusive franchises are not perpetual in nature. Nor are they unmodifiable. If the public is not provided with adequate service by the certificated utility, the certificate can be withdrawn. If a competitor can provide the same service at substantially lower costs, the incumbent utility can be forced to yield up its certificate. If a new and competing technology will better serve the public, then competition will be allowed within the certificated area. In short, the certificate of public convenience and necessity serves but one master, the public—not the entrenched monopolist, and not the intruding competitor.

4. Application of Principles to House Bill 149.

The principles enunciated above must guide us in answering the question whether H.B. 149 can survive constitutional scrutiny. The section in question states:

62-616. STATUS OF EXISTING OR EXPANDED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY, AND EXISTING AREAS OF SERVICE. (1) For telephone corporations, or their successors

in interest, which remain subject to title 61, Idaho Code, and which provide basic local exchange service, *their existing certificates of public convenience and necessity shall represent an exclusive service area franchise* for telecommunication services within the certificated area of such telephone corporation, unless such telephone corporation consents to the provision of such services by another telephone corporation. (Emphasis added.)

The question is whether the grant of “an exclusive service area franchise” to existing certificated utilities is in violation of art. 11, § 13, of the Idaho Constitution. We are guided by the two cardinal principles of statutory interpretation that a validly enacted statute is presumed constitutional and that a court will adopt a reading of a statute that renders it constitutional if at all possible. *State v. Hanson*, 81 Idaho 403, 409, 342 P.2d 706 (1959).

If the intent of the proposed statutory language is to grant exclusive franchises that are perpetual in duration and unmodifiable in content, then the section would be unconstitutional. A corporation holding such a franchise would no longer be accountable for providing adequate service and would be insulated from competition from alternative and superior technologies. Such a construction of the section would be at odds with seven decades of legislative enactments, P.U.C. practice and Idaho Supreme Court opinions. Such a construction would most probably violate art. 11, § 13, of the Idaho Constitution in both its grant of a privilege to engage in the telephone business and its enactment of “reasonable regulations” to carry out that privilege. Most importantly, such a construction would clearly violate the provisions of art. 11, § 8, of the Idaho Constitution, which states that:

The police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.

Similarly, if the section is construed to insulate the holder of a certificate from accountability to the public, it would violate art. 11, § 18, of the Idaho Constitution and its provisions against restraint of trade. The Idaho Supreme Court has construed that constitutional provision as standing for the proposition that a corporation vested with monopoly powers to serve the public becomes a utility subject to governmental regulation. *Blomquist*, 26 Idaho at 260.

Finally, if the “exclusive service area franchise” of proposed Idaho Code § 62-616 were construed to deny the public the right to insist upon high quality service at reasonable rates, then the section would also violate art. 1, § 18, of the Idaho Constitution and its guarantee that “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, . . .”

We cannot lightly ascribe such an intent to the legislature. Rather, the intent of the proposed section appears to be simply that existing certificates of public convenience and necessity will continue to be recognized for the valuable property rights that they are. The legislature must be presumed to know and adopt the construction put upon such certificates by the Idaho Supreme Court only 15 months ago in the *Cambridge Telephone* case:

Therefore, we conclude that the commission's order [partially rescinding the certificate of Cambridge Telephone and awarding the service area to a better located competitor] did not unconstitutionally deprive Cambridge of its certificate. *The certificate was modifiable by a non-arbitrary application of a public convenience and necessity standard, a condition of the certificate, based upon substantial competent evidence.* (Emphasis added.)

Cambridge Telephone, 109 Idaho at 880.

We conclude therefore that the phrase "exclusive service area franchise" in H.B. 149 is not a perpetual and unmodifiable license to provide inadequate service or to be free from competition from companies that can provide similar service at more reasonable rates or from companies that meet the public need with alternative and superior technologies. Read in this manner, the phrase would not survive constitutional scrutiny by a reviewing court. Such a reading also would not be consistent with the legislature's announced intent in H.B. 149, namely:

There is a need for establishing legislation to protect and maintain *high-quality universal telecommunications at just and reasonable rates* for all classes of customers *and to encourage innovation within the industry by a balanced program of regulation and competition.* (Emphasis added.)

By reading the phrase "exclusive service area franchise" to mean simply that existing certificated utilities retain the valuable property right of their existing certificates, subject to administrative and judicial review if they fail to provide adequate and technologically up-to-date service at reasonable rates, we are able to conclude that H.B. 149 will pass constitutional muster.

OTHER ISSUES:

Your second set of inquiries is as follows:

1. Is there any area of this bill that could potentially prevent or prohibit competition? If so, where?
2. Are there adequate provisions for consumers' protection relevant to subscriber complaints?
3. Does the provision for a sliding scale of access charges benefit both small and large companies dealing with long distance service?
4. Are there areas that require clarification to prevent possible abuse?
5. Regarding § 62-615, pages seven and eight of the bill: Would you please explain how that section translates into cost to the consumer?
6. What is the status of a multiple line customer?

As indicated above, these questions do not involve legal issues, but rather touch upon policy considerations. For example, in order to answer question 1 regarding the

possibility of competition being prevented or prohibited, an intricate understanding of the method and manner in which the telephone companies currently operate would be required, together with an equally comprehensive technical understanding of the factual basis upon which companies will operate in the future should the bill pass. Our office does not possess this technical expertise or knowledge. The same is true for the second question regarding consumer protection complaints. For the past several years, all complaints regarding telephone service have been processed by the Public Utilities Commission. It would not be appropriate for our office to comment upon something of which we have no knowledge.

The Public Utilities Commission is a legislatively created body and operates as an arm of the legislature. As such, these questions should be answered by the Public Utilities Commissioners themselves. Those individuals have the skill and expertise, together with the detailed factual knowledge required, to give advice on these very factually oriented non-legal policy issues.

AUTHORITIES CONSIDERED:

1. *Constitutions:*

Idaho Constitution, art. I, § 18.

Idaho Constitution, art. 11, § 8.

Idaho Constitution, art. 11, § 13.

Idaho Constitution, art. 11, § 18.

Montana Constitution, art. 15, § 14.

Washington Constitution, art. I, § 12.

2. *Statute:*

Idaho Code § 61-121.

3. *Idaho Cases:*

Mountain States Telephone and Telegraph Company v. Kelley, 93 Idaho 226, 459 P.2d 349 (1969).

State v. Idaho Power Company, 81 Idaho 47, 346 P.2d 596 (1957).

State ex rel. Rich v. Idaho Power Company, 81 Idaho 487, 346 P.2d 596 (1959).

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

McFayden v. Public Utilities Consolidated Corporation, 50 Idaho 651, 299 P. 671 (1931).

Cambridge Telephone Co. v. Pine Telephone System, Inc., 109 Idaho 875, 712 P.2d 576 (1985).

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

4. *Cases from Other Jurisdictions:*

State v. Mayor of City of Red Lodge, 76 P. 758 (Mont. 1904).

State ex rel. Crumb v. Mayor of City of Helena, 85 P. 744 (Mont. 1906).

State ex rel. Spokane and B.C. Telephone and Telegraph Co. v. City of Spokane, 63 P. 1116 (Wash. 1901).

Empire Elec. Ass'n v. Public Service Comm'n, 604 P.2d 930 (Utah 1979).

DATED this 2nd day of March, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 87-3

Sheriff Vaughn Killeen
Ada County Sheriff
7200 Barrister Drive
Boise, Idaho 83704

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Is the office of the county sheriff primarily responsible for attending district and magistrate courts?
2. In addition to the sheriff, are other court attendants authorized by statute?
3. Does a district court have the inherent authority to appoint non-sheriff court attendants when the sheriff is able and willing to so function?
4. Can the sheriff be held civilly liable for the wrongful acts of court-appointed attendants?

CONCLUSIONS:

1. It is the duty of the county sheriff to attend all courts located within his county.
2. There is no statutory authority by which the court may appoint a bailiff, marshal, constable, special constable or other staff member to perform the duties of a regular court attendant.
3. A district court has the inherent authority under Idaho case law to appoint court attendants when the sheriff fails to fulfill that statutory obligation or when exigent circumstances so require.
4. A sheriff is potentially liable for the wrongful conduct of court attendants appointed by a court when he fails to fulfill his statutory obligation to provide court attendants or negligently supervises such attendants.

ANALYSIS:*Question 1:*

In answering the question of whose duty it is to attend the district and magistrate's court, it is first necessary to define the duties of court attendants. Four general categories of duties are customarily provided by court attendants and are reasonably necessary for proper court functioning. First, the attendant has the traditional duty of "court crier." This includes announcing the opening and adjournment of court, maintaining order and decorum, directing jurors to their places during voir dire, taking charge of the jury during deliberations, handing exhibits to witnesses, and other miscellaneous tasks for the smooth running of the courtroom. Second, the attendant provides safety and security to those in the courtroom. Third, the attendant keeps custody of prisoners while in the courtroom and while escorting or transporting them to and from the jail. Finally, the attendant may be called on to serve arrest warrants and other process issued from the bench, particularly in cases where a defendant, witness or juror has failed to appear. *See generally*, Idaho Code § 31-2215, *Merrill v. Phelps*, 52 Ariz. 526, 84 P.2d 74 (1938). The four categories described above are not exhaustive; in practice, the scope of a court attendant's duties varies, depending upon local custom.

Under the common law it was the sheriff or his deputy who was required to attend all sessions of court held in his county, as well as obey the lawful orders and directions of a court and execute its process and summons. 80 C.J.S. *Sheriffs and Constables* § 35, p.204. In the case of *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 P. 392 (1913), the Montana Supreme Court discussed this common law requirement:

In general, the common law relations of the courts to the sheriff have been preserved in the United States. In the absence of a statute to the contrary, the office of sheriff imports, and has always imported, that *it is the sheriff that is the executive arm of the district court, that it is both his duty and privilege to attend upon its sessions, either in person or by deputy, to act as the crier of the court, [and] to execute the lawful orders of the court.*

137 P. at 394 (emphasis added).

The common law duty of a sheriff to attend the courts within his county was codified in virtually every jurisdiction in the country. The Idaho legislature required under Idaho Code § 31-2202 that the sheriff:

(4) Attend all courts except justices' and probate courts, at their respective terms held within his county, and obey their lawful orders and directions.

Probate courts, justice of the peace courts, and police courts were legislatively abolished, effective January, 1971. The jurisdiction of these courts was transferred to the district courts and the magistrate's division thereof. Idaho Code § 1-103. 1969 Sess. Laws, ch. 100, p.344. Idaho Code § 31-2202 was then amended to provide that, effective January, 1971, the sheriff must:

(4) Attend all courts, *including the magistrate's division of the district court when ordered by a district judge*, at their respective terms held within his county, and obey the lawful orders and directions *of the courts*.

1970 Sess. Laws, ch. 120, p.288.

In our opinion, this amendment reflects the legislature's intention that the primary duty of attending "all courts" is that of the county sheriff. The fact that a sheriff attends the courts of the magistrate's division when ordered to do so by a district judge does not, in our opinion, support an inference that some other person has the duty or authority to attend those courts. Where a statute is clear and unambiguous, the express intent of the legislature must be given effect. *Intermountain Health Care v. Board of County Commissioners of Madison County*, 109 Idaho 685, 710 P.2d 595 (1985).

When one considers the range of activities that must be engaged in by a court attendant in order to allow a court to function properly, it becomes even more apparent that the legislature intended the sheriff to serve in that capacity. This is because many of those activities can only be performed by a "peace officer." For example, a court may issue an arrest warrant from the bench, and it must be served. Arrest warrants must be directed to and executed by a peace officer. Idaho Code §§ 19-509, 19-603. A private person cannot serve an arrest warrant and may arrest without a warrant only in limited circumstances. Idaho Code § 19-604. In addition, court security requirements may call for a court attendant to wear a concealed weapon. No person other than a county, state or federal official or a peace officer may carry a concealed weapon unless the sheriff so authorizes. Idaho Code § 18-3302. Furthermore, someone must have custody of the prisoner in court and during transportation to and from the jail. It is the sheriff who has the exclusive duty to maintain the county jail and keep custody of pretrial detainees and prisoners sentenced to the county jail. Idaho Code §§ 20-601, 31-2202. It is obvious that these functions all properly belong to a peace officer.

Peace officers are defined in two places in the Idaho Code. Enacted in 1864, Idaho Code § 19-510 defines a peace officer as a "sheriff of a county or a constable, marshal or policeman of a city or town." In the context of chapter 5 of Title 19 of the Idaho

Code, this definition relates narrowly to service and execution of criminal complaints and arrest warrants. Enacted over 100 years later in 1981, Idaho Code § 19-5101 defines a peace officer as follows:

- (d) “Peace officer” means any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof *and* whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. (Emphasis added.)

Chapter 51 of Title 19 of the Idaho Code relates to the Peace Officers Standards and Training Council. It contains a comprehensive expression of legislative intent that peace officers, as defined therein, be professionally certified after meeting certain competency requirements of statewide application. (See, Attorney General Opinion 87-1.)

A sheriff and his deputies are by definition peace officers under both Idaho Code §§ 19-510 and 19-5101. They are enumerated under the former statute and they are also employees of a law enforcement agency whose duties primarily consist of prevention and detection of crime. They would, therefore, be able to perform all functions of court attendants described above.

Conversely, non-sheriff personnel who are appointed by courts to serve as attendants under the designation of “court marshal” or “bailiff” are not peace officers under either statutory definition. Their duties do not, as required by Idaho Code § 19-5101(d), “primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.”

Reliance upon Idaho Code § 19-510 as conferring peace officer status upon a “court marshal” is unwarranted. The statute makes no reference to court marshals. Moreover, “marshal” has historically been defined as a police officer of a municipality. 55 C.J.S. *Marshal*, p.954. A plain, unambiguous reading of the statute leads to the conclusion that the legislature intended to refer to a marshal of a city or town in the narrow context of execution of complaints and arrest warrants.

Conclusion:

There are several broad categories of duties that a court attendant performs in order to allow a court to function properly. Historically, the sheriff has performed these duties as the executive arm of the court. The sheriff’s duty to attend the courts is also clearly mandated by statute in Idaho. The existence of “peace officer” related duties of court attendants also leads to the conclusion that the sheriff has the primary responsibility to act in that capacity.

Question 2:

In answering the question whether a court has the statutory authority to appoint court attendants other than county sheriffs, we note that several methods for the

appointment and designation of court attendants have developed in courts around the state, depending upon local custom, unique needs and legal interpretation. According to an informal survey of district court administrators, court attendants have been independently hired with and without sheriff deputization. These court attendants are designated as “bailiffs,” “court marshals” and “special constables.” In answering this question, we address only the court’s authority to appoint court attendants *without sheriff deputization, and in the absence of exigent circumstances*. We expressly caution that we have not determined how the various methods of designating and appointing non-sheriff court attendants arose throughout the state. Thus, we do not attempt to pass judgment on the validity of these arrangements. Our discussion of a court’s authority to appoint court attendants under exigent circumstances is reserved for Question 3 below. Finally, while our response addresses the various designations of court attendants that have developed around the state, we emphasize that a court attendant receives authority to act not from the particular title bestowed upon him by the court, but only from the statutory or inherent authority to appoint such attendants in the first place.

A. The appointment of a “bailiff” as court attendant:

There is no statute authorizing the appointment or election of “bailiffs” in Idaho. At common law, a bailiff was not the holder of an independent office. Indeed, the term “bailiff” was used to “denote a deputy sheriff in charge of a jury.” 8 C.J.S. *Bailiff*, p.308. Thus, there is no statutory authority for court appointment of bailiffs as court attendants. This fact is recognized by those courts around the state that are attended by bailiffs who have been deputized by the sheriff pursuant to Idaho Code § 31-2003.

B. The appointment of a “marshal” as court attendant.

There is no statute specifically authorizing the appointment of a “marshal” to act as a court attendant in Idaho. Nevertheless, references to marshals and their law enforcement related functions are found in several places in the Idaho Code. Therefore, we address the question of whether there is implied statutory authority to appoint marshals to serve as court attendants.

At common law, the term “marshal” was defined as an officer of a municipality occupying the same relation to the governmental affairs of the municipality as the sheriff to his county or the constable to his town. 55 C.J.S. *Marshal*, p. 954. In Idaho, the position of marshal was expressly recognized in 1941 when the portion of the municipal laws describing the powers of policemen was amended and recodified to include marshals:

49-331. Powers of Policemen. The policemen *or marshals* of the city *or incorporated village* shall have power to arrest all offenders against the law of the State, or of the city, *or such village*, by day or by night, in the same manner as the sheriff or constable, and keep them in the city prison or other place to prevent their escape until trial can be had before the proper officer.

1941 Sess. Laws, ch. 68, p.132. This section has been recodified in Idaho Code § 50-209. Marshals are no longer mentioned therein.

The traditional city marshal was considered a peace officer, Idaho Code § 19-510, and as such could make arrests, Idaho Code §§ 19-509, 19-603, and execute search warrants, Idaho Code § 19-4407. It appears, therefore, that at one time in Idaho's history, the powers of city marshals were similar to those of city policemen. From this proposition, one might argue that city marshals also had implied statutory authority to attend police courts. These courts existed before the Court Reform Act and had jurisdiction over matters under city ordinances as well as misdemeanor violations of state law that took place within city limits. The police court judge had the authority to issue warrants, hold hearings, summon witnesses, render judgment, and assess punishment for offenses over which he had jurisdiction. *See*, former Idaho Code §§ 50-122 and 50-334. The police court judge may then impliedly have had the statutory authority to appoint attendants from the ranks of policemen and/or marshals to attend the court and assist in carrying out its duties.

Whatever implied statutory authority city marshals may have had to attend city police courts disappeared in 1971 with the Court Reform Act, which abolished probate courts, justice of the peace courts, and police courts, and transferred their jurisdiction to district court and the magistrate's division thereof. Idaho Code § 1-103; 1969 Sess. Laws, ch. 100, p.344. Later, under a corresponding amendment to Idaho Code § 31-2202, the sheriff was given the responsibility of attending all courts, including the magistrate's division when ordered by a district judge. 1970 Sess. Laws, ch. 120, p.288.

This analysis is bolstered by the fact that in 1967 there had been a complete recodification of the municipal codes. The distinctions between villages and cities of the first or second class were eliminated. Pursuant to these changes, the police court judge could direct service of warrants to ". . . the chief of police or other police officer of the city, the sheriff, constable of the county, or some person specially appointed in writing, . . ." 1967 Sess. Laws, ch. 429, § 455, p.1411. City marshals were deleted from the list.

We conclude from this historical survey that the court cannot simply appoint someone and call him a "marshal," thereby conferring upon him peace officer status and enabling him to carry a concealed weapon, serve arrest warrants, take custody of prisoners and secure courtrooms. However, if the sheriff cooperates with the court, a "marshal" could be authorized to perform all the sheriff's court attendance duties, after being deputized by the sheriff. Idaho Const. art. 18, § 6; Idaho Code § 31-2003.

C. The appointment of a "constable" as court attendant.

At common law "constable" was traditionally defined as an officer of a municipal corporation, usually elected, whose duties were similar to those of the sheriff. While the constable's powers were typically less than those of the sheriff, his traditional duties were to preserve the peace, execute process of magistrate's courts and of some other tribunals, serve writs, attend sessions of the criminal courts, and have custody of juries. 80 C.J.S. *Sheriffs and Constables* § 3, p.154.

In 1887, the Idaho legislature established the office of constable, relying upon the authority of art. 18, § 6, of the Idaho Constitution, which allows the establishment of "such . . . precinct . . . officers as public convenience may require." Pursuant to this

constitutional authority, the legislature made justices of the peace and constables precinct officers and delegated to the board of county commissioners the power to fix precincts for justices of the peace and constables.

The statutory function, responsibilities, and authority of the constable's office, first codified in 1887, existed in every codification of Idaho law without change until court reform. *E.g., compare*, 1887 R.S. § 2090 with Idaho Code § 31-3002 prior to the 1969 amendments. The duties relevant to this discussion were set out in previous I.C.A. § 30-2502:

Duties of Constables — Constables must attend the courts of justices of the peace within their precincts whenever so required, and within their counties execute, serve and return all process and notices directed or delivered to them by a justice of the peace of such county, or by any competent authority.

Pursuant to the Court Reform Act, constables' duties were changed. With the elimination of justice of the peace courts, constables were required to attend the new magistrate's courts. Idaho Code § 31-3002; 1969 Sess. Laws, ch. 119, p.378. Constables were not required or empowered to attend district courts.

A year later in 1970 (and before the January, 1971, effective date of the Court Reform Act), the Idaho legislature continued its comprehensive reform of the Idaho governmental process by enacting election reform. The Election Reform Act specifically listed the qualifications for every elected state and county official and, in so doing, deleted all references to constables. It also deleted all reference to "precinct officers," eliminated precinct elections, and amended Idaho Code § 31-2002 to make constables "county officers." 1970 Sess. Laws, ch. 120, § 4, p.286. However, while former Idaho Code § 33-207 had provided for the election of precinct constables, the legislature did not provide an election or appointment mechanism for the new *county* office of constable. As a result, the present statutes pertaining to constables set forth their duties but are silent as to how a constable comes into being. Idaho Code §§ 31-3002, et seq. Without a statutory mechanism for the election or appointment of constables, they no longer legally exist in Idaho.

Our research has revealed no specific expression of what the legislature intended with respect to the continued existence of constables. A plausible analysis is that the legislature intended to phase out the office of constable and its duties. The legislature may have intended that constables still in office at the time of election reform were to attend to the magistrate's courts until the end of their terms. At that time, the office would become forever vacant and the sheriff would thereafter assume the primary responsibility for attending the magistrate's courts if needed. Idaho Code § 31-2202. On the other hand, the legislature may simply have overlooked the need to establish a mechanism for the election of county constables. Regardless of what the legislature intended in 1970, there appear to be no remaining constables to attend to the courts. And, as noted above, the sheriff is statutorily authorized to act in that capacity.

Under another analysis, the office of constable was rendered constitutionally illegal upon the enactment of 1970 Sess. Laws 1970, ch. 120, § 4, amending Idaho Code § 31-2002. That statute formerly dealt with precinct officers. As was noted above, in 1970, "precinct officers" were eliminated and constables were redesignated as "other

county officers.” However, art. 18, § 6 of the Idaho Constitution expressly prohibits the establishment of county offices other than those specifically enumerated therein. Constables are not enumerated as a county office in the constitution. Therefore, the legislative designation of constable as a county officer was constitutionally void as there can be no “other county officers” besides those enumerated in art. 18, § 6.

Under either analysis, the office of constable is defunct and the duty of attending court is now statutorily assigned to the sheriff. With the sheriff charged with these duties, the courts have no implied power under Idaho Code § 31-3002 to appoint constables to attend to magistrate’s courts.

D. The appointment of a “special constable” as court attendant.

Historically, a justice of the peace has statutory authority to appoint special constables for particular purposes. 80 C.J.S. *Sheriffs and Constables* § 29b(1), p.198. In Idaho, this statutory authority has existed since 1907. See, I.C.A., § 30-2510. Until amended in 1969, this provision appeared in Idaho statutory law without modification. However, with the Court Reform Act and the abolition of justices of the peace and the transfer of their jurisdiction to the magistrate’s court, the statutory authority to appoint a special constable was given to the magistrate’s court. Idaho Code §§ 31-3010, 31-3011. 1969 Sess. Laws, ch. 119, §§ 3 and 4, p.378.

Despite these variations, however, an important limitation on the appointment of special constables has remained unchanged. This appointment is available to the magistrate only when a legally qualified constable is “absent . . . otherwise incapacitated, or prevented from performing the duties of his office. . . .” Idaho Code § 19-3010. As we have shown above, regular constables no longer exist in Idaho. Consequently, the “special constables,” cannot be called into being as their emergency substitutes.

We have also considered two recent Idaho cases mentioning the powers of “constables” and “special constables”: *Ketterer v. Billings*, 106 Idaho 832, 863 P.2d 868 (1984), and *Ziegler v. Ziegler*, 107 Idaho 527, 691 P.2d 773 (Ct.App. 1985). These two cases are troubling. They seem to stand for the proposition that magistrates (and district court judges) are authorized, pursuant to Idaho Code § 19-3010, to appoint “constables” and “special constables” to carry out various court directives.

This conclusion is not warranted by a close reading of the cases, including the briefs that were before the courts on appeal. In *Ketterer*, the Idaho Supreme Court held only that a district court was a “competent authority” to appoint a special constable to conduct an execution sale. In *Ziegler*, the Court of Appeals affirmed without comment the trial court’s ruling that the pro se defendant could not complain that a “constable” rather than a sheriff had served the writ of execution.

Neither case addressed the question of which officer is statutorily authorized to attend the courts. Neither case traced the history or addressed the scope of duties that could be assigned to a “constable” or “special constable.” Neither case challenged the constitutionality of transforming constables from “precinct officers” to “county officers.” In sum, the cases stand only for their own holdings, namely, that the named defendants could not be heard to complain of the court orders authorizing writs of

execution against them. Neither party stood in the shoes of a county sheriff and asserted a statutory right to serve as court attendant. That issue simply was not addressed.

Therefore, neither *Ketterer* nor *Ziegler* alters our conclusion that Idaho Code § 31-3010 is not valid statutory authority for the appointment of special constables to serve as court attendants. As indicated above, the duties of court attendants, formerly split between sheriffs and constables, now rest solely with sheriffs. If there are no constables, there can be no special constables to perform constable duties. In the few counties where “special constables” have been appointed to attend the court, they are acting without statutory authority, unless deputized by the sheriff or justified by exigent circumstances.

E. Other Personnel. Staff members.

The Court Reform Act makes each county responsible for providing facilities, equipment, “staff personnel,” supplies and other expenses of the magistrate’s division. Idaho Code § 1-2217; 1969 Sess. Laws, ch. 121, § 1, p.381. Cities were charged with the same responsibility upon a majority vote of the district judges in the judicial district. Idaho Code § 1-2218. 1969 Sess. Laws, ch. 121, § 2, p.381. Such requirements do not, in our opinion, create the authority for the appointment of court attendants. Taken in context, these two statutes list the provisions for “staff personnel” together with facilities, equipment, supplies, and other expenses, all of which would be necessary for the administration of the court system. They are intended to allocate the financial burden of providing for the magistrate’s courts between the counties and cities. This conclusion is buttressed by Idaho Code § 1-2219, which requires the state to provide salaries and travel expenses for magistrates. 1969 Sess. Laws, ch. 121, § 3, p.381. In any event, the “staff personnel” provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants. Nor are “staff personnel” recognized as “peace officers.” Thus, they are not competent to perform the full range of security functions of court attendants. Idaho Code §§ 19-510, 19-5101.

Conclusion:

There is no statutory authority by which the court may appoint a bailiff, marshal, constable, special constable or other staff member to perform the duties of a regular court attendant. Bailiffs have no independent statutory existence and have traditionally held their authority as deputy sheriffs. A court marshal has neither express nor implied statutory authority to act as court attendant. While Idaho statutes make reference to marshals as peace officers, their functions have largely been eliminated. There are no constables in Idaho because there is no mechanism for their election or appointment; moreover, they are a constitutionally illegal “county office.” Because there are no constables, there can be no special constables to act in their place. Finally, the appointment of other staff members to serve as court attendants is not authorized by statute.

Question 3:

A court does have the inherent authority to appoint court attendants. However, it is

clear that this inherent authority has been very carefully circumscribed. In the case of *State v. Leavitt*, 44 Idaho 739, 260 P.164 (1927), the Idaho Supreme Court discussed the exigent circumstances under which a court might exercise its inherent power to appoint non-sheriff court attendants:

The inherent power of courts of record to appoint bailiffs when exigency demands cannot be questioned, but *the exigency must arise from some peculiar emergency or where the agency vested by law with the power to appoint has neglected or refused to perform its duty*. This principle has been announced in several jurisdictions having statutes identical with or similar to our own . . . whereby the business of furnishing the court with attendants is lodged in the sheriff or board of commissioners.

44 Idaho at 744 (emphasis added).

In the *Leavitt* case, the Idaho Supreme Court reviewed and quoted approvingly from the Montana Supreme Court opinion in *State ex rel. Hillis v. Sullivan*, *supra*. In *Sullivan*, a district judge had appointed a bailiff to serve as a court attendant over the objection of the county sheriff. In ruling that such a decision by the court was an abuse of discretion, the Montana Supreme Court stated:

These statutes cannot be effectively assailed as invasions of the inherent power of the court, because the *power of the court, as organized by the Constitution, did not include the right to appoint attendants without prior recourse to the sheriff and to the county*. The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods.

137 P. at 395 (emphasis added).

In the case of *Merrill v. Phelps*, *supra*, the Arizona Supreme Court reached the same conclusion. It stated, in part:

[W]e think that . . . it is the duty of the sheriff to provide such attendants for the court, either in person or by deputy, as are necessary . . . Nowhere in the statutes is there any intimation that a judge of the superior court, primarily and of his own initiative, has the duty or the authority to provide . . . [attendants] . . . for transacting the business of the court.

84 P.2d at 77. Thus, a judge has inherent power to appoint court attendants only “when exigency demands.” *Leavitt*, 44 Idaho at 744. The word “exigency” is defined to cover two situations: (1) “some peculiar emergency,” and (2) neglect or refusal by the sheriff to carry out his statutory duties. One obvious example of an “emergency” would be a situation in which the sheriff himself is the investigator, complainant and key witness in a criminal prosecution; under such circumstances, service as court attendant or bailiff to the jury would present a strong conflict of interest and appearance of impropriety. Another and more frequent situation justifying exercise of the court’s inherent authority, is failure by the sheriff to perform the more mundane functions of court attendant.

Conclusion:

From a review of the above cases, it is our opinion that courts do not have the inherent authority to appoint courtroom attendants, whether they are called marshals, special constables, or bailiffs, when statutory authority to perform that function resides with a county sheriff who is willing and able to provide that service. Courts have the inherent authority to appoint court attendants only when the sheriff fails to perform that function or when other exigent circumstances so require.

Question 4:

Turning to the discussion of tort liability for wrongful conduct of court attendants, we note, as we did at the outset, that the duties of court attendants are extremely broad. It takes little imagination to recognize that some of these functions pose serious liability risks. For example, the use of force in maintaining order and security in the court can result in physical injury as well as the denial of liberty interests. Similarly, the use of firearms is governed by a large and continually growing body of case law on the use of deadly force. The court attendant who is called upon to use deadly force must be thoroughly qualified, trained, and prepared to justify his conduct to the most exacting modern standards. The custody and transportation of prisoners is likewise subject to professional standards announced by federal and state court decisions. A cursory understanding of these standards will not adequately prepare an attendant to deal with prisoners. Finally, the service of court-issued process presents risks of false arrest, false imprisonment under color of authority, and again the use of deadly force.

In the rapidly evolving world of Idaho's Tort Claims Act jurisprudence, there are few certainties. Nonetheless, it is our opinion that, because the sheriff has the statutory duty to attend all courts, he is potentially liable for negligently hiring, retaining or supervising court attendants, or for knowingly allowing nondeputized attendants to be negligently hired, trained or supervised.

Clearly, a sheriff who fails to supervise, or who negligently supervises court attendants, is no longer shielded by the fact that his duties are uniquely governmental in nature, with no "parallel function" in the private domain. *See, Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986); *Jones v. City of St. Maries*, 111 Idaho 733, 727 P.2d 1161 (1986).

Less clear is the question whether a sheriff's decision not to carry out his statutory responsibility to serve as or provide attendants to the court can be insulated from liability under the "discretionary function" exception to the Idaho Tort Claims Act. Idaho Code § 6-904(1). The court's recent pronouncements on this topic have left the matter in doubt. On the one hand, the court has interpreted its new "planning/operational analysis" to mean that a governmental entity may be exempt from liability if its failure to perform its statutory duties is the result of a deliberate policy choice resulting from budgetary shortfalls:

When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. . . . [S]uch decisions require the agency to establish priorities for the accomplishment of its policy objectives by balanc-

ing the objectives sought to be obtained against such practical considerations as staffing and funding. . . . Judicial intervention in such decision-making through private tort suits would require the courts to “second-guess” the political, social, and economic judgments of an agency exercising its regulatory function.

Lewis v. Estate of Smith, 111 Idaho 755, 757, 727 P.2d 1183, 1185 (1986) (quoting approvingly from *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755, 2768, 81 L.Ed.2d 660 (1984)).

On the other hand, the court has held that “operational activities,” i.e., those “involving the implementation of statutory and regulatory policy — are not immunized and, accordingly, must be performed with ordinary care.” *Sterling v. Bloom*, 111 Idaho at 229-30, 723 P.2d at 773-74.

The real lesson of the court’s recent attempts to clarify the Idaho Tort Claims Act is that what were formerly questions of law to be resolved by a motion for summary judgment to the court, have all become questions of fact to be submitted to a jury. Win or lose, the counties incur major expenses and significant exposure to liability under this scenario.

Finally, we cannot foreclose potential liability for the court itself, if the court takes upon itself the statutory responsibility of hiring, training and supervising court attendants. The question then becomes whether the court’s exercise of power in this area is protected by the doctrine of judicial immunity. The general rule is that a court enjoys immunity for “judicial acts” performed in the course of duty. *See, Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Such immunity does not attach to “nonjudicial” acts.

The key is whether the act of hiring and supervising court attendants is a “judicial” act. The Seventh Circuit has recently held that a judge’s decision to demote and dismiss a probation officer is a judicial act, enjoying immunity from civil suit. *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986). A strong dissent argued that the employment decisions of a judge acting in an administrative capacity are “nonjudicial” in nature and should not be shielded from tort liability. The U. S. Supreme Court granted a writ of certiorari on February 23, 1987. _____ U.S. _____, 107 S.Ct. 1282, 94 L.Ed.2d 140 (1987).

In Idaho, we can draw guidance from our Supreme Court’s recent decision in the case of *Crooks v. Maynard*, 112 Idaho 312, 318, 732 P.2d 281, 287 (1987). The Court then concluded that “the administrative district judge and/or district judge is not empowered to decide who shall be hired or appointed to serve as deputy clerks, . . .” The district court’s powers are even more restricted with regard to a sheriff or deputy sheriff because, as the court admonished in *Crooks v. Maynard*, “the sheriff’s office is a county office, unlike the clerk of the district court which is a judicial office created in art. 5.” *Id.*

The Court’s decision in *Crooks v. Maynard*, however, teaches that a bright line does not exist regarding responsibility for the conduct of court attendants. While hiring is clearly not the province of the court, the courtroom is. Thus, the court can set

standards to ensure that the sheriff does not assign “an incompetent, unqualified, irresponsible or untrusty person as a deputy to perform court-related duties.” *Id.* Similarly, if the sheriff “makes an assignment of personnel to a judicial function which the judge finds unacceptable, he [the judge] can refuse to accept that assignment.” *Id.* Finally, the very nature of the office itself means that the sheriff or deputy serving as court attendant must obey “the lawful orders and directions of the courts.” Idaho Code § 31-2202(4).

Conclusion.

Because the county sheriff has primary statutory duty to provide court attendants, the sheriff is civilly liable for improper hiring, inadequate training or negligent supervision of such personnel. The county commissioners and the county itself ultimately bear this liability. A judge who attempts to appoint, hire or supervise court attendants in the absence of “exigent circumstances” described above, is exposing himself to potential tort liability in both his individual and official capacities.

SUMMARY:

We have concluded that the county sheriff has primary statutory responsibility for attending all courts held within his county. We have also concluded that there is no statutory authority for the appointment of other court attendants by the court. Courts do, however, have inherent authority to appoint court attendants if the county sheriff fails to serve in that capacity. Several courts around the state have quite properly exercised their inherent authority in this regard and have appointed bailiffs, marshals, or special constables to attend their courts. We stress, however, that there may be serious exposure to tort liability — for the county, the commissioners, the sheriff and the court itself — if these court attendants are empowered to carry firearms, use deadly force, transport prisoners and serve arrest warrants without proper training and supervision.

Guidance for resolving conflicts that arise in this area was enunciated by the Idaho Supreme Court in *Crooks v. Maynard*:

Of course, the best policy is for the clerks and judges to work closely together and cooperate in the hiring process to ensure efficiency and effectiveness in the operation of the district courts . . .

112 Idaho at 318, 732 P.2d at 287.

Our informal survey shows that the same spirit of cooperation between district courts and county sheriffs already prevails throughout the state. In some instances, the sheriffs fully perform their statutory duties as court attendants. In others, the sheriffs and local administrative district judges “work closely together” to ensure “the smooth, efficient and proper operation of the court system. . . .” *Id.* Generally, this is accomplished by having the sheriff perform the more hazardous duties involved in attending the courts, or having the sheriff deputize, train and supervise those who perform those functions.

One final word. Our research for this opinion has demonstrated that courts and

sheriffs throughout the state are reaching common sense solutions to the problem of allocating scarce resources. Generally, the solution has been to appoint bailiffs to act as court crier, serve as courtroom personnel and take charge of sequestering the jury, while having the sheriff assume those duties requiring peace officer status such as serving arrest warrants, transporting prisoners and securing the courtroom from dangerous persons. We strongly recommend that the state's sheriffs and judges seek statutory changes to sanction the arrangements that have spontaneously arisen in this important area.

AUTHORITIES CONSIDERED

1. *Idaho Constitution*

Idaho Const., art. 2, § 1

Idaho Const., art. 18, § 6

2. *Idaho Statutes*

Idaho Code § 1-103

Idaho Code § 1-2217

Idaho Code § 1-2218

Idaho Code § 1-2219

Idaho Code § 6-904

Idaho Code § 18-3302

Idaho Code § 19-509

Idaho Code § 19-510

Idaho Code § 19-603

Idaho Code § 19-604

Idaho Code § 19-4407

Idaho Code § 19-5101

Idaho Code § 20-601

Idaho Code § 31-2002

Idaho Code § 31-2008

Idaho Code § 31-2202

Idaho Code § 31-2215

Idaho Code § 31-3002 (*compared with R.S. § 2090, and I.C.A. § 30-2502*)

Idaho Code § 31-3010 (*compared with I.C.A. § 30-2500*)

Idaho Code § 31-3011

Idaho Code Annotated § 33-207 (*repealed 1970*)

Idaho Code § 50-122 (*repealed 1969*)

Idaho Code § 50-209 (*compared with I.C.A. § 49-331, as amended by 1941 Session Laws, ch. 68, p.132*)

Idaho Code § 50-344 (*repealed 1969*)

3. *Session Laws*

1970 Session Laws, ch. 120, § 4, p.286

1969 Session Laws, ch. 121, p.381

1967 Session Laws, ch. 429, 455, p.1411

1941 Session Laws, ch. 68, p.132

4. *U. S. Supreme Court Cases*

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 2768, 81 L.Ed.2d 660 (1984)

Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)

5. *Other Federal Cases*

Forrester v. White, 792 F.2d 647, (7th Cir. 1986), *cert. granted*, _____ U.S. _____, 107 S.Ct. 1282, 94 L.Ed.2d 140 (1987)

6. *Idaho Cases*

Crooks v. Maynard, 112 Idaho 312, 732 P.2d 281 (1987)

Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986)

Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986)

Lewis v. Estate of Smith, 111 Idaho 755, 727 P.2d 1183 (1986)

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

Ketterer v. Billings, 106 Idaho 832, 683 P.2d 868 (1984)

State v. Leavitt, 44 Idaho 739, 260 P. 164 (1927)

Zeigler v. Zeigler, 107 Idaho 527, 691 P.2d 773 (Ct.App. 1985)

Cases From Other Jurisdictions

Merrill v. Phelps, 52 Ariz. 526, 84 P.2d 74 (1938)

State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 P.2d 392 (1913)

7. *Attorney General Opinions*

Attorney General Opinion 87-1

8. *Other Authorities*

8 C.J.S. *Bailiff* (1962)

55 C.J.S. *Marshal* (1948)

80 C.J.S. *Sheriffs and Constables* §§ 3,29b(1), and 35 (1953)

DATED this 18th day of June, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

PETER C. ERBLAND
Deputy Attorney General
Chief, Criminal Law Division

ATTORNEY GENERAL OPINION NO. 87-4

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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Your letter of January 19, 1987, requests our opinion as to "whether or not a boarding school is subject to Idaho's Child-Care Licensing Act" as found in Idaho Code § 39-1208, et seq.

CONCLUSION:

Our opinion is that a boarding school which provides 24-hour group care for children under the age of 18 years is subject to the provisions of the Child-Care Licensing Act.

ANALYSIS:

Your letter indicates that the owner of the facility in question does not think the Child-Care Licensing Act of 1963 (hereinafter "the Act") applies because, in his viewpoint, the facility is a "school providing an education and is not a group home providing full-time substitute parental care." Attached to your letter are copies of materials from the "school" known as the Eagle Mountain Outpost. These materials indicate that this is a facility which receives children through contractual arrangements with their parents. By the terms of these agreements the children live at the facility and are "supervised in group care by the staff of the Eagle Mountain Outpost." According to the attachments to your letter and an advertising brochure we have received, the facility serves "the adolescent with emotional, behavioral, substance abuse or learning disorders." It holds itself out as a "holistic environment to live, learn, and grow in," and has several program components consisting of "academic education," an "equally important . . . highly structured intensive therapeutic environment" and "therapeutic recreation."

In answering your question, we look first to the clear statement of public policy declared by the Idaho legislature in adopting the Act:

. . . to insure that children of this state shall receive adequate substitute parental care in the event of absence, temporary or permanent inability of parents to provide care and protection for their children. This policy is predicated upon the fact that a child is not capable of protecting himself, and when his parents for any reason have relinquished his care to others, there arises the possibility of certain risks to the child which require offsetting statutory protection of licensing.

Idaho Code § 39-1208. The legislature took the additional step of enacting Idaho Code § 39-1223 to require that the Act be liberally construed to achieve that policy.

We next turn to the definition section of the Act, Idaho Code § 39-1209, et seq., and set forth the following relevant definitions:

- (3) "Child" means a person less than 18 years of age.
- (4) "Foster home" means a home which accepts, *for any period of time*, with or without compensation, an *unrelated child* as a member of the household for the purpose of providing *substitute parental care* of the child.

* * *

- (7) "Children's agency" or "children's institution" means an organization, corporation, society or association which receives children for control, care, maintenance or placement, . . . or provides *group care for children who are in its custody and control through legal action or informal arrangement*, . . .

* * *

- (9) "Foster care" means child care, *in lieu of parental care* in a foster home, children's agency or children's institution.
- (10) "Group care" means *foster care* of a number of children . . . *in a dormitory or cottage type setting*, characterized by activities and discipline of a more regimented and less formal nature than found in a family setting. (Emphasis added.)

The authority for licensing foster homes, children's agencies and children's institutions is granted to the Idaho Department of Health and Welfare. Idaho Code § 39-1213. The standards for licensing these facilities are set forth in Idaho Code §§ 39-1210 and 39-1211. There is no exception in the Act for an educational institution, boarding school, or any other type of school operation which also provides 24-hour group care. The only exception to the scope of the licensing authority contained in this act is provided by Idaho Code § 39-1213(b) wherein a specific exception is granted to a foster home which has been approved by a *licensed* children's agency or children's institution.

In applying the definitions of the Act to the facility described in your letter and attachments, we are guided by some basic rules of statutory construction. First, in construing a statute the goal is to determine the legislative intent, which intent may be implied by the language used, or inferred on grounds of policy or reasonableness. *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318 (1971). When applying a statute to a factual setting, the initial determination is whether the meaning of the statute is clear or ambiguous. If the meaning of the statute is clear, then one should read the statute literally, neither adding nor taking away anything. *St. Benedict Hospital v. County of Twin Falls*, 107 Idaho 143, 148, 686 P.2d 88 (App. 1984); *see also, Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963).

Examining the Act with the above-cited principles in mind, we conclude that the licensing requirements of the Act apply to a boarding school that provides 24-hour group care for children under the age of 18 years. The children who live at and attend the facility are all “less than 18 years of age.” Idaho Code § 39-1209(3). They are “unrelated” to the owner or operator. Idaho Code § 39-1209(4). The facility cares for the children on a 24-hour basis. The children’s parents obviously are not in a position to provide care for them while they are at the facility. The facility operators and staff provide care “in lieu of parental care.” Idaho Code § 39-1209(9). By doing so, the facility is providing “foster care.” *Id.*

According to the sample “agreement” attached to your letter, the facility holds itself out as a provider of “group care.” Under the relevant language of the Act, “group care” is defined as “foster care of a number of children . . . in a dormitory or cottage-type setting, characterized by activities and discipline of a more regimented and less formal nature than found in a family setting.” Idaho Code § 39-1209(10). Finally, the facility also meets the definition of “children’s agency,” or “children’s institution,” because it is “an organization . . . which receives children for control, care, maintenance or placement, . . . or provides *group care* for children who are in its custody and control through . . . informal arrangement, . . .” (emphasis added) Idaho Code § 39-1209(7).

Our opinion that this facility is subject to the Child-Care Licensing Act is confirmed by reference to the expressed legislative policy to require the “offsetting statutory protection of licensing” when a child’s parents for any reason have relinquished his care to others. That legislative policy should be attained through liberal construction of the Act. Idaho Code §§ 39-1208 and 39-1223. We recognize that the stated goals of the facility’s operators are laudable, and that there may well be a need for this kind of program in our society today. However, the clear and unambiguous language of the Act and the legislative policy behind it do not discourage such programs. The Act simply specifies minimum standards to ensure that children receive adequate care when their “parents for any reason have relinquished [their] care to others.”

Your letter implies that the operators of this facility maintain that they are instead governed exclusively by the education acts found in Idaho Code Title 33. However, those statutes do not provide any definition of a “boarding school,” nor any specific exemption or exclusion from the scope of the Child-Care Licensing Act. Idaho Code §§ 33-118 and 119 prescribe the minimum course of study and accreditation. These are educational requirements and do not address group care, health, safety or living requirements. A review of the definition section in Idaho Code § 33-1001, together with the certification requirements for teachers in Idaho Code § 33-1201 and the savings provision of Idaho Code § 33-1257, indicates a legislative intent that the education acts not conflict with the provisions of the Child-Care Licensing Act. In fact, Idaho Code § 33-122 directs the Board of Education to cooperate with the Board of Health and Welfare on public health matters.

While a comparison of the provisions of the Child-Care Licensing Act and the provisions of the education acts contained in title 33 reveals no conflict, even if we were to assume such a conflict the provisions would have to be reconciled and construed so as to give effect to both. *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005 (1962). There is no inherent conflict in requiring the certification of a particular

educational program for a facility of this nature and also requiring that the group care and living environment aspects be licensed by the childcare licensing agency. *See*, 51 Am.Jur 2d, *Licenses and Permits*, §§ 21, 44, 126; *Independent School District v. Pfost*, 51 Idaho 240, 4 P.2d 893, 84 A.L.R. 820 (1931); Official Attorney General Opinion No. 76-9, p.65.

In response to the other concerns addressed in your letter, counties are responsible for the cost and enforcement of state penal statutes, and it is the duty of a prosecuting attorney to handle an appropriate child-care licensing case. Idaho Code §§ 31-2227, 39-1220, and 39-1222; Official Attorney General Opinion No. 84-4. The Attorney General does provide assistance to prosecutors in fulfilling their obligations. I.C. §§ 67-1401(7) and 31-2603.

SUMMARY:

Idaho Code § 39-1208, et seq., requires the licensing of a “boarding school” which provides group care for children less than 18 years of age on a 24-hour basis, even though it may also provide an educational program. There is no exception to the provisions of the Child-Care Licensing Act contained in title 33 of the Idaho Code relating to education. It is the duty and responsibility of the counties to enforce state penal statutes and it is the duty of the county prosecuting attorney to prosecute a violation of the Child-Care Licensing Act.

AUTHORITIES CONSIDERED:

1. *Idaho Statutes*

Idaho Code § 31-2227

Idaho Code § 33-118

Idaho Code § 33-119

Idaho Code § 33-122

Idaho Code § 33-1001

Idaho Code § 33-1201

Idaho Code § 39-1208

Idaho Code § 39-1209

Idaho Code § 39-1210

Idaho Code § 39-1211

Idaho Code § 39-1213

Idaho Code § 39-1220

Idaho Code § 39-1222

Idaho Code § 39-1223

Idaho Code § 39-1257

2. *Idaho Cases*

Summers v. Dooley, 94 Idaho 87, 481 P.2d 318 (1971)

St. Benedict Hospital v. County of Twin Falls, 107 Idaho 143, 686 P.2d 88 (App. 1984)

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

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

Independent School District v. Pfof, 51 Idaho 240, 4 P.2d 893, 84 A.L.R. 820 (1931)

3. *Other Authorities*

Official Attorney General Opinion Nos. 76-9, 78-34, 84-4

AmJur 2d, *Licenses and Permits*, §§ 21, 44, 126.

DATED this 8th day of July, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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ATTORNEY GENERAL OPINION NO. 87-5

Director A. I. Murphy
Department of Corrections
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the board of correction have the authority to do an outright early release of incarcerated prisoners?
2. Does the board of correction have the authority to release inmates through long-term furloughs, pursuant to Idaho Code § 20-242?

CONCLUSIONS:

1. The board of correction has no authority to do an outright early discharge of prisoners. The power to release prisoners is vested in the commission of pardons and parole, which may release prisoners on parole, or pardon or commute their sentences.
2. Because a furlough is not actually a release, but simply an alternate form of continued confinement, the board of correction can furlough a prisoner at any time, provided the statutory directions of Idaho Code § 20-242 are followed.

ANALYSIS:*Question 1.*

Unlike some states, Idaho has no statutory provision for early release of prisoners once penitentiaries reach maximum capacity. Florida statutes, by contrast, provide that once the prisons reach 98% capacity, the Department of Corrections shall declare a state of emergency, and shall release prisoners until the prison population is reduced to 97% of capacity. Fla.Stat. § 944.598 (1985). *See also*, Wash. Rev. Code Ann. 9.94A.160 (Supp. 1987); Texas Civil Stat. art. 6184o (1986). Other jurisdictions, when faced with overcrowded prisons, have declared that the powers of pardon and parole should be used to bring prison populations within constitutional limits. *See, State v. Scott*, 352 S.E.2d 741 (W.Va. 1987).

In Idaho, however, the board of correction has no power to pardon prisoners. The power to pardon and commute sentences was originally vested by art. 4, § 7, of the Idaho Constitution, in a board of pardons, and is now vested by statute in the state commission of pardons and parole. Idaho Code § 20-210. Although the commission members are appointed by the board of correction, the board has no authority to direct the commission to pardon or commute a prisoner's sentence. The powers of pardon and commutation are granted to the commission as the successor to the board of pardons, and cannot be directly interfered with by the board of correction.

The board of correction also has no power to parole prisoners. Early Idaho cases implied that the power to parole was derived from the power to pardon or commute sentences, and thus was vested in the board of pardons. *In re Prout*, 12 Idaho 494, 86 P. 275 (1906). However, the Idaho Supreme Court later clarified the source of the parole power: it is derived from the legislative authority to establish suitable punishment for various crimes. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975). The power to release prisoners on parole is vested exclusively in the commission of pardons and parole:

Subject to section 19-2513, Idaho Code, the commission [of pardons and parole] shall have the power to establish rules, regulations, policies or procedures in compliance with chapter 52, title 67, Idaho Code, under which any prisoner, excepting under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the commission.

Idaho Code § 20-223 (Supp. 1986).

The Idaho Constitution does give the board of correction some authority over the parole power:

The state legislature shall establish a nonpartisan board to be known as the state board of correction, . . . This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole, with such compensation, powers, and duties as may be prescribed by law.

Idaho Const., art. 10, § 5. The court has found, however, that art. 10, § 5 does not give the board of correction unfettered control, direction, and management of the penitentiaries or adult probation or parole. The board is simply charged with the power to implement those laws enacted by the legislature regarding those functions. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979). Accordingly, the board's parole power has been statutorily limited to the supervision of all persons released from the state penitentiary on parole. Idaho Code § 20-219 (Supp. 1986).

In conclusion, the board of correction has no power to release prisoners outright. The power to release prisoners is vested in the commission of pardons and parole, which can either parole prisoners under § 20-223, or pardon or commute the prisoner's sentence under art. 4, § 7 of the state constitution.

Question 2.

The question presented is whether the board of correction has the authority to release inmates through long-term furloughs from prisons. The long-term furlough of prisoners is controlled by Idaho Code § 20-242(1) and (2):

1. When a person is committed to the custody of the state board of correction, the board may . . . direct that the person be permitted to continue in his regular employment, work project, or educational program . . . or may au-

thorize the person to secure employment for himself.

2. If the board directs that the prisoner be permitted to continue in his regular employment or education, the board shall arrange for a continuation of the employment or education without interruption. If the prisoner does not have regular employment, and the board has authorized the prisoner to secure employment for himself, the prisoner may do so, and the board may assist him in doing so.

These sections are somewhat ambiguous as to whether they allow presently incarcerated prisoners to be released on work furloughs, or whether they only allow newly-sentenced prisoners to continue or secure employment. Where the meaning of a statute is unclear, resort may be had to the statutory heading as an aid in ascertaining legislative intent. *Walker v. Nationwide Finance Corp. of Idaho*, 102 Idaho 266, 629 P.2d 662 (1981). The statutory heading to § 20-242 provides that the section relates “to furlough, by providing that a person committed to the custody of the board of correction may be *released* on furlough.” 1970 Idaho Sess. Laws, ch.143 (emphasis added). This statement implies that the legislature intended for the board of correction to have authority to release on work furlough *all* persons committed to the board’s custody, both those newly sentenced and those already incarcerated. Such a reading is more consistent with the last sentence of Idaho Code § 20-242(2) quoted above. That sentence appears to apply directly to those who are already incarcerated and who therefore lack “regular employment.” It demonstrates a legislative intent to give flexibility to the board to determine which prisoners may qualify for furlough and may seek or be assisted in seeking meaningful employment.

It should be noted in passing that although an incarcerated prisoner can be released “to secure employment for himself,” there is no parallel provision granting furlough to start an educational program. A familiar rule of statutory construction dictates that inclusion of one term implies the deliberate exclusion of all others. *Poston v. Hollar*, 64 Idaho 322, 132 P.2d 142 (1943). Therefore, we must conclude that educational furloughs are authorized only if the prisoner is already engaged in an ongoing educational program at the time of incarceration.

It is our opinion that the time spent on work furlough is applied toward fulfillment of the prisoner’s sentence. This is not explicit in § 20-242, but is implied in paragraph (5), which provides:

If the prisoner violates the conditions established for his conduct, custody or employment, the board may order the *balance of the prisoner’s sentence* to be spent in actual confinement. (Emphasis added).

The use of the term “balance of the prisoner’s sentence” implies that time spent on work furlough is applied toward the required period of incarceration. This interpretation is in accord with other jurisdictions, which agree that a prisoner on work furlough is technically in confinement. *See, Green v. Superior Ct.*, 132 Ariz. 468, 647 P.2d 166 (1982). Because the prisoner is still technically in confinement, the restrictions on the granting of parole found in § 20-223 should not apply to work furloughs. Also, time spent on work furloughs should be applied toward the fulfillment of fixed sentences required by Idaho Code §§ 19-2513A, 19-2514 and other statutes.

Additional guidance regarding the board's power to grant furloughs is derived from paragraph 3 of § 20-242, which states:

Whenever the prisoner is not employed and between the hours or periods of employment, work project, or schooling, he shall be domiciled in a jail, facility, or residence as directed by the board of correction.

This provision was amended in 1984 to allow prisoners on work furlough to be domiciled in residences in addition to jails or facilities. 1984 Sess. Laws, ch. 58. It can be inferred that by adding the word "residence," the legislature intended to expand the ability of the board of correction to place prisoners on work furlough. Before the statute was amended, furloughed prisoners had to be domiciled in a "jail or facility" when not at work. Space in such facilities is limited. The amendment, which allows prisoners to be domiciled in private residences, greatly expands the number of prisoners that can be released on work furlough.

In conclusion, the board of correction has the authority to release a prisoner on long-term furloughs at any time during his or her sentence, either to work, seek work, or engage in a continuing educational program, subject to the conditions required by § 20-242, and such additional conditions as the board may set. Idaho Code § 20-242(1).

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

Idaho Const. art. 4, § 7

Idaho Const. art. 10, § 5

2. *Idaho Statutes*

Idaho Code § 19-2513A

Idaho Code § 2514

Idaho Code § 20-210

Idaho Code § 20-219 (Supp. 1986)

Idaho Code § 20-223

Idaho Code § 20-242,(1),(2),(3)

1970 Idaho Sess. Laws, ch. 143

1984 Idaho Sess. Laws, ch. 58

3. *Idaho Cases*

In re Prout, 12 Idaho 494, 86 P. 275 (1906)

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975)

State v. Rawson, 100 Idaho 308, 312-13, 597 P.2d 31, 36 (1979)

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

Poston v. Hollar, 64 Idaho 322, 132 P.2d 142 (1943)

4. *Cases From Other Jurisdictions*

State v. Scott, 352 S.E.2d 741 (W.Va. 1987)

Green v. Superior Ct., 132 Ariz. 468, 647 P.2d 166 (1982)

5. *Other Authorities*

Fla.Stat. § 944.598 (1985)

Texas Civil Stat., art. 6184o (1986)

Wash.Stat. § 9.94A.160 (Supp. 1987)

DATED this 16th day of July, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

PETER C. ERBLAND
Deputy Attorney General
Chief, Criminal Law Division

STEVEN STRACK
Legal Intern

ATTORNEY GENERAL OPINION NO. 87-6

The Honorable Stan Hawkins
Representative, District 33
Box 367
Ucon, Idaho 83454

Per Request for Attorney General's Opinion

RE: Legislative Review of Minimum Stream Flow Application

QUESTION PRESENTED:

1. Does the provision in Idaho Code § 42-1503 (Supp. 1987) that purports to allow the legislature to reject, by concurrent resolution, a minimum stream flow application approved by the Director of the Idaho Department of Water Resources contravene any provision of the Idaho Constitution?

2. What legislative action must occur to prevent a minimum stream flow from being approved pursuant to the last clause of Idaho Code § 42-1503 (Supp. 1987)?

CONCLUSIONS:

1. Despite the presumption in favor of a statute's constitutionality, our opinion is the provision in Idaho Code § 42-1503 that purports to authorize the legislature to reject, by concurrent resolution, a minimum stream flow approved by the Director of the Idaho Department of Water Resources would be found by the Idaho Supreme Court to contravene art. 2, § 1; art. 3, §§ 1 and 15; and art. 4, § 10, of the Idaho Constitution.

2. Because of the foregoing conclusion, this opinion does not address the second question presented.

ANALYSIS:

You requested our opinion regarding the constitutionality of the role of the legislature in approving minimum stream flow applications, pursuant to Idaho Code § 42-1503. That statute, enacted by the Idaho legislature in 1978, sets forth the procedure by which the Idaho Water Resource Board will make application to the Director of the Idaho Department of Water Resources to appropriate waters to maintain minimum flows in Idaho streams. The statute then requires the director to solicit input from affected stated agencies and to conduct public hearings. If the director determines that the public interest will be served, he is directed to approve the minimum stream flow application. The final step of the approval process is in the hands of the legislature. Idaho Code § 42-1503 provides as follows:

Approved [minimum stream flow] applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent

resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

Under this provision, the legislature retains final veto power over the director's decision to approve a minimum stream flow application.

In recent years, courts have taken a negative view of the constitutionality of "legislative veto" statutes, under which an executive agency must submit the decisions it makes or the rules it adopts to the legislature for ultimate approval, disapproval or amendment. Court analysis of "legislative veto" provisions proceeds along two paths. First, assuming that such a veto is *legislative* in character, courts hold that veto by concurrent resolution is constitutionally defective because it fails to conform to requirements regarding the exercise of the legislative power. Second, assuming the veto is *executive* in nature, courts hold that such action is constitutionally defective because it violates the separation of powers doctrine. Our opinion will analyze each of these two approaches.

Enactment and Presentment Clauses

The initial question raised by Idaho Code § 42-1503 is whether the act of the legislature in rejecting a minimum stream flow application constitutes a legislative act. If the rejection of a minimum stream flow is a legislative act, it must be accomplished by a bill, duly passed, in accordance with the enactment and presentment provisions of the Idaho Constitution. A concurrent resolution is insufficient. *Idaho Power Company v. State*, 104 Idaho 570, 661 P.2d 736 (1983); *Griffith v. Van Deusen*, 31 Idaho 136, 169 P. 929 (1917).

Legislative power is the authority to determine policy for government. *Rich v. Williams*, 81 Idaho 311, 325, 341 P.2d 432, 440 (1959). The legislature is exercising its legislative power when its action has the purpose and effect of altering legal rights, duties, and relationships of persons, including the executive branch. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

Idaho Code § 42-1503 delegates the duty to file applications for minimum stream flows to the Idaho Water Resource Board and vests the director of the Idaho Department of Water Resources with the authority to approve minimum stream flows. Additionally, Idaho Code § 42-1504 (Supp. 1987) gives the public a right to request the Idaho Water Resource Board to file an application for a minimum stream flow. The legislative veto contained in § 42-1503 alters these rights and duties; therefore, the rejection of a minimum stream flow likely would be found to be a legislative act that must comply with the constitutional requirements regarding the exercise of the legislative power.

Art. 3, § 1, of the Idaho Constitution vests the legislative power of the state in the senate and house of representatives. The framers of Idaho's Constitution, guided by the United States Constitution, however, recognized the need for constraints on the exercise of the legislative power. Therefore, the framers provided that the exercise of the legislative power be by a bill, which must contain the phrase "Be it enacted by the Legislature of the State of Idaho." Idaho Const. art. 3, § 1. In addition, each bill must

then comply with the printing, reading, and voting provisions set forth in Idaho Const. art. 3, § 15. Finally, after passage by both houses of the legislature, every bill must be presented to and acted upon by the governor, in conformity with the provisions of Idaho Const. art. 4, § 10.

The Idaho Supreme Court has determined that a concurrent resolution does not meet the minimal constitutional requirements of a “law”:

But even if I.C. § 42-1736 had authorized legislative action which was not in conflict with art. 15, § 7 of the constitution, it could still have no legal effect because it provides for legislative action on the state water plan by means of a concurrent resolution. The state legislature can enact no law except it be by the constitutionally prescribed process, which requires that every bill, before it becomes law, be presented to the governor. Idaho Const. art. 3, § 15; art. 4, § 10. To the extent that art. 15, § 7 authorizes the legislature to influence the operation of the Water Resources Board, it does so only as to “such laws as may be prescribed by the legislature” (emphasis added). Legislative action by resolution is not a “law” in that context. *See, Griffith v. Van Deusen*, 31 Idaho 136, 169 P. 929 (1917); *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910).

Idaho Power Co. v. State, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983).

The United States Supreme Court reached a similar conclusion in an analogous situation. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the United States Supreme Court held unconstitutional the provision in 8 U.S.C. § 1254(c)(2) (1983) permitting one house of the Congress, by resolution, to invalidate the decision of the U.S. Attorney General with respect to deportation of an alien. The Court concluded that the procedure violated, among other provisions, the presentment clause of the United States Constitution. U.S. Const. art. I, § 7.

The presentment clause of the United States Constitution provides that every bill passed by Congress must first be presented to the President before becoming law. U.S. Const. art. I, § 7. The United States Supreme Court identified the purposes of the clause as follows:

It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence the majority of that body.

The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.

Id. at 948 citing *The Federalist*, No. 73, at 458 (A. Hamilton). The Supreme Court held that the congressional veto of an alien deportation decision under 8 U.S.C. § 1254(c)(2) was, in fact, an exercise of legislative power requiring compliance with the presentment clause of the United States Constitution. The Court reasoned that

because the Attorney General's duties were created by statute, they could only be modified by an act of equal dignity. *Immigration and Naturalization Service v. Chadha*, 462 U.S. at 954, 955.

Proponents of the legislative veto have argued that because the statute creating the veto is enacted in accordance with the constitutional limitations on the exercise of the legislative power, there is no constitutional infirmity. This argument is without merit, however, because the legislature cannot pass an act that allows it to violate the constitution. Constitutional requirements cannot be eliminated by virtue of one enactment approved by the governor. As the Alaska Supreme Court noted in its opinion striking down a legislative veto: "Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto." *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 779 (Alaska 1980).

Although the Idaho Supreme Court has not yet ruled on the constitutionality of a legislative veto, in *Holly Care Center v. State*, 110 Idaho 76, 714 P.2d 45 (1986), the court, in dicta, stated "The legal efficacy of the legislative veto raises potentially serious constitutional issues, involving, among others, that pertaining to the presentment of bills and the fundamental principle of separation of powers." *Id.* at 82, 714 P.2d at 51. In an accompanying footnote, the court briefly surveyed recent rulings by other state courts on the "legislative veto" issue:

We note that many courts, both state and federal, are now struggling with such issues. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (legislative veto unconstitutional); *General Assembly of State of New Jersey v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982) (legislative veto unconstitutional); *State ex rel. Stephan v. Kansas House of Rep.*, 236 Kan. 45, 687 P.2d 622 (1984) (legislative veto unconstitutional); *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783 (1981) (legislative veto unconstitutional); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W.Va. 1981) (legislative veto unconstitutional); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980) (legislative veto unconstitutional).

Id. The citation to five different state courts that have followed the U.S. Supreme Court in striking down legislative vetoes, and the fact that our research has not found any court decisions in the last decade upholding a legislative veto, suggests that the Idaho Supreme Court is likely to follow the rationale of *Chadha* if presented with that question.

Separation of Powers Clause

As indicated by the Idaho Supreme Court in the *Idaho Power* case, the legislative veto is also constitutionally invalid if it amounts to an exercise by the legislature of power that properly belongs to the executive branch of government. 104 Idaho at 574, 661 P.2d at 740. The separation of powers doctrine prohibits the legislature from exercising power delegated to the executive branch.

Article 2, § 1, of the Idaho Constitution expressly adopts the separation of powers doctrine that underlies the structure of the federal government. The provision reads

as follows:

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

Idaho Const. art. 2, § 1. The purpose of the separation of powers doctrine is to “check the extent of power exercisable by any one branch of government in order to protect the people from oppression.” *Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 471 (D.C. Cir. 1982). As Justice Brandeis said, “The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J. dissenting.)

Though the concept of separation of powers is easy to articulate, the delineation between what is a legislative, executive, or judicial function is not always clear. By necessity there is a blending of powers, which blending is most apparent in the area of administrative law. Often problems are so complex that development of a detailed statute covering all situations is impracticable. Thus, the federal government and state legislatures have opted to delegate legislative power to administrative agencies to fill in the details of a statute establishing broad policy guidance.

The fact that the legislature has the power to delegate its legislative powers does not mean that the legislature is powerless to direct the agencies it has created. The legislature may retain direct control over administrative action by providing detailed rules of conduct to be administered without discretion; or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. *See, Consumer Energy Council of America v. FERC*, 673 F.2d 425, 476 (D.C. Cir. 1982). Once the legislature has delegated power to an agency, however, its responsibility is to oversee the implementation of duly enacted laws and to revise the laws if the desired objectives are not being achieved. Any legislative involvement in the administrative process beyond such oversight and revision by statute violates the separation of powers doctrine because it ultimately leads to shared administration. *Id.* at 474.

The legislative veto in effect allows the legislature to block execution of a statutory program until the agency agrees to act in compliance with the current views of the legislature that may well be different from the legislature that enacted the substantive law. *Id.*; General Education Provisions Act, 43 Op. Att’y Gen. No. 25, 8 (June 5, 1980). By its nature, this type of oversight is beyond judicial review because the exercise of such powers can be held to no enforceable standard. *Id.* Thus, the legislative veto removes any checks on legislative action and opens the door to autocracy, which conflicts with the purpose of the separation of powers doctrine.

Applying the principles set forth above to Idaho Code § 42-1503, it is the opinion of this office that the Idaho Supreme Court would find the legislature’s role in approving minimum stream flows under that section violates art. 2, § 1, of the Idaho Constitution. Even though *State of Idaho, Department of Parks v. Idaho Department of*

Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), recognizes the legislature's ability to establish a minimum stream flow by enactment of a statute, § 42-1503 delegates this power to the director of the Idaho Department of Water Resources. Because of this delegation, the power to create a minimum stream flow is committed to the executive branch and cannot be controlled by the legislature except by enactment of a bill. As former United States Attorney General Benjamin R. Civiletti stated in his opinion on the legislative veto provision contained in the General Education Provisions Act:

The test is not whether an activity is inherently legislative or executive, but whether the activity has been committed to the executive by the constitution and applicable statutes. In other words, the constitution provides for a broad sweep of possible congressional action; but once a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.

General Education Provisions Act, 43 Op. Att'y Gen. No. 25, 9 (June 5, 1980). A contrary conclusion would reduce the separation of powers doctrine to a mere shadow.

Severability

Although the Idaho Supreme Court is likely to find the legislative veto provision contained in Idaho Code § 42-1503 unconstitutional, it does not follow that a court would conclude all of the section is invalid. When a portion of a statute is found unconstitutional, a court must determine whether the balance of the statute is severable.

The act creating the minimum stream flow statute has a severability clause. Act of March 29, 1978, § 13, 1978 Idaho Sess. Laws 897. Idaho Code § 42-1503 was subsequently amended by the act of March 28, 1980, § 25, 1980 Idaho Sess. Laws 553, which also contains a severability clause. These clauses create a presumption in favor of severability. *Lynn v. Kootenai County Fire Protection District, Inc.*, 97 Idaho 623, 627, 550 P.2d 126, 130 (1976). Thus, if the legislative veto is not indispensable to the act, a court will attempt to construe Idaho Code § 42-1503 to give effect to the legislative intent as expressed in the severability clause. *Id.* at 626, 550 P.2d at 130.

The deletion of the legislative veto from Idaho Code § 42-1503 does not emasculate the statute. As the United States Supreme Court noted in finding the legislative veto in the Airline Regulation Act of 1987 severable from the balance of the Act, "a legislative veto . . . by its very nature is separate from the operation of the substantive provisions of the statute." *Alaska Airlines, Inc. v. Brock*, 480 U.S. _____, _____, 94 L.Ed.2d 661, 670 (1987). Indeed, the legislature contemplated that minimum stream flow decisions would be effective absent legislative action. Thus, the legislative veto is not an integral part of the statute. *See, Voyles v. City of Nampa*, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976). Since the severability clause creates a presumption that the statute will operate in a manner consistent with the legislative intent, the Idaho Supreme Court probably would determine that legislative veto can be excised from Idaho Code § 42-1503, absent strong evidence that the legislative intent is to the

contrary.

While this opinion is advisory only and a final determination can be provided only by the Idaho Supreme Court, we conclude that should the court be asked to rule on the legislative veto contained in Idaho Code § 42-1503, it would find the provision unconstitutional. Further, it is our opinion that the court would sever the legislative veto from the minimum stream flow statute.

AUTHORITIES CONSIDERED:

1. *United States Constitution:*

U.S. Const., art. I, § 7.

2. *United States Supreme Court Cases:*

Alaska Airlines, Inc. v. Brock, 480 U.S. _____, 94 L.Ed.2d 661 (1987).

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

Myers v. United States, 272 U.S. 52 (1926).

3. *Federal Appellate Court Cases:*

Consumer Energy Counsel of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *Aff'd sub nom., Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983).

4. *Idaho Constitution:*

art. 2, § 1.

art. 3, § 1.

art. 3, § 15.

art. 4, § 10.

art. 5, § 13.

5. *Idaho Statutes:*

Idaho Code § 42-1503 (Supp. 1987); Idaho Code § 42-1504 (Supp. 1987); Act of March 29, 1978, ch. 345, § 13, 1978 Idaho Sess. Laws 884, 897.

Act of March 28, 1980, ch. 238, § 25, 1980 Idaho Sess. Laws, 526, 553.

6. *Idaho Cases:*

Griffiths v. Van Deusen, Idaho 136, 169 P. 929 (1917).

Holly Care Center v. State, 110 Idaho 76, 714 P.2d 45 (1986).

State of Idaho, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736 (1983).

Lynn v. Kootenai County Fire Protective District fil, 97 Idaho 623, 550 P.2d 126 (1976).

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

Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976).

7. *Cases From Other States:*

General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982).

Opinion of the Justices, 121 N.H. 552, 431 A.2d 783. (1981).

State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981).

State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622 (1984).

8. *Other Authorities:*

General Education Provisions Act — Congress' Disapproval of Department of Education Regulations by Resolution Not Presented to the President Is Unconstitutional, 43 Op. Att'y Gen. 25 (1980).

1982 Op. Tenn. Att'y Gen. 82-115.

1 *Sutherland Statutory Construction*, § 1.02 (4th ed. 1985).

Shapiro, *APA: Past, Present, Future*, 72 Va. L.Rev. 447 (1986).

Shirley, *Resolving Challenges to Statutes Containing Uncontrolled Legislative Veto Provision*, 85 Colum. L.Rev. 1808 (1985).

Smythe, *Judicial Review of Rule Rescissions*, 84 Colum. L.Rev. 1928 (1984).

Strauss, *Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L.J. 789.

Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 Yale L.J. 1493 (1985).

DATED this 31st day of July, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

Clive J. Strong
Deputy Attorney General
Chief, Natural Resources Division

ATTORNEY GENERAL OPINION NO. 87-7

TO: Director A. I. Murphy
Department of Corrections
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STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. What is the extent of the venereal disease examination required by Idaho Code § 39-604 to be conducted upon all persons confined or incarcerated in city, county and state prisons?
2. Which city, county, or state entity is responsible for paying the cost of such examination and the resulting treatment referred to in Idaho Code § 39-604?
3. Does the reference to "isolation or quarantine" in Idaho Code § 39-604 refer only to persons identified in Idaho Code § 39-603 or does it include persons having the venereal diseases enumerated in Idaho Code § 39-601?
4. Would the isolation or quarantine, as provided by Idaho Code § 39-604 for the period of time stated, "until cured," for persons who are infected with venereal disease at the time of the expiration of their term of imprisonment violate the rights of an incarcerated person recognized under the first, fifth, eighth and fourteenth amendments to the United States Constitution as well as the Constitution of the State of Idaho?

CONCLUSIONS:

1. Each incoming inmate confined to a detention facility in Idaho must be given a blood examination in order to detect the existence of AIDS.
2. The state is responsible for medical costs incurred by state detention facilities for the examination and treatment of venereal disease, including the detection and treatment of prisoners found to be infected with AIDS.
3. The reference to "isolation or quarantine" in Idaho Code § 39-604 does include persons who have been identified as having been infected by a venereal disease included in Idaho Code § 39-601. Thus, prisoners having AIDS may be isolated or quarantined while they serve their sentences if state health officials first determine that such a quarantine is necessary to protect the public health.
4. Prison officials can not continue to hold in quarantine those persons whose terms of imprisonment have expired unless other classes of AIDS victims are also subjected to similar quarantine.

ANALYSIS:*Question 1:*

Idaho Code § 39-604 states:

All persons who shall be confined or imprisoned in any state, county or city prison in this state shall be examined for and, if infected, treated for venereal diseases by the health authorities of the county or their deputies.

In 1986 the Idaho legislature amended Idaho Code § 39-601, which defined those diseases that would be considered venereal diseases, to read as follows:

Syphilis, gonorrhea, *acquired immuno-deficiency syndrome (AIDS)*, *AIDS related complexes (ARC)*, *other manifestations of HTLV-III (human T-cell lymphotropic virus-type III) infections* and chancroid, hereafter designated as venereal diseases, are hereby declared to be contagious, infectious, communicable and dangerous to public health . . . (Emphasis added.)

Reading the above two statutes together it is apparent that Idaho Code § 39-604 requires any detention facility in Idaho that accepts prisoners for confinement to test those persons for AIDS. At the present time the only known method by which a person may be identified as having been infected by AIDS is an examination of the person's blood. A blood test, referred to as an ELISA test, detects the presence of antibodies stimulated by the body's exposure to the AIDS-causing HTLV-III virus. The ELISA test can be administered to individuals during a routine medical examination. Levine & Bayer, *Screening Blood, Public Health and Medical Uncertainty*, in *AIDS: The Emerging Ethical Dilemmas*, Hastings Center Rep., Aug. 1985 at 8.

Section 39-604 defines the persons to be tested in the future tense: "All persons who *shall be* confined or imprisoned." The use of the words "shall be" connotes a prospec-

tive application of the statute, rather than a retrospective application. See *Unsatisfied Claim and Judgment Fund Board v. Bowman*, 249 Md. 705, 241 A.2d 714 (1955). The legislature chose not to change those words when it amended § 39-601 to include AIDS as a venereal disease. Therefore, this office concludes that § 39-604 only requires AIDS testing for incoming prisoners. It should be noted that this conclusion does not prohibit prison officials from testing prisoners who are already incarcerated if they determine it is necessary to do so.

Mandatory testing and quarantine of people infected with contagious diseases have traditionally been upheld as valid exercises of the state's police power and have withstood constitutional challenge. See A. Gray, *The Parameters of Mandatory Public Health Measures and the AIDS Epidemic*, 20 Suffolk L. Rev. 504, 511 (1986). However, most such cases were decided at a time when courts *presumed* that state actions taken within the police power were constitutional. See W. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 Hofstra L. Rev. 53, 60 (1985). Today, constitutional doctrine is radically different. Courts routinely subject to constitutional scrutiny regulations that previously would have been justified as coming within the police power. *Id.* at 76-77. Thus it is necessary to predict how the courts would assess the constitutionality of the mandatory testing provisions of §§ 39-601 through 604.

The traditional standard for constitutional review of state law requires only that the statute bear some rational relationship to legitimate state purposes. *Cleburne v. Cleburne Living Center*, 473 U.S. _____, 87 L.Ed.2d 313, 320 (1985); *Bell v. Wolfish*, 441 U.S. 520, 561 (1979). However, where a regulation is directed against a "suspect class" or impinges on fundamental rights, a higher standard of review is triggered: the regulation must be necessary to advance a compelling state interest. *Cleburne* at _____, 87 L.Ed.2d at 320. This higher level of scrutiny is sometimes performed under the rubric of the equal protection clause (*Id.*), and sometimes under the due process clause. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

Suspect classes have generally been limited to race, alienage or national origin. *Cleburne* at _____, 87 L.Ed.2d at 320. Additionally, classes based on sex and illegitimacy, while not recognized as suspect, have received a heightened level of scrutiny. *Id.* Prisoners in general, and incoming prisoners in particular, do not constitute a "suspect class" and thus their mandatory testing should not invoke a heightened level of scrutiny under the equal protection clause.

Nor is a court likely to rule that mandatory testing seriously impinges on prisoners' fundamental rights thus invoking heightened scrutiny under the due process clause.¹ Prisoners do not forfeit all their fundamental rights when they enter prison. They retain freedom of speech and religion, freedom from racial discrimination and the rights of equal protection and due process. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). They also retain the right to privacy. *Cumbey v. Meachum*, 694 F.2d 712, 714 (10th Cir. 1982). However, the fact of confinement, as well as the legitimate goals and

¹It should be noted that this is a general statement. Certain prisoners might refuse to allow a blood test on religious grounds. See *Smallwood-El v. Coughlin*, 589 F. Supp. 692 (S.D.N.Y. 1984). This opinion does not address whether a compulsory blood test would violate such a prisoner's first amendment rights.

policies of the penal institution, limit these retained constitutional rights. *Bell* at 546. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnson*, 334 U.S. 266, 285 (1948). In *Bell*, the Supreme Court stated: "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained would be of a diminished scope." *Bell* at 556. Accordingly, the Court upheld body-cavity searches conducted every time a prisoner came into contact with an outsider, specifically stating that such searches could be held without probable cause. *Id.* at 560. The Court held further that such searches do not violate the fourth amendment prohibition against unreasonable search and seizure. Such a right, if it applies at all in prison, is greatly diminished by the realities of confinement and the need for prison security. *Id.* at 559. If a forced body-cavity search does not violate a prisoner's right to privacy, it is unlikely that a compulsory blood test would do so. Compulsory immunizations of school children, which involve a bodily intrusion similar to that of a blood test, have been held on balance not to invade the right to privacy. *Hanzel v. Arter*, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

Given that the state's interest in stopping the spread of AIDS in the prison population is legitimate, it still must be decided whether the state's methods are rationally related to those interests. In *Bell v. Wolfish*, *supra*, the Court balanced the security interest of the penal institution against the prisoners' diminished expectation of privacy and held that forced body-cavity searches conducted without probable cause were a constitutionally permissible means to enforce prison security. *Bell* at 560. Such a balancing test would also be applied to compulsory blood tests for AIDS. The state's interests must be balanced against the prisoners' limited expectations of privacy and freedom from search and seizure. Prison authorities not only have a strong interest in containing the spread of contagious diseases within the prison and in protecting their own staff members, they may have an affirmative duty to do so. Failure to provide adequate protection against the spread of communicable diseases can violate the eighth amendment's prohibition of cruel and unusual punishment. *See Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981), *overruled on other grounds*; *International Woodworkers v. Champion International*, 790 F.2d 1174 (5th Cir. 1986); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977). Given the strong state interest in stopping the spread of communicable diseases, the high risk status of prison populations generally, the prisoners' limited fundamental rights, and the fact that a blood test is presently the only available means to detect the AIDS virus, it is likely that a reviewing court would hold that compulsory blood tests are rationally related to a legitimate state interest and are therefore constitutional.

Conclusion:

Each incoming inmate confined to a detention facility in Idaho must be given a blood examination to detect the existence of AIDS.

Question 2:

Idaho Code § 39-604 states:

All persons who shall be confined or imprisoned in any state, county or city prison in this state shall be examined for and, if infected, treated for venereal diseases by the health authorities of the county or their deputies

At first glance, this section would appear to require the county to shoulder the burden of paying for the examination and treatment of state prisoners with venereal diseases. However, the section does not expressly require the county to pay for the examinations, but only to perform them.²

This office believes it would be inappropriate to require counties or health districts to pay the medical expenses of *state* prisoners. To do so would place an inequitable burden on counties in which state prisons are located. History shows that counties have never been required to pay for the examination and treatment of *all* venereal disease cases. In 1921, the same year the legislature enacted §§ 39-601 through 604, the legislature appropriated \$5000 to the Department of Public Welfare for venereal disease control. 1921 Sess. Laws, Ch. 94, p. 188. According to the Department of Health and Welfare, this money was spent to confine and treat venereal disease patients at the State Farm. The legislature continued to appropriate such funds for some years thereafter. *See e.g.*, 1923 Sess. Laws, ch. 199, p. 315; 1925 Sess. Laws, ch. 211, p. 383.

In 1947, the legislature enacted Idaho Code § 20-209 which states:

The state board of correction shall have the control, direction and management of such correctional facilities as may be acquired by law for use by the state board of correction and of the present penitentiary of the state and all property owned or used in connection therewith, *and shall provide for the care, maintenance and employment of all inmates now or hereinafter committed to its custody.* (Emphasis added.)

This section clearly requires the state to provide for the medical needs of inmates in state custody. It should be noted that the state is also constitutionally obligated to provide medical care to those it is punishing by incarceration. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Because of the statutory and constitutional obligations and because § 39-604 does not specifically allocate the *cost* of inmate examination and treatment to the counties, we believe the state is obligated to bear the cost of examining incoming prisoners at, and of treating AIDS victims in, the state penitentiary.

Conclusion:

The state is responsible for the medical costs incurred by state detention facilities for the examination and treatment of venereal disease, including the detection and treatment of prisoners found to be infected with AIDS.

²It should be noted that counties are no longer charged with the enforcement of quarantine laws, as they were in 1921 when § 39-604 was enacted. In 1947, the legislature amended the Idaho Code to create health districts which are now the primary agent for enforcing the state's quarantine laws. *See* Idaho Code § 39-415. This opinion should not be read as requiring health district authorities to perform venereal disease examinations upon prisoners. Because prison authorities already perform such tests as part of each incoming prisoner's physical examination, it would be superfluous to require district health officials to do so.

Question 3:

Idaho Code § 39-604 provides that space may be set aside in any state, county or city prison to establish a clinic or hospital to isolate and quarantine two different classes of persons: (1) "all persons who may be confined or imprisoned in any such prison and who are infected with venereal disease at the time of the expiration of their terms of imprisonment," and (2) "in case no other suitable place for isolation or quarantine is available, such other persons as may be isolated or quarantined under the provisions of section 39-603." In lieu of such isolation, both classes of persons may be allowed to report to a licensed physician.

The section does not specifically authorize the quarantine of prisoners *before* the expiration of their sentences. However, § 39-604 should be read in conjunction with its accompanying sections, 39-601 and 39-603. A consistent reading of these sections would authorize county health officials to isolate or quarantine prisoners found to be infected with AIDS. It is our opinion that any additional restrictions placed upon the prisoner by virtue of a quarantine would not be constitutionally impermissible. The Supreme Court has stated that: "The transfer of an inmate to less amenable and more restrictive quarters for nonputative reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt v. Helms*, 459 U.S. 460, 465 (1983). Prison officials have broad discretion in the administration of their prisons and incarcerated individuals retain "only a narrow range of protected liberty interests." *Id.* at 465. Following these statements, courts have upheld the quarantine of prisoners with AIDS, finding no significant deprivation of liberty in the restriction of such prisoners to limited parts of the prison. *Cordero v. Coughlin*, 607 F. Supp. 9 (D.C.N.Y. 1984).

However, it should be emphasized that a condition precedent to any quarantine, whether within or without a state prison, is a finding by the appropriate health officials that a quarantine is necessary to protect the public health. Idaho Code § 39-603 states:

State, county and municipal health officers, or their authorized deputies, within their respective jurisdictions, are hereby directed and empowered, *when in their judgment it is necessary to protect the public health*, to make examinations . . . to require persons infected with venereal disease to report for treatment . . . and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons affected with venereal disease. (Emphasis added.)

Therefore, before prisoners in the state penitentiary could be quarantined, it would be necessary for prison authorities to obtain a judgment from officials of the State Department of Health and Welfare that such a quarantine was necessary to protect the public health.

Conclusion:

Any prisoner who is determined to be infected with a venereal disease, including AIDS, may be isolated or quarantined while serving his or her sentence if state health

officials first determine that such a quarantine is necessary to protect the public health.

Question 4:

A discussion of this question involves the differentiation between the terms incarceration and quarantine. Incarceration involves an act pursuant to a judicial order whereby a person is placed in a jail or prison as a form of punishment for committing a criminal offense as defined by statute. Criminals that are confined in prison by judicial process are confined up to a stated maximum time period. Continued confinement beyond that maximum is a violation of their constitutional rights under the due process clause of the fifth amendment and the prohibition against cruel and unusual punishment under the eighth amendment to the United States Constitution. See *Weber v. Willingham*, 356 F.2d 933 (10th Cir. 1966).

Quarantine, on the other hand, is the enforced isolation of a person who has been found to harbor a disease that endangers the public health. Normally it is an action taken by public health officials, not by law enforcement officers. While quarantines were routine when § 39-604 was enacted in 1921, they are only used in rare circumstances today. The courts traditionally upheld the validity of quarantine orders issued by public health officials, especially where specifically authorized by statute. However, most such quarantine cases were decided before the modern evolution of constitutional doctrine. Today, courts routinely scrutinize the constitutionality of regulations which previously would have come under the rubric of the "police power" and thus considered free from judicial review. See our discussion of this topic in Question 1.

Commentators have questioned whether AIDS quarantines could stand up to constitutional scrutiny. Such quarantines could seriously impinge on important liberty interests of individuals and several modern cases suggest that such a severe restraint on liberty could only be justified if it were narrowly tailored to effectuate its stated purpose and was necessary to achieve the state's goal of stopping the spread of the disease. See W. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 Hofstra L. Rev. 53, 82-83 (1985). Given the limited manners in which AIDS is presently known to be transmitted from person to person, it is likely that a quarantine would not be held "necessary" to achieve the state's objectives.

No cases have yet decided whether a general quarantine of AIDS victims could withstand constitutional scrutiny. As mentioned earlier, the quarantine of AIDS victims in prisons has been upheld as constitutional. *Cordero v. Coughlin*, 507 F.Supp. 9-10 (S.D.N.Y. 1984). However, the applicability of such decisions outside the confines of a prison is highly questionable. Obviously, the deprivation of liberty inherent in a quarantine would be much more severe for non-prisoners and would receive a higher level of scrutiny. Such a quarantine would probably not withstand constitutional scrutiny under prevailing medical knowledge as to how AIDS is communicated.

The continued isolation and confinement of prisoners beyond the expiration of their terms of imprisonment would violate the equal protection clause of the fourteenth amendment if non-prisoners are not similarly quarantined. Sections 39-601, 603 and 604 do not violate equal protection on their face: they provide for the quaran-

tine of all persons infected with venereal diseases, both prisoners and non-prisoners. However, a law which is valid on its face may deny equal protection if administered as to unjustly discriminate between persons in similar circumstances. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Thus, if Idaho Code § 39-604 were used to quarantine prisoners beyond the expiration of their jail term, but no other classes of AIDS victims were subjected to similar quarantine, it is likely that a court would find this unequal application of the law to be violative of equal protection. Some courts have expressed a willingness to uphold the selective application of laws unless "the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boyles*, 368 U.S. 448, 456 (1962). However, limiting quarantines to ex-prisoners would almost certainly be arbitrary: it would not be based on any statutory directions and there are no special circumstances making ex-prisoners a greater health threat than other AIDS victims.

Conclusion:

Prison officials can not continue to hold in quarantine those persons whose terms of imprisonment have expired unless other classes of AIDS victims are also subjected to similar quarantine.

AUTHORITIES CONSIDERED

1. *United States Constitution*

- a. First Amendment
- b. Fourth Amendment
- c. Eighth Amendment
- d. Fourteenth Amendment

2. *U.S. Supreme Court Cases*

- a. *Cleburne v. Cleburne Living Center*, 473 U.S. _____, 87 L.Ed.2d 313 (1985)
- b. *Roe v. Wade*, 410 U.S. 113 (1973)
- c. *Bell v. Wolfish*, 441 U.S. 520 (1979)
- d. *Price v. Johnson*, 334 U.S. 266 (1948)
- e. *Hewitt v. Helms*, 459 U.S. 460 (1983)
- f. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)
- g. *Oyler v. Boyles*, 368 U.S. 448 (1962)
- h. *Estelle v. Gamble*, 429 U.S. 97 (1976)

3. *U.S. Courts of Appeal Cases*

- a. *Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982)
- b. *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981)
- c. *Weber v. Willingham*, 356 F.2d 933 (10th Cir. 1966)

4. *U.S. District Court Cases*

- a. *Smallwood-El v. Coughlin*, 589 F.Supp. 692 (S.D.N.Y. 1984)
- b. *Hanzel v. Arter*, 625 F.Supp. 1259 (S.D. Ohio 1985)
- c. *Cordero v. Coughlin*, 607 F.Supp. 9 (D.C.N.Y. 1984)

5. *Idaho Statutes*

- a. Idaho Code § 39-601
- b. Idaho Code § 39-603
- c. Idaho Code § 39-604
- d. Idaho Code § 31-3505
- e. Idaho Code § 31-3506
- f. Idaho Code § 39-415

6. *Idaho Session Laws*

- a. 1921 Sess. Laws, ch. 94, p. 188
- b. 1923 Sess. Laws, ch. 199, p. 315
- c. 1925 Sess. Laws, ch. 211, p. 383

7. *Cases From Other Jurisdictions*

- a. *Unsatisfied Claim and Judgment Fund Board v. Bowman*, 249 Md. 705, 241 A.2d 714 (1955)

8. *Other Authorities*

- a. Levine E. Bayer, *Screening Blood, Public Health and Medical Uncertainty*, in *AIDS: The Emerging Ethical Dilemmas*, Hastings Center Rep. Aug. 1985 at 8.

- b. A. Gray, *The Parameter of Public Health Measures and the AIDS Epidemic*, 20 Suffolk L. Rev. 504 (1986)
- c. W. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 Hofstra L. Rev. 53 (1985)
- d. Note, *The Constitutional Rights of AIDS Carriers*, 99 Harvard L. Rev. 1274 (1986)
- e. Note, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 Cincinnati L. Rev. 217 (1986)

DATED this 10th day of August, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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Chief, Criminal Law Division

DAVID R. MINERT
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STEVE STRACK
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ATTORNEY GENERAL OPINION NO. 87-8

TO: Anthony J. Fagiano, Director
Department of Insurance
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Do the references in Idaho Code, title 41, chapter 44, to medicare supplement insurance policies covering persons eligible for medicare "by reason of age" restrict the writing of such policies in Idaho to this particular group of medicare-eligible persons, or may such policies also be written for persons eligible for medicare by reason of disability?
2. Does the Director of the Department of Insurance have authority to regulate med-

icare supplement policies covering persons eligible for medicare by reason of disability?

CONCLUSIONS:

1. Medicare supplement policies may be written for persons eligible for medicare by reason of disability.
2. The Director of the Department of Insurance has authority under Idaho Code §§ 41-4403(2), 41-4404, 41-4405, 41-4407, and 41-4408 to regulate medicare supplement policies covering persons eligible for medicare by reason of disability.

ANALYSIS:

Question 1.

The Medicare Supplement Insurance Minimum Standards Act ("the Act"), Idaho Code, title 41, chapter 44, contains several references to persons eligible for medicare "by reason of age." The Director of the Department of Insurance is required to issue reasonable regulations establishing specific standards that set forth the content and provide for full and fair disclosure of medicare supplement policies covering persons eligible for medicare by reason of age. Idaho Code §§ 41-4403(1), 4406(1). "Free look" provisions for such persons are mandated by Idaho Code § 41-4408. In addition, the director may prescribe informational brochures to improve older buyers' understanding of medicare and their ability to select the most appropriate coverage. Idaho Code § 41-4406(4).

In order to answer your question as to whether the Act excludes the writing of medicare supplement insurance policies for persons eligible for medicare by reason of disability, we must determine the significance of the references to those eligible "by reason of age." The starting point of our analysis is a review of the legislative intent.

The "Statement of Purpose" to 1981 Senate Bill 1078, reads as follows:

The purpose of this bill is to comply with Public Law 96-265, Social Security Disability Amendments of 1980 (42 USC 101 et seq.) and thereby retain Idaho's right to regulate the medicare supplemental insurance business in this state. *The bill is a National Association of Insurance Commissioners Model Act.* 1981 Sess. Laws, ch. 68, p.98. (Emphasis added.)

Since the Idaho bill was originally drafted by the National Association of Insurance Commissioners (NAIC) as a Model Act, it is appropriate to examine the history of that organization's use of the phrase "by reason of age." The NAIC meets on a quarterly basis, primarily to draft model legislation dealing with insurance issues common to the states.

In 1979, Ms. Anne DeNovo of the Federal Trade Commission, testifying at an NAIC meeting, noted that the text of the Model Act was amended to add the phrase "because of age" following the word "medicare eligible." She stated that the amendment could eliminate any requirement for providing information to persons eligible

for medicare by reason of disability, even though they face the same medicare supplement insurance purchase decisions as those over 65 (eligible “by reason of age”). 1979 NAIC Proceedings, II, 357.

In addressing this amendment, the Model Act contained a drafting note stating that consideration may nonetheless be given to providing information and disclosure materials to prospective supplemental insurance policyholders who are eligible for medicare by reason of disability. 1979 NAIC Proceedings, I, 394. As discussed below, Idaho’s version of the Model Act calls for the provision of information for all medicare eligible persons. *See, e.g.*, Idaho Code § 44-4401.

These notes from the history of the NAIC Model Act clearly indicate that the sale of medicare supplement insurance policies to persons eligible for medicare by reason of disability was always contemplated. The phrase “by reason of age” was added only to deal with the question of who was and who was not required to receive information concerning medicare supplement insurance. There is no suggestion that this language was ever intended to restrict the sale of insurance policies to a particular group.

The reasoning behind inclusion of the phrase “by reason of age” is further explained by looking at the early history of the Model Act. Much of the federal medicare legislation was passed in 1965. The intent of that legislation was to provide a broad program of hospital insurance protecting the over-65 population. 1979 NAIC Proceedings, I, 1016 (quoting House Report No. 213, March 29, 1965, p.2). Subsequently, the NAIC undertook a study of medicare supplement insurance.

The study revealed a nationwide problem of over-insurance of senior citizens. 1974 NAIC Proceedings, I, 426. The Model Act addressed these abuses in the marketing of medicare supplement insurance policies to the elderly. 1978 NAIC Proceedings, II, 317. Numerous complaints described the “unique vulnerability” of the elderly to fraud, misrepresentation and misinformation by unfair marketing agents. 1979 NAIC Proceedings, I, 392. More complete disclosure, increased availability of information and buyers’ guides to make the senior citizen an informed purchaser were developed as solutions to these problems. These protections became the Model Act itself. 1979 NAIC Proceedings, II, 333.

The NAIC’s concern for the elderly can also be explained by sheer numbers. A 1978 census report put 23.5 million people in the group of those eligible for medicare “by reason of age.” 1980 NAIC Proceedings, II, 1073 (quoting the U.S. Department of Commerce Bureau of the Census Statistical Abstract of the United States [1978]). By contrast, the group of those eligible for medicare by reason of disability in the same census report numbered 2.4 million. 1979 NAIC Proceedings, II, 357. Thus, it is understandable why those eligible “by reason of age” were targeted to receive special protection.

In short, the history of the NAIC Model Act shows that our version, Idaho Code, title 41, chapter 44, was aimed at facilitating understanding of policy provisions, not at restricting the sale of such policies to a given group. The overall purpose of the Medicare Supplement Insurance Minimum Standards Act, as set out in Idaho Code § 44-4401, demonstrates this intent:

The purpose of this act shall be to *provide reasonable standardization and simplification* of terms and coverages of medicare supplement disability insurance policies, subscriber contracts of nonprofit hospitals, medical and dental service associations, and subscriber contracts of health maintenance organizations to *facilitate public understanding and comparison*, to *eliminate provisions* contained in disability insurance policies, subscriber contracts of nonprofit hospital, medical and dental service associations, and subscriber contracts of health maintenance organizations *which may be misleading or unreasonably confusing* in connection either with the purchase of such coverages or with the settlement of claims, and to *provide for full disclosure* in the sale of such coverages. (Emphasis added.)

It is clear that the purpose of the Act is to facilitate understanding and provide for disclosure. Nowhere does the Act restrict the classes to whom such policies may be sold.

Question 2:

We have determined that the intent of the references to those eligible for medicare “by reason of age” is to provide special protection for the elderly against unscrupulous marketing tactics. While noting the legislature’s intent to protect the elderly, we do not mean to imply that the director is powerless to protect the disabled. As we noted above, the history of the Model Act makes it clear that consideration should also be given to protecting the other group of medicare-eligible persons, the disabled. 1979 NAIC Proceedings, I, 394.

The Idaho legislature has considered the disabled and has not excepted them from the majority of the Act’s protective provisions. For instance, Idaho Code § 41-4403(2) authorizes the Director of the Department of Insurance to consider protective measures for *any* person insured under a medicare supplement policy:

The director may issue reasonable regulations that specify prohibited policy provisions; not otherwise specifically authorized by statute, which in the opinion of the director are unjust, unfair, or unfairly discriminatory to the policyholder, beneficiary or any person insured under a medicare supplement policy.

Similarly, the general “free look” provision applies to both medicare-eligible groups. Idaho Code § 41-4408. Other sections of the Act apply across the board to all eligible persons. *See, e.g.*, Idaho Code § 41-4404 (minimum standards for benefits), § 41-4405 (loss ratio standards), and § 41-4407 (preexisting conditions).

We conclude that the Medicare Supplement Insurance Minimum Standards Act is intended to give the Director of the Department of Insurance the authority to assist all medicare-eligible persons with decisions relating to medicare supplement insurance. The fact that the elderly receive special assistance does not preclude the director from guaranteeing regulatory assistance to the disabled as well.

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

Idaho Code § 41-4401

Idaho Code § 41-4403

Idaho Code § 41-4404

Idaho Code § 41-4405

Idaho Code § 41-4406

Idaho Code § 41-4407

Idaho Code § 41-4408

2. *Session Laws*

1981 Sess. Laws, ch. 68, p.98

3. *Other Authorities*

1980 NAIC Proceedings, II, 1073

1979 NAIC Proceedings, I, 394

1979 NAIC Proceedings, II, 333, 357, 1016

1978 NAIC Proceedings, I, 392

1978 NAIC Proceedings, II, 317

1974 NAIC Proceedings, I, 426

DATED this 17th day of August, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. HOLT
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 87-9

TO: Olivia Craven, Executive Director
Commission of Pardons and Parole

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the Commission of Pardons and Parole have authority to parole an inmate from an indeterminate sentence to a consecutive sentence while the inmate remains incarcerated in a penal or correctional institution?

CONCLUSION:

The Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served. When paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. This opinion applies only to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987.

ANALYSIS:

Your opinion request concerns the eligibility for parole of inmates who are serving indeterminate sentences and who have one or more consecutive sentences remaining to be served. It is helpful to briefly review the powers of the Commission of Pardons and Parole and the background of this issue.

The commission may take four different types of action with regard to an inmate: pardon, commutation, parole and discharge. Under article 4, § 7, of the Idaho Constitution, *the power to grant pardons and commutations* is vested in a board of pardons; the commission is empowered to exercise the powers and authority of the board of pardons by Idaho Code § 20-210. The authority to grant pardons and commutations is therefore derived from the constitution.

The commission's third power, i.e., its *authority to parole inmates*, is derived from Idaho Code § 20-223. The statute sets limits on the eligibility for parole of inmates who have been sentenced to indeterminate sentences for certain crimes. The commission's authority to grant parole is therefore separate from its pardon and commutation powers and is statutory, rather than constitutional, in its derivation. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979); *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

Finally, the commission has *the power to discharge a parolee* under certain conditions, as set forth in Idaho Code § 20-233, when the commission determines that the parolee's "final release is not incompatible with his welfare and that of society." The term "discharge" is also applied to the order of release of an inmate who has served out his maximum sentence in the penitentiary. Idaho Code § 20-239.

Idaho statutes do not include any specific provisions concerning the parole eligibility of prisoners serving consecutive indeterminate sentences.¹ In the absence of such guidance the commission has on occasion granted early “discharges” to inmates who were serving indeterminate sentences and who had consecutive sentences remaining to be served. Such discharges would be granted to inmates at what the commission deemed to be appropriate times to allow them to begin serving the consecutive sentences. This practice was discontinued following a decision in an Ada County case in which the district court ruled that the commission was without authority to grant such discharges. *Smith v. State*, Ada Co. Case No. HC 2515 (June 17, 1986). The commission’s sole power to grant discharges is derived from Idaho Code § 20-233, which provides that only persons who have been on parole for at least one year, or whose maximum term has expired, may be discharged. Discharges are otherwise granted only when the prisoner has served the maximum sentence. Idaho Code § 20-239. In granting early discharges, the commission was exceeding its statutory authority.

This conclusion is bolstered by the fact that an early discharge decreases the inmate’s sentence, and is therefore equivalent in effect to a commutation. “A commutation diminishes the severity of a sentence, e.g. shortens the term of punishment.” *Standlee v. State*, 96 Idaho at 852. While the commission has the authority to grant commutations, it must meet the requirements set forth in the Idaho Constitution and applicable statutes. In particular, an application for commutation must be made by the inmate and public notice of the hearing on the application must be given by publication at least once a week for four weeks. Idaho Const., art. 4, § 7; Idaho Code § 20-213; Idaho Att’y Gen. Op. No. 84-8, *Annual Report* at 75. A commutation granted in the absence of compliance with the constitutional public notice requirement is void. *Miller v. Meredith*, 59 Idaho 385, 83 P.2d 206 (1938). An early “discharge” granted to an inmate in the absence of compliance with the requirements for application and public notice would violate the constitutional and statutory provisions pertaining to commutations.²

¹The eligibility for parole of persons serving consecutive sentences is generally controlled by statute. Cohen and Gobert, *The Law of Probation and Parole*, § 3.04 (1983). Some states have provided that the minimum periods to be served under each of the consecutive sentences should be added together to determine the date of parole eligibility. See, e.g., Cal. Penal Code § 3046 (eligibility for parole of persons serving consecutive life sentences). Other states have provided that eligibility should be determined on the basis of the longest sentence to which the inmate has been sentenced. See, e.g., N.H. Rev. Stat. Ann. § 651-A:6(II). Courts in other jurisdictions have interpreted language in statutes which provided that eligibility was to be determined on the basis of the “term or terms” that were being served and have held that such language permitted the aggregation of consecutive sentences for the purpose of determining parole eligibility. See, *Young v. United States Parole Commission*, 682 F.2d 1105 (5th Cir. 1982), cert. denied, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 517; *Taylor v. Risley*, 684 P.2d 1118 (Mont. 1984).

²In a recent per curiam opinion, the court of appeals stated: “When two genuinely separate and consecutive indeterminate sentences are imposed, the commission may *discharge* the first sentence at what it deems to be an appropriate time. The second sentence then will start running, and parole may follow.” *State v. Saykhamchone*, 1987 Opinion No. CA-65, slip op. at 4, n.1 (Ct. App. June 17, 1987) (emphasis added). This statement did not constitute a holding in the case on appeal, which involved a challenge to a sentence that consisted of an indeterminate life term enhanced with an indeterminate ten-year term for the use of a firearm. As noted in the text, the commission may not discharge an inmate from the first of two or more consecutive terms unless the inmate has been on parole for at least one year. Idaho Code § 20-233. The commission would exceed its statutory authority by issuing a discharge under any other circumstances.

This situation has led to the inquiry posed in your opinion request: whether an inmate, while remaining incarcerated, may be paroled from an indeterminate sentence to a consecutive sentence. The Idaho Supreme Court dealt with this issue in a case involving an indeterminate life sentence that was enhanced for use of a firearm in *State v. Kaiser*, 108 Idaho 17, 696 P.2d 868 (1985). Kaiser had been convicted of second degree murder and of carrying or displaying a firearm during the commission of the crime. The trial court imposed an indeterminate life sentence for the murder and a consecutive indeterminate fifteen-year sentence for the use of a firearm.

Initially, the court of appeals held that an indeterminate life sentence could not be enhanced with an additional consecutive sentence despite the clear provision of Idaho Code § 19-2520, which at that time required a consecutive sentence of not less than three nor more than fifteen years for use of a firearm in committing certain specified offenses. *State v. Kaiser*, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984). On review, the Idaho Supreme Court held that such an enhancement was possible and entirely consistent with the legislative intent behind the sentencing statutes. The court, in analyzing the firearms enhancement statute, stated:

The legislative language clearly evidences its intent that involvement of a firearm mandates an additional prison *term* of three to fifteen years. The legislative purpose obviously was the increase of the penalty for commission of a crime using a firearm.

108 Idaho at 18-19 (emphasis in original.)

How was this legislative intent to impose additional punishment to be effected when the underlying sentence was for a term of life? The court held that this was to be done by continuing to hold the inmate in confinement on the enhancement term following a parole on the underlying term for the crime itself:

A person serving an indeterminate life sentence is eligible for parole under I.C. § 20-223 after serving ten years. [Citations omitted.] Unlike a fixed life or death penalty sentence, it is highly likely that an inmate with an indeterminate life sentence will be paroled or eventually discharged. Hence, there remains the opportunity within the defendant's lifetime to serve additional years imposed because of commission of a crime with a firearm, as is the will of the people through their legislature. . . . Although the reading of I.C. § 19-2520 by the Court of Appeals may be literally and technically correct, it defies the clear spirit of the enhancement statute. We believe the district court's interpretation of I.C. § 19-2520 was more in accord with the intention of the legislature: a defendant sentenced to an indeterminate life sentence plus an additional term for use of a firearm, said sentences to be served consecutively, *must serve the indeterminate life sentence until paroled or pardoned, at which time he or she must immediately begin serving the firearm sentence until paroled, pardoned or discharged.*

108 Idaho at 19 (emphasis added).

The Supreme Court's decision in *Kaiser* expressly states that an inmate who has received an enhancement term for use of a firearm may be paroled from the underly-

ing indeterminate term for the crime itself to begin serving the enhancement term. It also implicitly recognizes that there is nothing in the nature of parole or in the provisions of Idaho law to preclude the parole of any inmate who is serving an indeterminate sentence and who has consecutive sentences remaining to be served. The possibility of any inmate's serving a consecutive sentence following a parole from a previous sentence was also noted by the court of appeals in dicta in *State v. Merrifield*, 112 Idaho 365, 732 P.2d 334, 335-36 (Ct. App. 1987).³

This position has also been adopted in other jurisdictions. In *Howell v. State*, 569 S.W.2d 428 (Tenn. 1978), the court was asked to determine the parole eligibility of an inmate who had been given consecutive determinate 35-year sentences. Under Tennessee law, an inmate must serve one-half of such sentences before becoming eligible for parole. 569 S.W.2d at 431. Howell maintained that he would become eligible for parole after serving 17 and one-half years, or one-half of his first sentence and that, if paroled at that time, he would be free to leave the penitentiary for the remaining 17 and one-half years of his sentence. At the conclusion of that time, he would be returned to the penitentiary to begin serving his second sentence. Howell claimed that he could not begin serving his second term while on parole from his first sentence because a consecutive sentence can only begin when the prior sentence has terminated, and parole does not terminate a sentence. The court, while characterizing this argument as "ingenious and superficially plausible," found that Howell's approach would "erode, if not destroy, the whole concept of consecutive sentencing." 569 S.W.2d at 431-32. It therefore held that, following his parole on the first sentence, Howell would immediately commence serving his second sentence without an intervening period of release. During the first portion of his second sentence, "the prisoner simultaneously serves the first portion of his second sentence and, as a resident parolee, or cell-parolee, completes the remaining portion of his first sentence"; after

³In *State v. Saykhamchone, supra*, a defendant convicted of first degree murder was sentenced to an indeterminate life term enhanced by a consecutive indeterminate ten-year term for the use of a firearm. He challenged this sentence, claiming that the consecutive enhancement term would convert his indeterminate life sentence to a fixed life sentence because the commission would not consider him for parole during the first sentence. The court of appeals affirmed the sentence, and went on to note:

There are conceptual problems with enhancements of life sentences. But there is a pragmatic solution. The commission readily can determine what period a prisoner would serve before a tentative parole date is available for an indeterminate life segment of the sentence. The commission also can calculate such a period for the enhancement segment. Adding these two periods together would yield the total period the defendant must serve in confinement before receiving parole consideration on the whole sentence. There should not, and need not, be separately or consecutively served sentences.

Slip. op. at 4.

It is true that the periods of imprisonment for the substantive crime and for the use of a firearm do not constitute two separate sentences, but rather two separate terms comprising a single sentence. The calculation suggested by the court of appeals will inform both the commission and the inmate of the earliest possible date of the inmate's release from confinement in the penitentiary. However, the supreme court made it clear in *State v. Kaiser, supra*, that the inmate must serve the term for the substantive crime until pardoned or paroled, at which time the inmate begins serving the firearm enhancement term. That term is then served until the inmate is paroled, pardoned or discharged. 108 Idaho at 19.

serving one-half of the second sentence, the prisoner would be eligible for parole and release from physical custody. 569 S.W.2d at 433. The court thus acknowledged that it was quite possible for an inmate to be a parolee from a prior sentence and an inmate on a consecutive sentence at the same time. *See also, Ex parte Fitzpatrick*, 75 A.2d 636 (N.J. Mercer County Ct. 1950), *aff'd*, 82 A.2d 8 (N.J. Super. Ct. App. Div. 1951); *Cawley v. Board of Pardons and Paroles*, 701 P.2d 1188 (Ariz. 1985), *aff'g*, 701 P.2d 1195 (Ariz. App. 1984); *Fox v. Board of Pardons and Paroles*, 717 P.2d 476 (Ariz. App. 1986); *State v. LaBarre*, 610 P.2d 1058 (Ariz. App. 1980).

It must be acknowledged that some authority does exist for the position that a parolee from a prior sentence cannot simultaneously serve a consecutive sentence. *See, for example, People v. Dandridge*, 282 N.E.2d 18 (Ill. App. 1972); *Mileham v. Board of Pardons and Paroles*, 520 P.2d 840 (Ariz. 1974). *See also, Ariz. Att'y Gen. Op. No. 77-214; Alaska Att'y Gen. Op., February 6, 1974.*

It is our opinion that the Idaho Supreme Court's decision in *State v. Kaiser*, *supra*, and the more persuasive authority from other jurisdictions, lead to the conclusion that there is nothing in the nature of parole that precludes the parole of a prisoner to a consecutive sentence. Nor has the legislature indicated an intention to prevent such paroles.

Therefore, the commission has authority to establish rules, regulations, policies and procedures for the parole of inmates serving indeterminate sentences who have consecutive sentences remaining to be served. In doing so, the commission may set forth the standards that will be applied in considering such inmates for parole, the basic parole conditions that will be imposed in such cases, and the nature of the supervision of parolees while they continue to be inmates.

Finally, it should be noted that a different set of rules will apply under the Unified Sentencing Act, the principal provision of which is contained in Idaho Code § 19-2513. Under this act, which took effect February 1, 1987, a sentencing court shall specify a minimum period of confinement during which the prisoner is not eligible for parole and may specify a subsequent indeterminate period of custody. Further, if there are consecutive sentences or enhancement terms, all minimum terms of confinement must be served before any indeterminate period begins to run. As an example, we may consider the case of an inmate who is sentenced to two consecutive sentences, each consisting of a minimum period of confinement of five years followed by an indeterminate period of ten years. The sentences would be served as follows:

1. First five years — The inmate serves the minimum period of confinement under the first sentence.
2. Next five years — The inmate serves the minimum period of confinement under the second sentence.
3. Next ten years — The inmate serves the indeterminate portion of the first sentence. The commission may consider the inmate for parole at any time during this period. Since the inmate has served the minimum period of confinement under the second sentence, the commission may simultaneously consider the inmate for parole on that sentence as well, which would result in the inmate's release from the penitenti-

ary on parole. If the inmate is not paroled during this ten-year period, a discharge from the first sentence should be issued at its conclusion.

4. Next ten years — The inmate serves the indeterminate portion of the second sentence. The commission may consider the inmate for parole from the second sentence.

Under the Unified Sentencing Act, there would appear to be no purpose to be served by paroling an inmate from one sentence to a consecutive sentence. Therefore, such an approach should be used only for those inmates who are serving indeterminate sentences under the prior law and who are subject to remaining consecutive sentences. By employing such an approach, the commission will be able to avoid the harsh result of the conversion of an indeterminate sentence to a fixed sentence as a result of the presence of a consecutive term.

AUTHORITIES CONSIDERED:

1. *Constitutions:*

Idaho Constitution, article 4, § 7

2. *Idaho Statutes:*

Idaho Code § 19-2513

Idaho Code § 19-2520

Idaho Code § 20-210

Idaho Code § 20-213

Idaho Code § 20-223

Idaho Code § 20-233

Idaho Code § 20-239

3. *Idaho Cases:*

State v. Kaiser, 108 Idaho 17, 696 P.2d 868 (1985)

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

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

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

State v. Saykhamchone, 1987 Opinion No. CA-65 (Ct. App. June 17, 1987)

State v. Merrifield, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987)

State v. Kaiser, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984)

Smith v. State, Ada Co. Case No. HC 2515 (June 17, 1986)

4. *Statutes Cited from Other Jurisdictions:*

Ariz. Rev. Stat. § 31-412

Cal. Penal Code § 3046

N.H. Rev. Stat. Ann. § 651-A:6(11)

5. *Cases Cited from Other Jurisdictions:*

Young v. United States Parole Commission, 682 F.2d 1105 (5th Cir. 1982), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 517

Cawley v. Board of Pardons and Paroles, 701 P.2d 1188 (Ariz. 1985), *aff'g*, 701 P.2d 1195 (Ariz. App. 1984)

Mileham v. Board of Pardons and Paroles, 520 P.2d 840 (Ariz. 1974)

Fox v. Board of Pardons and Paroles, 717 P.2d 476 (Ariz. App. 1986)

State v. LaBarre, 610 P.2d 1058 (Ariz. App. 1980)

People v. Dandridge, 282 N.E.2d 18 (Ill. App. 1972)

Taylor v. Risley, 684 P.2d 1118 (Mont. 1984)

Ex parte Fitzpatrick, 75 A.2d 636 (N.J. Mercer County Ct. 1950), *aff'd*, 82 A.2d 8 (N.J. Super. Ct. App. Div. 1951)

Howell v. State, 569 S.W.2d 428 (Tenn. 1978)

6. *Other Authorities:*

Alaska Att'y Gen. Op., February 6, 1974

Ariz. Att'y Gen. Op. No. 77-214

Idaho Att'y Gen. Op. No. 84-8, *Annual Report* at 75

Cohen and Gobert, *The Law of Probation and Parole*, § 3.04 (1983)

DATED this 19th day of August, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

MICHAEL A. HENDERSON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 87-10

TO: Lincoln County Commissioners
Lincoln County Courthouse
Shoshone, Idaho 83352

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Which governmental entity is responsible for filling a vacancy in the office of county prosecuting attorney?
2. Is there an alternative means to fill a vacancy in the office of county prosecuting attorney, if the board of county commissioners is unable to find a properly qualified replacement for that office?

CONCLUSIONS:

1. It is the duty of the board of county commissioners, pursuant to Idaho Code § 59-906, to fill a vacancy in the office of county prosecuting attorney by appointing a person with the same qualifications necessary for election to that office.
2. When the board of county commissioners is unable to find an election-qualified replacement to fill a vacancy in the office of county prosecuting attorney, the district court, pursuant to Idaho Code § 31-2603, may appoint some "suitable" person as special prosecutor to perform prosecutorial duties for the time being.

Question I:

Your opinion request asks which governmental entity has primary authority to fill vacancies in the office of county prosecutor. Our informal survey of practice around the state indicates that such vacancies are routinely being filled by boards of county commissioners.

Two separate obstacles arise, however, in assigning this duty to the board of county commissioners. In the first place, under Idaho statutes, there are several other candidates potentially available to assume the appointing function once a vacancy occurs in the office of county prosecutor. The district court, to assure the smooth and uninter-

rupted administration of justice, is given authority to appoint a “special prosecutor” when the office is vacant, or when the prosecutor is absent from the county or has a conflict. Idaho Code § 31-2603(a). The attorney general, pursuant to his duty to oversee effective enforcement of penal laws throughout the state and his duty to supervise prosecuting attorneys in criminal actions, is authorized to appoint a “special assistant attorney general” to assist local prosecutors in criminal prosecutions. Idaho Code §§ 31-2603(b) and 67-1401(5). And the governor, pursuant to his duty under Idaho Code § 67-802 to see that all offices are filled and all statutory duties performed, is empowered to fill vacancies not otherwise provided by law. Idaho Code § 59-912.

Clearly, the authority of the district court, the attorney general and the governor is fallback in nature and is triggered only when other mechanisms break down. It thus appears that the board of county commissioners is the logical entity to fill a vacancy in the office of county prosecutor.

Here, however, a second and more fundamental obstacle arises. The board of county commissioners is authorized to fill “all vacancies in any *county office* . . .” Idaho Code § 59-906 (emphasis added). But in Idaho it would appear that “county office” is a term of art, designating only the six county officers (commissioners, coroner, sheriff, assessor, treasurer and clerk/auditor/recorder) enumerated in art. 18, § 6, of the Idaho Constitution. That section, after listing these six county offices, expressly states: “No other county offices shall be established, . . .” The county prosecutor is not included in the list and thus would not appear to be a “county officer” at all. If this be the case, then the board of county commissioners is not empowered to fill a vacancy in that office.

Several decisions of the Idaho Supreme Court can be read as supporting the proposition that the county prosecutor does not occupy a county office. In *State v. Wharfield*, 41 Idaho 14, 236 P. 862 (1925), the defendant was accused of bribing the county prosecutor and therefore of violating 1919 Compiled Statutes § 8118, which stated: “Every person who gives or offers any bribe to *any executive officer of this state*, . . . is guilty of a felony.” 41 Idaho at 15, 236 P. at 862 (emphasis added). The district court dismissed the charge on the ground that the alleged bribe had not been given to an “executive officer of this state.” The Idaho Supreme Court sustained this ruling:

While [the prosecuting attorney’s] duties, as prescribed by law, may call upon him to perform executive functions in executing or administering the laws, it cannot reasonably be said that he was intended by the constitution to be an executive officer, or to be included in the executive department, or a classification as broad as that of an “executive officer of this state.”

41 Idaho at 17-18, 236 P. at 863. The court rested its analysis on the fact that the office of prosecuting attorney is found in article 5 of the Idaho Constitution, dealing with the judicial department. The court concluded that the prosecutor was “if not a *quasi*-judicial officer, or an officer of the court, at least an officer of the judicial department, charged with the exercise of powers properly belonging thereto.” 41 Idaho at 17, 236 P. at 863.

This holding of the *Wharfield* court has been cited twice in later opinions of the

court, each time in dissent. *State v. Griffiths*, 101 Idaho 163, 183, 610 P.2d 522, 542 (1980); *State v. Russell*, 108 Idaho 58, 64, 696 P.2d 909, 915 (1985).

More recently, the matter was tangentially addressed in *Derting v. Walker*, _____ Idaho _____, 739 P.2d 354, 87 I.S.C.R. 875 (1987). The supreme court in that case affirmed a summary judgment in favor of the defendant, county prosecuting attorney Walker, in an action seeking reimbursement to the county of all monies earned by Walker from contracts with municipalities for prosecution of city misdemeanors. The court held that “any compensation received for prosecution of city misdemeanors is outside the scope of either Idaho Constitution art. 5, § 18 [dealing with prosecuting attorneys] or art. 18, § 7 [dealing with compensation of county officers].” *Id.* at 879-880. En route to this holding, the Court found it “significant that the creation of [the office of prosecuting attorney] was accomplished by amending of art. 5 of the constitution comprehending the judicial department, and no amendment was made to art. 18, § 6, denominating ‘county officers.’” *Id.* at 877.

Thus, the Idaho Supreme Court in *Wharfield* and again in *Walker* has stated that the county prosecutor is a member of the judicial department. However, the court has left open the question as to whether the county prosecutor might nonetheless be a “county officer.” The two propositions are not mutually exclusive. For example, the district court clerk is a county officer as ex-officio auditor and recorder under art. 18, § 6, and Idaho Code § 31-2001, even though the office is created in art. 5, § 16, as part of the judicial department. Even more tellingly, the former office of probate judge, until court reform, was enumerated as a “county office” under art. 18, § 6, and Idaho Code § 31-2001, even though the position was created at statehood within the judicial department by art. 5, § 21 (repealed in 1962).

Thus, there is no fundamental incompatibility between the statement that a prosecutor functions within the judicial department of government and the statement that he occupies a county office. A review of the history of the office of county prosecutor convinces us that both statements are correct.

Historical Background.

At statehood, in 1890, Idaho adopted a district attorney system to prosecute violations of the criminal law. District attorneys were provided for in art. 5, § 18. It made sense to place the office of district attorney within article 5, “Judicial Department,” as all attorneys function as officers of the court. See 27 C.J.S. *District & Prosecuting Attorneys*, § 1, p.623. It would not have made sense to place the district attorney among the enumerated “county officers” in article 8, “County Organization,” because the original constitution expressly rejected a county prosecutor system. Indeed, at statehood, there were only five district attorneys for the entire state, one for each of the judicial districts set out in art. 5, § 11.

Six years after statehood, Idahoans abandoned the district attorney system in favor of a county prosecutor system. They did so by amending art. 5, § 18 — which had called for a district attorney to be elected “for each judicial district” — to provide that a prosecuting attorney be elected “for each organized county in the state.” The question put to the voters read: “Shall section 18 of article V, of the Constitution of the State of Idaho, be so amended as to abolish the office of district attorney, and create

the office of county attorney?” 1895 Sess. Laws, S.J.R. No. 5, p.236 (emphasis added). The meaning of the electorate’s action was unmistakable: the office of district attorney was stricken from the constitution and the office of county attorney was substituted in its place.

It is understandable that the legislature in 1896 chose to attain its goal of substituting a county prosecutor system for a district attorney system by amending art. 5, § 18. That section was a clean vehicle spelling out the credentials, residency requirements, prosecutorial duties and salary schedule for the district attorney. As such, it was easily amended to substitute the county prosecutor and the parallel requirements of that office. It would have been considerably less tidy to strike § 18 altogether from article 5 (“Judicial Department”), thereby leaving a gap in that article of the constitution, and insert the parallel language into article 18 (“County Organization”). This sort of constitutional contortion may well have been advisable, but was unnecessary to effect the legislative purpose of creating the new office of county (prosecuting) attorney.

The Idaho Supreme Court so held in the case of *Hays v. Hays*, 5 Idaho 154, 47 P. 732 (1897). The case was brought by the newly appointed county prosecutor for Ada County, demanding that the incumbent district attorney turn over his case files and vacate his allegedly defunct office. The supreme court held that the amendment of 1896 was not intended to take effect on the day it was certified by the board of canvassers. Instead, the new county prosecutors were not intended to take office until the next general election of county officers:

The general election laws of the state provide the time and manner for *the election of county officers, of whom the prosecuting attorney is made one*; . . .

5 Idaho at 160, 47 P. at 733 (emphasis added). The court proceeded to analyze the salary provisions and the duties of office assigned to the prosecuting attorney and again concluded that the amendment was not intended to:

go into full operation until the time fixed by law for *county officers* to qualify and enter upon the discharge of their duties by virtue of their election in November, 1898.

Id. at 161, 47 P. at 734 (emphasis added).

Thus, the Idaho Supreme Court, in a case decided only two months after adoption of the constitutional amendment of 1896, expressly held that the effect of the amendment was to make the county prosecutor into a “county officer.”

The action of the legislature shortly after approval of the 1896 amendment to art. 5, § 18, demonstrates the same understanding. The legislators proceeded to list the county prosecuting attorney in the statutory section entitled “county officers enumerated.” See, Idaho Code § 31-2001 *and predecessors beginning with* 1901 Idaho Political Code § 1553.

Thus, it is our opinion that the effect of the 1896 amendment was to create a new

county office. The list of county officers in art. 18, § 6, must henceforth be read as having been amended to include the office of county prosecutor. The prohibition in that article against establishing any new county offices applies only to legislative action, not constitutional amendment.

This understanding of the purpose of the 1896 amendment is illustrated by the fact that the duties of district attorney were carried over with little alteration into later codifications of the duties of the county prosecutor. *Compare*, 1887 Revised Statutes, § 2052, as amended by 1891 Sess. Laws, p.46, *with* 1897 Sess. Laws, p.74. Since that time, the prosecutor's duties have always been located in the county section of the Code. *See*, Idaho Code § 31-2604 *and predecessors beginning with* 1901 Idaho Political Code § 1669. By locating these duties in this part of the code, the legislature has affirmed that the county prosecutor is a county officer.

In addition, statutory provisions governing the election of the county prosecuting attorney have always been located among statutes relating to election of county officers. The first codification providing for the election of a prosecutor listed him among county officers. 1901 Idaho Political Code § 747. This inclusion of the prosecutor among elected county officers continued until recently when election provisions for the various county officers were listed in consecutive statutes. *Compare*, 1932 Idaho Code Annotated § 33-202 *and* Idaho Code § 34-615, *repealed by* 1970 Sess. Laws, ch. 140, *with* Idaho Code §§ 34-617 to 34-623. Again, the legislature determined that the prosecuting attorney is a county officer.

Finally, our opinion that the county prosecutor holds a county office is bolstered by the treatment given to the prosecutor's salary in both the constitution and the code. The 1896 amendment to art. 5, § 18, specifically provided for payment of the county prosecutor's salary out of the county treasury. The current version provides for compensation "as may be fixed by law." The law presently applicable is Idaho Code § 31-3106, which, like its predecessors, deals with compensation of county officers. *See* 1901 Idaho Political Code § 1690. *See also*, 1907 Revised Code § 2118; 1919 Compiled Statutes 3699. (From 1929 until 1982, the statutes listed prosecutor salaries separately, as the compensation varied depending on the population of the county. *See e.g.*, 1932 Idaho Code Annotated §§ 30-2609, 30-2610; former Idaho Code §§ 31-3109 (repealed 1949), 31-3110 (repealed 1949), 31-3111 (repealed 1957), 31-3112 (repealed 1959) 31-3113; and 1982 Sess. Laws, ch. 191, p.333.) Thus, every codification of Idaho law following the amendment of 1896 has treated the county prosecutor as one of the "county officers" who must be compensated out of the county treasury, pursuant to art. 18, § 7, of the Idaho Constitution. The Idaho Supreme Court expressly recognized the applicability of this constitutional provision to county prosecutors in *Givens v. Carlson*, 29 Idaho 133, 157 P. 1120 (1916).

Our conclusion here is not arrived at lightly. We recognize there may arguably be authority for the proposition that a prosecuting attorney is not a county officer. Though mindful of this authority, we remain convinced that what is commonly assumed is also grounded in sound legal analysis. If the prosecuting attorney is *not* a county officer, then we would have to conclude that the understanding of the people of this state has been contrary to law for close to a century. This is not our conclusion.

Having determined that the county prosecuting attorney is a county officer, the

statutory means for filling vacancies in the office is clear. Idaho Constitution art. 5, § 19, indicates that prosecutor vacancies are filled “. . . as provided by law.” Idaho Code § 59-906 provides the law:

All vacancies in any county office of any of the several counties of the state, except that of the county commissioners (who shall be appointed by the governor), shall be filled by a ppointment by the county commissioners of the county in which the vacancy occurs in accordance with the procedure prescribed below until the next general election, when such vacancy shall be filled by election.

It follows that the board of county commissioners, except under circumstances outlined below in Question 2, is statutorily empowered to fill vacancies in the office of county prosecutor.

Question 2:

A problem may arise in the smaller counties of Idaho when the board of county commissioners attempts to fill a vacancy in the office of county prosecutor. The power of the board to fill such vacancies is limited by the requirement that:

The person selected shall be a person who possesses the same qualifications at the time of his appointment as those provided by law for election to the office.

Idaho Code § 59-906. In the case of the prosecutor, this means that the person selected must be “a resident and elector of the county for which he is elected.” Idaho Const. art. 5, § 18. Similarly, Idaho Code § 34-623 requires that the prosecuting attorney be “a qualified elector within the county.” Clearly, then, under Idaho Code § 59-506, the board of county commissioners may not fill a vacancy in the prosecutor’s office with an appointee who resides outside the county.

The inability of the board of county commissioners to find an election-qualified replacement does not prevent a county from hiring an able attorney to perform prosecutorial functions. Without such a capable legal servant, the administration of justice in the county would certainly fail. Idaho Code § 31-2603 provides a solution in the limited instance where commissioners are unable to fill a prosecutor vacancy pursuant to Idaho Code § 59-906.

Special prosecutor-Appointment.- (a) When there is no prosecuting attorney for the county, or when he is absent from the court, . . . the district court may, upon petition of the prosecuting attorney, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such. . . . (Emphasis added.)

This provision for the appointment of a “special prosecutor” has existed as long as the office of county prosecuting attorney. 1897 Sess. Laws, p.74. *See also*, 1891 Sess. Laws, p.46. The rationale behind equipping the district court with this emergency

power is clear. Without someone to perform the duties of prosecutor, the court could not effectively render justice and the system of criminal justice in that county would grind to a halt. The appointment of a "special prosecutor" temporarily resolves this problem until such time as the board of county commissioners is able to appoint an election-qualified candidate or until the position is filled at an election.

We note, however, that the phrase "upon petition of the prosecuting attorney, . . ." cannot apply when the office is vacant. Obviously, when there is no prosecuting attorney, a prosecuting attorney cannot petition the district court for the appointment of a special prosecutor. The statutory purpose would be frustrated if a petition from the prosecuting attorney were a condition precedent to a court appointment "when there is no prosecuting attorney for the county."

In sum, county commissioners may only appoint election-qualified candidates to the position of county prosecutor. The district court is not so constrained when appointing a "special prosecutor." Such appointees need only be "suitable"; they need not be county residents. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

We stress the necessity for cooperation between the district court and the board of county commissioners. The power of the district court to appoint a "special prosecutor" derives from the court's need to assure the smooth administration of justice, most especially the enforcement of the criminal law. But this is only half the prosecutor's job. The prosecutor must also provide legal advice to the county commissioners and to all other public officers of the county. Idaho Code § 31-2604(3). The right of the county commissioners to employ compatible civil counsel, though narrowly circumscribed, is ensured by the constitution. Idaho Const. art. 18, § 6. Thus, while the district court may be expected to appoint a special prosecutor who is competent in the courtroom, it is critical that the person chosen enjoy the confidence of the county commissioners and the other county officials that he or she must advise.

CONCLUSION:

County prosecuting attorneys are "county officers" as envisioned by the Idaho Constitution, art. 5, § 18, and the Idaho Code. As such, when there is a prosecutor vacancy, it is the duty of the board of county commissioners to appoint an election-qualified replacement pursuant to Idaho Code § 59-906. This replacement must be twenty-one years old, a citizen of the United States, a practicing attorney admitted to the state bar, and a resident and elector of the county. In the unusual instance where a resident replacement cannot be found, the board must turn to the district court to appoint a temporary "special prosecutor" pursuant to Idaho Code § 31-2603. The "special prosecutor" possesses the same powers as a prosecuting attorney.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

Idaho Const., art. 5, § 11

Idaho Const., art. 5, § 16

Idaho Const., art. 5, § 18

Idaho Const., art. 5, § 19

Idaho Const., art. 5, § 21 (repealed 1962) Idaho Const., art. 18, § 6

Idaho Const., art. 18, § 7

2. *Idaho Statutes*

Idaho Code § 31-2001

Idaho Code § 31-2603

Idaho Code § 31-2604

Idaho Code § 31-3106

Idaho Code § 31-3109 (repealed 1949)

Idaho Code § 31-3110 (repealed 1949)

Idaho Code § 31-3111 (repealed 1957)

Idaho Code § 31-3112 (repealed 1959)

Idaho Code § 31-3113

Idaho Code § 34-615 (repealed 1970)

Idaho Code § 34-617

Idaho Code § 34-618

Idaho Code § 34-619

Idaho Code § 34-620

Idaho Code § 34-621

Idaho Code § 34-622

Idaho Code § 34-623

Idaho Code § 59-906

Idaho Code § 59-912

Idaho Code § 67-802

Idaho Code § 67-1401(5)

1932 Idaho Code Annotated § 30-2609

1932 Idaho Code Annotated § 30-2610

1932 Idaho Code Annotated § 33-202

1919 Compiled Statutes § 3699

1919 Compiled Statutes § 8118

1907 Revised Code § 2118

1901 Idaho Political Code § 747

1901 Idaho Political Code § 1553

1901 Idaho Political Code § 1669

1901 Idaho Political Code § 1690

1887 Revised Statutes § 2052

3. *Session Laws*

1982 Sess. Laws, ch. 191, p.333

1897 Sess. Laws, H.J.R. No. 10, p.185

1897 Sess. Laws, p.74

1895 Sess. Laws, S.J.R., No. 5, p.236

1891 Sess. Laws, p.46

4. *Idaho Cases*

Derting v. Walker, _____ Idaho _____, 739 P.2d 354, 87 I.S.C.R. 875 (1987)

State v. Russell, 108 Idaho 58, 64, 696 P.2d 909, 915 (1985)

State v. Griffiths, 101 Idaho 163, 183, 610 P.2d 522, 542 (1980)

State v. Wharfield, 41 Idaho 14, 236 P. 862 (1925)

Hays v. Hays, 5 Idaho 154, 47 P. 732 (1897)

Givens v. Carlson, 29 Idaho 133, 157 P. 1120 (1916)

State v. Corcoran, 7 Idaho 220, 61 P. 1034 (1900)

5. *Other Authorities*

27 C.J.S. *District & Prosecuting Attorneys*, § 1 (1959)

DATED this 27th day of August, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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Chief Deputy

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Deputy Attorney General
Chief, Intergovernmental Affairs Division

JOHN K. HANSEN
Legal Intern

ATTORNEY GENERAL OPINION NO. 87-11

TO: Belton J. Patty
Director of Finance
Department of Finance
700 West State Street
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Whether it is lawful for late charges to be imposed upon (a) open-end credit accounts, or (b) interest-bearing consumer credit transactions, under the Idaho Credit Code?

2. If such charges may be imposed, must they be disclosed as "finance charges" as that term is defined in the Idaho Credit Code?

CONCLUSIONS:

1. Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge. Late charges can only be imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property.

2. Because of inconsistencies in definitions, if the creditor is subject to the Federal Consumer Protection Act, late charges must be disclosed as "other charges" but not as part of the "finance charge."

ANALYSIS:*Question 1:**Late Charges on Open-end Credit*

Idaho Code § 28-42-201(1) sets forth the general principle that:

With respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction.

The definition of "finance charge" is found in § 28-41-301(18):

(18) "Finance charge":

(a) Except as provided in paragraph (b) of this subsection, "*finance charge*" means the sum of any of the following types of charges payable directly or indirectly by the debtor and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, as applicable:

1. Interest or any amount payable under a point, discount, or other system of charges, however denominated;
2. Time-priced differential, credit service, service, carrying, or other charge, however denominated;
3. Premium or other charge for any guarantee or insurance protecting the creditor against the debtor's default or other credit loss; and
4. Charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the creditor had no notice of the charges when the credit was granted.

(b) *The term does not include:*

1. Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence, unless the parties agree that these charges are finance charges; a charge is not made for actual unanticipated late payment, delinquency, default or other like occurrence if imposed on an account that is or may be debited from time to time for purchases or other debts and, under its terms, payment in full or of a specified amount is required

when billed, and in the ordinary course of business the debtor is permitted to continue to have purchases or other debts debited to the account after imposition of the charge; . . . (Emphasis added.)

To paraphrase: (1) Virtually any charge paid by a debtor in connection with a credit transaction is part of the finance charge unless it is specifically excluded by the definition and (2) delinquency charges are not “finance charges” unless the parties agree that they are, *or if the charge is imposed on the type of account described in the latter part of paragraph (b).* The account described is an “open-end” account, which is defined in § 28-41-301(25):

- (25) “Open-end credit” means an arrangement pursuant to which:
 - (a) A creditor may permit a debtor, from time to time, to purchase on credit from the creditor or pursuant to a credit card, or to obtain loans from the creditor or pursuant to a credit card;
 - (b) The amounts financed and the finance and other appropriate charges are debited to an account;
 - (c) The finance charge, if made, is computed on the account periodically; and
 - (d) Either the debtor has the privilege of paying in full or in installments or the creditor periodically imposes charges computed on the account for delaying payment and permits the debtor to continue to purchase on credit. (Emphasis added.)

This language closely tracks the specific language in the latter part of § 28-41-301(18)(b), describing the type of account in which delinquency charges may be included as finance charges. Both the definitions of “finance charge” and “open-end credit” refer to debiting an account from time to time for purchases, loans, or other debts; both refer to the debtor’s option to pay the entire amount, installments, or specified amounts; and both contemplate that the debtor will continue to use the credit even after late charges have been imposed.

Therefore, this office concludes that late charges on open-end credit transactions are authorized by statute. They are included in the “finance charge” and, as such, late charges can be imposed pursuant to Idaho Code § 28-42-201.

Late Charges on Simple Interest Consumer Loans

Idaho Code § 28-45-301 prohibits the parties to a consumer credit transaction from agreeing to the imposition of late charges in most instances:

Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a regulated consumer credit transaction may not provide for any charges as a result of default by the debtor except those authorized by this act. A provision in violation of this section is unenforceable. (Emphasis added.)

The term “default” is not found in the “Definitions” section of the Idaho Credit Code, § 28-41-301. However, a default occurs whenever a debtor “fails to make a payment as required by agreement.” Idaho Code § 28-45-107. The term “late

charge” indicates that the debtor has failed to make a payment as required by agreement, i.e., not on time, but “late.” Thus, a late charge is a charge resulting from default and is prohibited except where “authorized” by the Credit Code.

Specific authorization of late charges is found in Idaho Code § 28-42-301(1) and (2). These subsections allow such charges for precomputed loans and loans secured by a security interest in real property used or expected to be used as a residence by the debtor. As mentioned above, late charges may also be imposed on open-end credit transactions because § 28-41-301(18) provides that such charges are “not made for . . . default.” Instead, such charges are “finance charges” and thus do not fall under the prohibition of § 28-45-301. A maxim of statutory construction, “*expressio unius est exclusio alterius*,” states that where certain things are enumerated, things not enumerated are excluded. 2A Sutherland, *Statutory Construction*, § 47.33. The legislature’s enumeration of three specific exceptions to the prohibition of late charges implies a legislative intent to exclude all other exceptions.

It has been argued that authorization to impose late charges can be found in Idaho Code § 28-42-201(1):

With respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction. In addition to the finance charge permitted herein, *a creditor may contract for and receive any other charge unless expressly prohibited* or limited by this act. (Emphasis added.)

In our opinion, this section does not authorize late charges. A section generally allowing the debtor and creditor to agree to “any other charge,” § 28-42-201, cannot prevail over a section specifically prohibiting those parties from agreeing on late charges. § 28-45-301. This follows from the general rule of statutory construction that “where there is a general statute, and a specific or special statute, dealing with the same subject, the provisions of the special or specific statute will control those of the general statute.” *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005 (1962); *see also* *Guillard v. Department of Employment*, 100 Idaho 647, 603 P.2d 981 (1979).

Section 28-45-301 only allows late charges where “authorized by this act.” If late charges are authorized every time the creditor and debtor agree to such “other charges,” then the statute’s general prohibition of late charges in the context of regulated consumer credit transactions becomes meaningless. To interpret the section in that manner would destroy it altogether, and it is an elementary rule of statutory construction that “a statute should be construed to give effect to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.” *Norton v. Dept. of Employment*, 94 Idaho 924, 928, 500 P.2d 825 (1972). Thus, the section should be read as authorizing late charges only in the three situations specifically authorized by statute. This interpretation preserves all sections intact.

It might also be argued that late charges are authorized by Idaho Code § 28-41-301(18). That section provides that the term “finance charge” does not include:

Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence, *unless the parties agree that these charges are finance charges . . .* (Emphasis added.)

For the same reasons stated above, this section cannot be read to authorize late charges merely by agreeing to label them as “finance charges.” As stated by the leading treatise on the interpretation of legislation, “[s]tatutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible.” 2A Sutherland, *Statutory Construction*, § 51.02. To harmonize the sections, § 28-41-301(18) should be read as authorizing the parties to label late charges as finance charges only in those instances where late charges are already specifically authorized. Thus, for precomputed loans and loans secured by interests in real property, the parties could agree to the imposition of late charges as part of the “finance charge.” Late charges would be prohibited in all other instances whether imposed under the rubric of “finance charge” or “any other charge.”

Question 2:

Your second question asks whether late charges must be disclosed as “finance charges” as the term is defined in the Idaho Credit Code.

The Idaho Credit Code contains only one provision regarding disclosure:

A person upon whom the Federal Consumer Credit Protection Act, including regulations promulgated pursuant thereto, imposes duties or obligations, shall make or give to the debtor the disclosures, information, and notices required of him by that act and in all respects comply with that act.

Idaho Code § 28-43-201. Thus, the disclosure provisions of the federal law are controlling.

The federal definition of “finance charge” is found in both the statutes and the administrative regulations of the Federal Reserve Board. The statute, 12 U.S.C. § 1605, sheds no light on this question, but what is commonly called “Regulation Z” differs from the Idaho statutory definition. 12 C.F.R. § 226.4(c)2 excludes from the finance charge “[c]harges for actual unanticipated late payment, for exceeding a credit limit or for delinquency, default or similar occurrence.”

For this reason, “late charges” are not required to be disclosed as a part of the “finance charge” as defined by the Idaho Credit Code. They must be disclosed in both the initial disclosure statement and in the periodic statements as “other charges.” 12 C.F.R. § 226.6, 7.

AUTHORITIES CONSIDERED:

1. *Idaho State Statutes:*

Idaho Code § 28-41-301(18), (25)

Idaho Code § 28-42-201(1)

Idaho Code § 28-42-301

Idaho Code § 28-43-201

Idaho Code § 28-45-107

Idaho Code § 28-45-301

2. *Idaho Cases:*

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

Guillard v. Department of Employment, 100 Idaho 647, 603 P.2d 981 (1979).

Norton v. Dept. of Employment, 94 Idaho 924, 500 P.2d 825 (1972).

3. *Federal Statutes:*

12 U.S.C. § 1605

4. *Other Authorities:*

2A Sutherland, *Statutory Construction*, §§ 47.33, 51.02

DATED this 23rd day of September, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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Department of Finance

STEVE STRACK
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ATTORNEY GENERAL OPINION NO. 87-12

TO: Jean Uranga
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P.O. Box 1678
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is a Certified Registered Nurse Anesthetist (CRNA) a "nurse practitioner" as defined by Idaho Code § 54-1402(d) which section, if applicable, would require that rules be jointly promulgated by the boards of medicine and nursing?

CONCLUSION:

No. The CRNA is not a nurse practitioner under the definition of Idaho Code § 54-1402(d) and joint promulgation of rules governing the conduct of the CRNA is not required.

ANALYSIS:

In your letter of July 17, 1987, you seek an opinion on behalf of the Board of Medicine concerning several questions relating to nurse practitioners, Certified Registered Nurse Anesthetists (CRNA), and the authority of the Board of Nursing to adopt rules and regulations without the joint participation by the Board of Medicine. By agreement with counsel for the Board of Nursing, the issue to be addressed was limited solely to the question as set forth above. In order to answer the question, it is necessary to review the history of the nurse practitioner in Idaho and the role of the CRNA in general.

The nurse practitioner was first identified by statute in Idaho in 1971 Idaho Sess. Laws, ch. 17, p.30 and ch. 85, p.187. That function was further clarified and given its present definition and title in 1977 Idaho Sess. Laws, ch. 132, p.279 and now reads as follows:

"Nurse practitioner" means a licensed professional nurse having specialized skill, knowledge and experience authorized, by rules and regulations jointly promulgated by the Idaho state board of medicine and the Idaho board of nursing and implemented by the Idaho board of nursing, to perform designated acts of medical diagnosis, prescription of medical therapeutic and corrective measures and delivery of medications.

Idaho Code § 54-1402(d).

As required by this statute, the scope of practice of a nurse practitioner has been identified in rules jointly adopted by the Board of Nursing and Board of Medicine in IDAPA 23.03.D. These rules and regulations define not only the scope of practice, but also the "designated acts of medical diagnosis, prescription of medical therapeutic

tic and corrective measures and delivery of medications” that may be engaged in by nurse practitioners. The role of the nurse practitioner is thus limited to those specifically identified areas contained within the jointly adopted rules and regulations of the Board of Nursing. These rules and regulations contain an effective date of February, 1980.

From 1979 to 1984, a separate section of the nurse practice rules and regulations was adopted and was in effect covering the conduct of the CRNA. These regulations were unilaterally repealed in 1984, presumably to permit the Board of Nursing to re-evaluate the role of the CRNA and adopt new rules and regulations to govern the practice. During the history of both the nurse practitioner and the CRNA in Idaho, at no time were CRNA rules and regulations jointly adopted or approved by the Boards of Medicine and Nursing. In fact, the history indicates that CRNA rules and regulations were not considered a part of the nurse practitioner standards.

Commencing in May, 1985, the Board of Nursing drafted rules concerning the CRNA and submitted them to the Board of Medicine for its review. Over the next two years, the Boards of Nursing and Medicine jointly worked to review and clarify the role of the CRNA. In November, 1986, the Board of Nursing determined that the rules regulating the conduct of the CRNA did not require joint promulgation and proceeded to unilaterally adopt rules governing the CRNA. The rules became effective on August 31, 1987. The Board of Medicine now contends that the CRNA is a “nurse practitioner.” If that contention is correct, Idaho Code § 54-1402(d) clearly requires the joint promulgation of rules governing CRNA practice.

The role and the authority of the nurse anesthetist (CRNA) has been a question of some dispute over the years. The test in Idaho, as elsewhere, has generally been whether the nurse anesthetist is engaged in *diagnosing* medical conditions, *prescribing* treatment and *delivering* medications. In the older cases, such conduct was seen as invading the province of the physician and therefore constituted the illegal practice of medicine. Here, the “designated acts” are restricted to nurse practitioners and thus would require joint regulation by both the Board of Medicine and the Board of Nursing.

As long ago as 1936, the California Supreme Court faced the problem of defining the role of nurse anesthetists. The court found that “nurses in the surgery during the preparation for and progress of an operation are *not diagnosing or prescribing* within the meaning of the Medical Practice Act.” *Chalmers-Francis v. Nelson*, 57 P.2d 1312, 1313 (1936) (emphasis added). The court therefore concluded that nurse anesthetists were not engaged in “the illegal practice of medicine.” *Id.*

A generation later, in 1961, the California Supreme Court revisited the question of who is authorized to administer anesthesia. As background, the court noted “that it is a common practice in California and elsewhere to permit persons not licensed as physicians to administer anesthetics,” but emphasized that the practice was limited to “nurses and interns.” *Magit v. Board of Medical Examiners*, 17 Cal. Rptr. 488, 366 P.2d 816, 818 (1961). The court noted that in California (as in Idaho) the statutes do not “specifically provide that one who administers anesthetics must have a license to practice medicine. . . .” *Id.* Reviewing its earlier decision in *Chalmers-Francis*, the court held that “[t]he decision was thus based on the special status of a licensed

nurse” and could not be used by foreign-trained but unlicensed doctors to engage in anesthesiology. 366 P.2d at 820.

The case law further demonstrates that the nurse anesthetist at all times operates under the supervision and direction of a physician. See *Chalmers-Francis v. Nelson*, 57 P.2d at 1313 (nurse anesthetist acts “under the immediate direction and supervision of the operating surgeon and his assistants”); *Magit v. Board of Medical Examiners*, 366 P.2d at 819 (“licensed registered nurse should not be restrained from administering general anesthetics in connection with operations under the immediate direction and supervision of the operating surgeon and his assistants”); *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1471 (9th Cir. 1985) (“in administering anesthesia a nurse must act at the direction of, and under the supervision of, inter alia, a physician”).

The question of this “supervision” or “direction” of nurse anesthetists is said to be the very crux of the Board of Medicine’s concern over the new rules. We do not read the new rules as departing from the long-established tradition in Idaho and elsewhere of having nurse anesthetists function under the supervision and direction of physicians. In its definition of a “registered nurse anesthetist,” the Board of Nursing states that such specialists may provide anesthesia care services only “as defined in these rules and *under the direction of a physician* or dentist authorized to practice in Idaho.” IDAPA 23.04.C.7.b.ii (emphasis added). We do not ascribe any major significance to the choice of the word “direction” as opposed to that of “supervision” (or any combination of the two). The position statement of the foremost professional group of nurse anesthetists states:

The terms *supervision and direction* are used interchangeably in licensing laws and nurse practice acts. These terms are often undefined and are to be interpreted in the context of the reality of practice.

“Position Statement on Relationships Between Health Care Professionals,” adopted by AANA Board of Directors, March 1, 1987, quoted in 55 *Journal of the American Association of Nurse Anesthetists* 103 (1987).

Looking at the historical role of the CRNA and the cited cases, it is clear that the nurse anesthetist does not engage in diagnosis, write prescriptions, or deliver medications as contemplated by Idaho Code § 54-1402(d). Rather, the CRNA works under the supervision and direction of a physician or dentist in administering anesthesia. The rules and regulations of the Board of Nursing are consistent with the historical role of the nurse anesthetist and do not violate those principles established early on in the cases discussing the CRNA; nor does the function of the CRNA impinge on that area reserved to the nurse practitioner. We do not read the list of acts enumerated by the Board of Nursing in IDAPA 23.04.C.7.b.ii, as expanding the scope of practice of nurse anesthetists beyond that traditionally encompassed by that specialty and recognized by the courts. Thus, it is our opinion that the CRNA is not a nurse practitioner as defined by Idaho law and there is no requirement of joint promulgation of rules with the Board of Medicine governing the conduct of the CRNA.

AUTHORITIES CONSIDERED:

1. *Idaho Statutes and Administrative Rules*

Idaho Code § 54-1402(d)

1971 Idaho Sess. Laws, chapters 17 and 85

1977 Idaho Sess. Laws, chapter 132

IDAPA 23.03.D

IDAPA 23.04.C.7.b.ii

2. *Cases*

Chalmers-Francis v. Nelson, 57 P.2d 1312 (Calif. 1936)

Magit v. Board of Medical Examiners, 17 Cal. Rptr. 488, 366 P.2d 816 (1961)

Bhan v. NME Hospitals, Inc., 772 F.2d 1467 (9th Cir. 1985)

3. *Other*

55 *Journal of the American Association of Nurse Anesthetists*, 103 (1987)

DATED this 6th day of October, 1987.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy

DANIEL G. CHADWICK
Deputy Attorney General
Chief, Intergovernmental Affairs Division

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1987



Jim Jones
Attorney General
State of Idaho

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 28, 1987

Erwin L. Sonnenberg
Coroner for Ada County
7200 Barrister
Boise, ID 83704

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Jurisdiction of Coroners

Dear Mr. Sonnenberg:

On January 12, 1987, a conference was held in our office attended by you, Walt Potter, Gem County Coroner, Marc Haws, Chief, Criminal Law Division, and me. During the conference and in your letter of the same date, you point out jurisdictional problems for coroners which may result without further clarification of our letter of December 17, 1986, a copy of which is attached. This letter is provided to clarify any misunderstanding which may have arisen as a result of our earlier letter.

The misunderstanding can be resolved by the answer to the question, "What responsibility for the death certificate does the coroner have in the county where death occurs?" Consistent with the requirement that a death be registered in the county or district in which death actually occurs, Idaho Code § 39-260(a), the coroner of that county or district should certify on the death certificate as to the cause of death when required by § 39-260(b). Then, this coroner is obligated to cooperate with the coroner in the county where the incident occurred to determine the manner and responsibility for the cause of death as set forth in the letter of December 17th. As pointed out in our earlier letter, Idaho Code § 19-4301, requires that the coroner of the county where the incident causing death occurred is responsible and has jurisdiction in conjunction with law enforcement officials to jointly determine the manner and responsibility for the cause of death.

These requirements also apply to those situations where a person is brought to Idaho from outside the state and dies or when a person is taken from Idaho to another state. The coroner in the county, district or state where death occurs should certify on the death certificate as to the cause of death when appropriate.

If additional clarification is needed, please do not hesitate to contact me.

Sincerely,

DANIEL G. CHADWICK
Deputy Attorney General
Intergovernmental Affairs

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 10, 1987

Steve Calhoun
Prosecuting Attorney
Clearwater County
P.O. Box 1742
Orofino, ID 83544

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code §§ 23-604 and 39-310

Dear Mr. Calhoun:

You have requested an opinion from our office regarding an apparent conflict between Idaho Code § 23-604, which prohibits public drunkenness, and Idaho Code § 39-310, which forbids prosecution of an offense where one of the elements of the offense involves drinking or being intoxicated. Specifically, you request our opinion as to whether Idaho Code § 39-310 overrules Idaho Code § 23-604, as well as other related statutes that include intoxication as an element of the offense (i.e., possession of a firearm while intoxicated, Idaho Code § 18-3302; acting as a physician while intoxicated, § 18-4202; etc.).

Conclusion

For reasons explained below, we conclude that there is an irreconcilable conflict between Idaho Code § 23-604 and the provisions of the Alcoholism and Intoxication Treatment Act as contained in chapter 37, title 18, and therefore the provisions of that Act are to be given effect over Idaho Code § 23-604, the prior "drunk in public" statute, and over the similar provisions of Idaho Code § 49-1115. Statutes dealing with intoxication by specific classes of people do not conflict with the Alcoholism and Intoxication Treatment Act and thus retain their effect.

Statutory Background

Idaho Code § 23-604, which was enacted in 1939, states:

Drunkenness. — Any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor.

Idaho Code § 39-310, which was enacted in 1975, states:

Criminal Law Limitations. — (1) With the exceptions of minors below the statutory age for consuming alcoholic beverages and of persons affected by the provisions of subsection (3) herein, no person shall be incarcerated or

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prosecuted criminally or civilly for the violation of any law, ordinance, resolution or rule that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to criminal or civil penalty or sanction.

Idaho Code § 39-310 does contain exceptions to the general legislative intent that intoxicated persons not be prosecuted but that they be offered rehabilitation. Idaho Code § 39-310(3) states:

Nothing in this act shall affect any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.

Analysis: The "Drunk-in-Public" Statute

Upon examination, it appears that the intent of the legislature in adopting the Alcoholism and Intoxication Treatment Act (Idaho Code §§ 39-300 – 39-312) was to preclude the prosecution of persons found to be drunk in public. This is in opposition to the earlier enacted statute, Idaho Code § 23-604, which provided statutory authority for prosecution of persons found drunk in public. For whatever reason, the legislature did not repeal Idaho Code § 23-604 when it enacted Idaho Code § 39-310.

The enactment of the Alcoholism and Intoxication Treatment Act by the Idaho legislature in 1975 reflected an increasing awareness that efforts directed at control of public intoxication are best channeled through rehabilitation, not incarceration, of the alcohol abuser. In 1967, three authoritative commissions, the United States Crime Commission, the District of Columbia Crime Commission and the Cooperative Commission on the Study of Alcoholism, concluded that criminal law sanctions were an ineffective, inhumane, and costly method for the prevention and control of alcoholism and public drunkenness. All three commissions recommended that a public health and rehabilitation approach be substituted for the prevailing criminal law sanctions. In response to these recommendations, the American Bar Association, together with the American Medical Association, drew up a model statute called the Uniform Alcoholism and Intoxication Treatment Act (hereafter referred to as the "Act") which was subsequently adopted, in whole or in part, by twenty-two states, including Idaho.

With the widespread adoption of the Act, courts have expressed an increased unwillingness to enforce public drunkenness statutes when they conflict with the more recent provisions of the Act. The Alaska case of *Peter v. State*, 531 P.2d 1263 (1975), is a good example. The Alaska legislature adopted the Uniform Alcoholism and Intoxication Treatment Act in 1972 but, like Idaho, failed to repeal a prior statute making it a misdemeanor offense for a person to be upon or along a highway or street while under the influence of intoxicating liquor. In arguments before the Alaska Supreme Court, the state asserted that the Act and the prior "drunk along a highway or road" statute were not inconsistent because Alaska's Act, like Idaho's, exempted the use of

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alcoholic beverages at specified times and places (highway or street) or by a particular class of people (pedestrians).

The court held that the state's argument, if accepted, would have emasculated the statute:

Given the expansive definition of the word "highway". . . it is hard to imagine how a person could appear in public in an intoxicated condition without sooner or later violating [the drunk upon a street or highway statute]. . . [F]or all practical purposes [the statute] is little more than a law prohibiting public drunkenness in the guise of a traffic regulation.

531 P.2d at 1270-1271.

The Alaska Supreme Court concluded that the comprehensive Act was in conflict with the prior "drunk in public" statute and that one statute must be given preference over the other. Two statutory guidelines are used in resolving such a conflict: First, when provisions of two acts are in irreconcilable conflict, the later act constitutes an implied repeal of the earlier. Second, when a later act comprehensively covers a whole subject area and is clearly intended to preempt the area, it operates as an implied repeal of any earlier, conflicting statutes. Sutherland, *Statutes and Statutory Construction*, § 23.10. As the Alaska court stated:

If enforcement of the prior statute is in irreconcilable conflict with such purpose [of the Alcoholism and Intoxication Treatment Act] it will be held to have been impliedly repealed.

Peter v. State, 531 P.2d 1263, at 1268.

Based on the above analysis, it is our opinion that Idaho Code § 23-604, drunk in public, is in irreconcilable conflict with the provisions of the Alcoholism and Intoxication Treatment Act, which Act was enacted later in time and was intended to comprehensively deal with the subject of intoxication, including public drunkenness. We conclude that the provisions of the Act repealed, by implication, the prior "drunk in public" statute. (Idaho Code § 23-604.)

Other Statutes Addressing Intoxication

As previously noted, there are several statutes listed in the Idaho Code that make intoxication an element of an offense. For example, Idaho Code § 18-3302 makes it an offense for a person to carry a concealed weapon when intoxicated or under the influence of intoxicating drinks. Likewise, Idaho Code § 18-4202 makes it a crime for a physician to act as such while in a state of intoxication and thereby endanger the life of another person.

It is our opinion that Idaho Code § 39-310 does not preclude the continued prosecution of such offenses. As noted above, Idaho Code § 39-310(3) contains various exceptions to the general rule that persons are not to be prosecuted for criminal offenses that include intoxication, as an element of the offense. Idaho Code § 39-310(3) spe-

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cifically excludes D.U.I. offenses, as well as “similar offenses involving the operation of a vehicle, aircraft, boat, machinery, or other equipment.” It also excludes the “use of alcoholic beverages at stated times and places or by a particular class of persons.”

In our view, the prosecution of a person acting as a physician while intoxicated continues to be a viable offense because it involves the “use of alcoholic beverages by a particular class of persons,” in this case, physicians. Similarly, the prosecution of persons who are in possession of a firearm while intoxicated is not precluded as the possession of a firearm, together with the condition of intoxication, would be at stated times and places by a particular class of persons and hence be excepted from Idaho Code § 39-310(3).

Pedestrians Intoxicated Upon a Highway

In connection with your inquiry, a final question exists regarding the validity of Idaho Code § 49-1135, a statute dealing with pedestrians under the influence of alcohol or drugs. That statute states:

A pedestrian who is under the influence of alcohol or any drug to a degree which renders himself a hazard shall not walk or be upon a highway except on a sidewalk.

This statute was enacted in 1982 and is a slimmed down version of Idaho Code § 23-604. Because Idaho Code § 49-1135 is a misdemeanor offense, its enforcement would be inconsistent with the spirit and intent of the Alcoholism and Intoxication Treatment Act.

As noted above, the general rule of statutory construction states that in the case of a conflict between two statutes, normally the one enacted later in time takes precedence. In this case, Idaho Code § 49-1135 was enacted later in time than the provisions of the Alcoholism and Intoxication Treatment Act. However, in our opinion the comprehensive nature of that Act, wherein the legislature adopted the policy that public drunkenness will be dealt with through rehabilitation and not criminal punishment, should be given preference over a single statute contained within the comprehensive revision of the Traffic on Highways Act.

Our conclusion that the Alcoholism and Intoxication Treatment Act must take precedence over the drunk-on-highway provisions of Idaho Code § 49-1135 does not signify a lack of awareness of the important policies embodied in that statute. However, as the Alaska Supreme Court has stated in similar circumstances:

This is not to make light of the state’s justifiable interest in protecting the drunk from stumbling off the sidewalk in the path of an automobile and in protecting the driver from injury resulting from any attempt to avoid such an individual. However, it seems the legislature has previously found this interest to be subordinate to the desire to provide some treatment other than a jail cell for those addicted to alcohol, the ones most likely to violate any law prohibiting public drunkenness.

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Nor is our conclusion designed to hamper law enforcement personnel in dealing with persons who are found along a highway in an intoxicated state. Idaho Code § 39-307 gives officers the authority to place intoxicated persons found to be in need of help or protection in protective custody and transport them to a nearby treatment facility:

- (a) A person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment facility, an approved private treatment facility, or other health facility, by a law enforcement officer.
- (b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by a law enforcement officer and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available, he may be taken to a city or county jail where he may be held until he can be transported to an approved treatment facility, but in no event shall such confinement extend more than twenty-four (24) hours. A law enforcement officer, in detaining the person and in taking him to an approved treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

Thus, in dealing with persons found to be intoxicated in public, whether they are near or aside a public street or highway, the preferable course of action is to see that they are assisted away from danger and taken to a facility that would aid in their recovery and rehabilitation. Such action would carry out the goals of Idaho Code § 49-1135 in a method consistent with the provisions of the Alcohol Intoxication and Treatment Act.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

I hope that this opinion has fully answered your inquiry. Please contact our office if you have any further questions involving this or any other questions that may require our assistance.

Sincerely yours,

DAVID R. MINERT
Deputy Attorney General
Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 12, 1987

Mr. Alvin G. Hooten
Associate Vice President for Financial Affairs
Boise State University
1910 University Drive
Boise, ID 83725

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

RE: Sales Taxes Upon Room Rentals At Boise State University

Dear Mr. Hooten:

Your letter regarding the applicability of sales taxes upon room rentals at BSU has been referred to me for response. As I understand the facts, BSU rents dorm rooms to various individuals and groups during the summer months. With limited exceptions, the rooms are rented to persons or groups involved in educational activities such as conferences, symposia, or other training programs. You have asked the following questions regarding the Idaho Sales Tax, the Travel and Convention Tax and the Greater Boise Auditorium District Tax:

1. Do the various taxes mentioned above apply to the summer rental of Boise State University dorms by individuals and groups who hold conferences, i. e., educational programs?
2. Do the various taxes apply to noneducational individuals and groups such as Ore-Ida Women's Challenge?
3. Are all the taxes mentioned applicable to the rental of Boise State University dorms?

As discussed herein, we conclude that the three taxes apply to such room rentals provided the rentals do not exceed the length of stay provisions of the three tax statutes.

By way of background, it should be noted that the state and its agencies, departments and institutions are exempt from sales tax upon purchases they make. However, sales by the state and its agencies to others are generally not exempt from taxation unless the purchaser qualifies for some exemption. The only specific tax exemption for sales by the state relates to the sale of official documents (Idaho Code § 63-3622AA).

Since there is no specific exemption for the rental of dormitory rooms, we must look to the statutes applying the taxes to determine if tax should be charged upon such room rentals. As to the sales tax, Idaho Code § 63-3612 defines "sale" in pertinent part as follows:

"Sale" shall also include:

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* * *

- (g) Providing hotel, motel, tourist home or trailer court accommodations and services, except where residence is maintained continuously under the terms of a lease or similar agreement for a period in excess of thirty (30) days.

The terms “hotel, motel, tourist home or trailer court” are not defined in the Sales Tax Act. Pursuant to authority granted by Idaho Code § 63-3624, the State Tax Commission has adopted Sales Tax Regulation 12-3 [IDAPA 35.02.12-3], which adopts the provisions of the Idaho Hotel/Motel Room and Campground Sales Tax Regulations for purposes of the Sales Tax Act. Copies of those regulations are enclosed for your convenience. Regulation 3 of those regulations [IDAPA 35-06.03] defines hotel or motel as follows:

a. Hotel or Motel Defined. — The words “*hotel*” or “*motel*” as used in these regulations *means any person, partnership, corporation, trustee, receiver, or other association, regularly engaged in the business of furnishing rooms for use or occupancy (whether personal or commercial) in return for a consideration or which holds itself out as being regularly engaged in such business. Furnishing rooms for a consideration includes but is not limited to rooms provided for personal occupancy and rooms provided for meeting, convention, or other commercial purposes.* The rental of condominiums or townhouses is subject to tax unless exempted under the provision of Regulation 07. (Emphasis added)

Thus, the furnishing of rooms for consideration, including the furnishing of rooms for meetings or conventions, is included within the definition.

It might be argued that the university should not be construed to be a “person” for purposes of the regulation. However, we do not think the argument would be sustained for the following reasons. “Person” is defined in Idaho Code § 63-3607 to include individuals, various types of entities, and “any other group or combination acting as a unit.” The statute has long been administratively construed to include sales by the state and its agencies and political subdivisions (Sales Tax Regulation 22,16e). Therefore, it is unlikely that the tax commission intended to exclude public entities from the requirements of the regulation. Also, if the legislature intended the state to be excluded from the definition of “person,” the public documents exception provided by Idaho Code § 63-3622AA would be unnecessary.

Therefore, we interpret the Sales Tax Act as applying to the university’s furnishing rooms for consideration, including furnishing rooms for meetings or conventions.

The pertinent provisions regarding the Greater Boise Auditorium District Tax are set forth in Idaho Code §§ 67-4917A and 67-4917C. Idaho Code § 67-4917A provides in pertinent part:

The purposes of this act are to provide authority to auditorium or community center districts organized under chapter 49, title 67, Idaho Code, to levy and collect a “hotel/motel room sales tax” on the receipts derived by hotels and

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motels within the district from the furnishing of hotel and motel rooms, except no tax shall be imposed where residence therein is maintained continuously under the terms of a lease or similar agreement for a period in excess of seven (7) days.

Idaho Code § 67-4917C provides in pertinent part:

A district which has levied a sales tax pursuant to section 67-4917B, Idaho Code, may contract with the state tax commission for the collection and administration of the tax in like manner, and under the definitions, rules and regulations of said commission for the collection and administration of the state sales tax under chapter 36, title 63, Idaho Code, on receipts from the furnishing of hotel and motel rooms.

Therefore, the auditorium district tax applies in like manner as the state sales tax, except that it does not apply when the length of stay exceeds seven days.

The pertinent statutory provisions regarding the Idaho Travel and Convention Tax are Idaho Code §§ 67-4711 and 67-4718.

Idaho Code § 67-4711(4) defines "hotel/motel" as:

... an establishment which provides lodging to members of the public for a fee, and shall include condominiums, townhouses or any other establishments which makes a sale as herein defined.

Idaho Code § 67-4711(6) defines "sale" as:

... the renting of a place to sleep, to an individual by a hotel, motel, or campground for a period of less than twenty-nine (29) continuous days.

Idaho Code § 67-4718(1) provides in pertinent part:

From and after January 1, 1985, there is hereby levied and imposed an assessment at the rate of two percent (2%) of the amount of a sale as defined in section 67-4711, Idaho Code. The receipts from the assessment levied by this section shall be paid to the state tax commission in like manner, and under the definitions, rules and regulations of said commission for the collection and administration of the state sales tax under chapter 36, title 63, Idaho Code.

Therefore, the Idaho Travel and Convention Tax applies to room rentals in the same manner as the state sales tax, except that it does not apply when the length of stay exceeds 28 days.

In summary, the three taxes apply to dormitory room rentals by Boise State University. The state sales tax applies when the length of stay is 30 days or less. The Idaho Travel and Convention Tax applies when the length of stay is 28 days or less. The auditorium district tax applies when the length of stay is seven days or less.

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Sincerely,

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

March 5, 1987

Mr. Martin L. Peterson
Division of Financial Management
Statehouse, Room 122

STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code Section 23-1319 — Wine Tax

Dear Mr. Peterson:

This is in response to your request for our advice regarding the following question:

If the 1984 amendment to § 23-1319, Idaho Code, is unconstitutional, should the State Tax Commission begin enforcing the law as it was written prior to the 1984 amendment? This would tax all wines sold in Idaho, regardless of the state of origin, at \$.45 per gallon.

Attorney General Opinion No. 86-14 found the tax preference of Idaho Code § 23-1319 to be unconstitutional based upon the recent United States Supreme Court decision of *Bacchus Imports, Ltd., et al. v. Diaz*, 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984). Accordingly, we conclude that the State Tax Commission should begin enforcing Idaho Code § 23-1319 as it existed prior to the unconstitutional tax preference amendment to the section.

We reach the above conclusion based upon our understanding of legislative intent and upon the general approach used by the Idaho Supreme Court in analyzing the effect of invalid legislation. In determining the appropriate remedy when legislation is invalid, courts will look to the intention of the legislature and attempt to fashion a remedy consistent therewith. *Lynn v. Kootenai County Fire Protection District No. 1*, 97 Idaho 623, 550 P.2d 126 (1976).

In enacting the Wine Tax Act, it is clear that the legislature intended to impose a

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tax on wines sold in Idaho. The 1984 amendment was not intended to eliminate the general tax rate of \$.45 per gallon. Rather, it was intended to foster the local wine industry with a preferential tax rate. Idaho House of Representatives, Revenue and Taxation Committee, minutes, February 21, March 2 and 23, 1984. Since the legislative intent was not to eliminate the general tax rate, the most likely result would be for the court to invalidate only the 1984 amendment providing for the preferential rate. This would leave in effect the prior language of § 23-1319 which imposed a \$.45 tax on all wines, regardless of where produced.

This approach would also be consistent with the Idaho Supreme Court's general approach regarding invalid substitute legislation announced in *American Independent Party in Idaho, Inc., v. Cenarrusa*, 92 Idaho 356, 359, 442 P.2d 766 (1968), which held:

When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid.

The argument favoring retention of the \$.45 per gallon tax rate would appear to be even stronger than was the argument favoring reinstatement of the former statute in *Cenarrusa*, supra, since the general \$.45 per gallon tax rate was never repealed in this case. Thus, we advise that the Tax Commission should begin enforcing Idaho Code § 23-1319 as it existed prior to the unconstitutional amendment.

In making this determination, we have also considered whether the State Tax Commission is administratively required to continue to enforce a statute which is clearly unconstitutional. It has been held that administrative agencies generally do not determine constitutional issues and do not determine the constitutionality of statutes or ordinances under which they act. Usually, the validity of such statutes and ordinances must be assumed by the agency until there is a judicial declaration to the contrary. See, for example, *Wanke v. Ziebarth Construction Company*, 69 Idaho 64, 75, 202 P.2d 384 (1949). Determination of the constitutionality of a statute is a judicial function. Thus, it would generally be improper for an administrative agency to refuse to enforce a statute on grounds of its alleged unconstitutionality. *Wanke*, supra.

In our opinion, the rule announced in *Wanke*, supra, is applicable in cases where there is some reasonable basis in law to argue that a legislative enactment is constitutional. In such cases, due deference to the legislative and judicial branches requires the executive branch to carry out a statute unless it is determined to be unconstitutional by the judiciary.

On the other hand, when it is clear from case law that no reasonable defense can be made of a statute, due deference to the judicial branch requires the executive branch to follow clear decisions of the judicial branch.

A specific example includes enforcement of the federal Fair Labor Standards Act, 29 U.S.C.S. § 217, made applicable to the states in the case of *Garcia v. San Antonio*

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Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Although Idaho was not a party to the case, it must clearly abide by the decision, even though state statutes remain inconsistent with federal law. Another example on the state level is the conflict of the Parental Responsibility Act found at Idaho Code § 32-1008A and federal law, thoroughly discussed in Attorney General Opinion No. 85-10. In that situation, an Idaho agency, in order to retain federal funds, was required to ignore the mandates of state law.

Similarly, it was held in Attorney General Opinion No. 84-10 that a bill was clearly ineffective to amend the income tax provisions of Idaho Code § 63-3022(a)(1) since there was no indication of the intended amendment in the title of the bill. In that case, it was necessary for the State Tax Commission to ignore the invalid amendment in order to give effect to the Idaho Constitution as interpreted by the Idaho Supreme Court in several cases on point.

In this case, Attorney General Opinion No. 86-14 determined that the tax preference of Idaho Code § 23-1319 is clearly unconstitutional given the recent U. S. Supreme Court decision in *Bacchus Imports, Ltd., et al. v. Diaz*, supra. Accordingly, the State Tax Commission should no longer enforce the unconstitutional preference.

Sincerely,

DANIEL G. CHADWICK
Deputy Attorney General
Chief, Intergovernmental Affairs
Division

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

March 23, 1987

Larry Kirk, CPA
Deputy Legislative Auditor

STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: State Travel/Private-Owned Automobiles

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Dear Larry:

Thank you for your inquiry of March 19, 1987, concerning the possible implications of reimbursing a state employee for the deductible that the employee was required to pay under his auto insurance policy; the employee was involved in an accident while using his vehicle on state business.

As you may know, the Board of Examiners' travel policy contemplates the use of privately-owned vehicles for state business under certain circumstances. Regulation 7 states in part:

The use of privately-owned automobiles, airplanes, or other conveyances may be authorized whenever it is more practical than transportation by common carrier or State vehicles. Privately-owned conveyances shall be adequately covered by public liability and property damage insurance. The cost of transportation by private conveyance shall be paid at the rate set by the Board of Examiners up to the maximum allowed by law.

The above-quoted regulation permits state agencies to authorize employee use of private vehicles when such use is deemed to be the most practical means of transportation. Such authorizations frequently arise when state vehicles are not available. We believe that the intent of this regulation is that state employees, when authorized to use their own vehicles for state business, should not be required to sustain losses arising from such use which would not have arisen had a state vehicle been used.

If the employee referenced in your letter had been operating a state vehicle when the accident occurred, he would have sustained no personal financial impact. We believe that fairness dictates the same result when his superiors have authorized him to use his own auto. We note that the Board of Examiners' policy specifically states that private vehicles must be "adequately covered by public liability and property damage insurance." It would appear that one reason this language was included was to insure that state employees suffer no personal loss under circumstances such as those you describe in your letter.

You suggest that, by reimbursing the employee for the deductible, the state could be implicitly admitting liability for the accident. We doubt that, as an evidentiary matter, reimbursement of the deductible would be compelling evidence of the state's ultimate liability. However, to the extent this is a concern, it could conceivably be remedied by remitting along with the reimbursement a reservation of the state's right to deny liability in any future litigation along with a specific provision that the reimbursement is merely a matter of state policy and should not be deemed an admission of any kind.

In summary, while we do not intend to encourage the expanded use of privately-owned vehicles for state business, we do believe that, under the limited circumstances where such use is appropriate, the employee should not be compelled to incur monetary losses he would not have suffered had he been driving a state vehicle. Further, we do not envision any significant concerns in terms of the state's future liability arising from such reimbursements.

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Please note that the foregoing is an informal and unofficial expression of the view of this office.

If you have any additional questions or would like to discuss this matter further, please call at any time.

Yours truly,

PATRICK J. KOLE
Deputy Attorney General
Chief, Legislative Affairs

March 26, 1987

The Honorable Mike Strasser
Idaho House of Representatives
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Tort Reform Bill/Violations of Art. 3, Sec. 16, Idaho Constitution

Dear Mike:

In your letter of March 23, 1987, you question whether S1223, commonly known as the tort reform bill, violates art. 3, sec. 16, of the Idaho Constitution. That provision provides:

Unity of subject and title. — 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.

At issue here is whether the act, by embracing elements of tort reform and changes to the insurance laws of Idaho, violates the prohibition on an act combining two subjects. For the reasons set forth below, it is my conclusion that the statute in question would likely pass constitutional matters challenged on these grounds.

Early Idaho cases strictly construed this constitutional provision. For example, in *Hailey v. Huston*, 25 Idaho 165, 136 P. 212 (1913), the Idaho Supreme Court invalidated an act that combined an appropriation to the librarian of the state historical society with an increase in the librarian's annual salary. Similarly, in *Pioneer Irriga-*

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tion District v. Bradley, 8 Idaho 310, 68 P. 295 (1908), the court held that acts having two or more subjects diverse in their nature and having no necessary connection with each other were unconstitutional and void.

Later pronouncements by the court somewhat clarified and liberalized the standards applicable to this constitutional provision. In *Cole v. Fruitland Canning Association*, 64 Idaho 505, 134 P.2d 603 (1943), the court held that art. 3, sec. 16, must be reasonably construed and that acts need only treat one "general" subject expressed in a "general" title. Therefore, if each of the act's parts are arguably necessary for and relate to the accomplishment of the objects of the act, there would be no constitutional violation. See also *AFL v. Langley*, 66 Idaho 763, 168 P.2d 831 (1946).

In this case, the common object treated by S1223 is the crisis in the liability insurance area which is addressed by resolving problems with the civil justice system and related insurance practice and reporting statutes. Under the case law cited it is my conclusion that our court would likely find that both subjects could be legitimately combined to treat the common object. Please advise me if I can be of further assistance.

Very truly yours,

PATRICK J. KOLE
Deputy Attorney General
Chief, Legislative and
Public Affairs Division

June 18, 1987

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

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Conflict of Interest/Incompatibility

Dear Mr. Harris:

You have asked whether a member of a county planning and zoning commission can serve as a city councilman without creating a conflict of interest.

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The Local Planning Act contains a conflict of interest provision:

A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business(,) associate, or any person relating to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Idaho Code § 67-6506.

Because a city council member is an agent of the city he represents, this section would probably prevent him from participating in any county zoning decisions which may affect the city's economic interests. However, there is no provision requiring the council member to resign his position.

Although not specifically stated, the facts in your letter also present a question of incompatibility of office. This common law doctrine applies if there is a potential conflict between the two offices such that one individual could not give absolute allegiance to both offices. Incompatibility is most often found where one office supervises the other, or when the interests of the two offices are antagonistic to each other. 3 McQuillin on Municipal Corporations, § 12.66 et seq.

In the area of zoning, the interests of the county and the city may frequently be at odds, and it is not uncommon for cities and counties to sue one another over zoning disputes. See *State v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981); *Board of County Comm'rs v. City of Thornton*, 629 P.2d 605 (Colo. 1981). Under such circumstances one person could not fill both offices without a conflict of loyalty.

If two offices are incompatible, one office should be vacated. In some instances, it has been held that the acceptance of a second incompatible office will vacate the first office; that is, the mere acceptance of the second incompatible office per se terminates the first office as effectively as a resignation. 3 McQuillin, § 12.67.

Although we do not offer an opinion as to whether the per se rule applies in Idaho, we do recommend that one office be vacated to eliminate the incompatibility problem.

If we can be of further assistance on this matter, please contact us.

Sincerely,

DANIEL G. CHADWICK
Acting Chief
Intergovernmental Affairs Division

June 18, 1987

Mr. Neal Candler, Mayor
City of Potlatch
P.O. Box 525
Potlatch, Idaho 83855

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Idaho Code Title 40, Chapter 2

Dear Mayor Candler:

Your letter asked two questions:

1. May county roads be abandoned by not including them on the official map of the highway district system?
2. Who owns the right-of-way for roads not included on the official map?

CONCLUSIONS:

1. County roads cannot be abandoned simply by failing to include them on the official highway district system map. County roads can only be abandoned and vacated after full compliance with the procedures laid out in Idaho Code § 40-203.
2. Roads not included on the official map are not abandoned; therefore the public continues to own the right-of-way.

ANALYSIS:

The answer to your first question — whether county roads can be abandoned by not including them on the official highway district system map — is governed by Idaho Code §§ 40-202 and 40-203. No cases have been found interpreting these statutes as amended in 1986. Therefore, the meaning of the statutes must be drawn from the language of the sections and from rules of statutory construction.

Section 40-202 sets forth the procedure to be used in the initial selection of roads to be included in the highway district system. This selection is accomplished by the adoption of an official map by the highway commissioners following notice and hearing. However, the section is ambiguous as to whether existing highways can be abandoned by not including them on the official map.

The ambiguity in Idaho Code § 40-202 as to whether roads can be abandoned by non-inclusion on the official map is resolved by reference to Idaho Code § 40-203, which delineates the specific procedures that must be followed before any highway is abandoned and vacated. The commissioners must prepare a report stating the effects

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of the proposed abandonment and vacation on the public interest, notice must be published in a local newspaper, notice must be mailed to owners of land abutting the highway to be abandoned, and a hearing must be held to review the report and accept testimony from interested persons. Idaho Code § 40-203(1). Additionally, highways established by five years of maintenance at public expense (Idaho Code § 40-109(5)) can be abandoned if not maintained or used for five years, unless they are included on the official map. Idaho Code § 40-203(4)

Because Idaho Code § 40-203 provides specific procedures to be used when abandoning or vacating county roads, it can be inferred that in providing these procedures, the legislature intended to exclude other methods of abandonment or vacation. *Poston v. Hollar*, 64 Idaho 322, 132 P.2d 142 (1942). This interpretation of the statute conforms to the majority view in other jurisdictions that whenever a procedure for abandonment or vacation is provided for by statute, it is exclusive of all other methods of abandonment or vacation. 175 A.L.R. 760, § 2. Therefore, it must be concluded that highway district commissioners cannot abandon existing highways simply by failing to include them on the official map.

As to your second question, it is our opinion that the public continues to own the right-of-way for roads not included on the official map. The apparent purpose of the official map is to designate those highways which the county or highway district will have a duty to maintain. A road does not have to be included on the official map to be designated as a highway. Idaho Code § 40-203(3). However, there is no duty to maintain non-included highways until they are “designated as part of the county or highway district system by inclusion on the official map.” Idaho Code § 40-202(3). Nor is there an affirmative duty to include all existing highways on the official map. Section 40-202(4) states:

Nothing in this section shall limit the power of any board of commissioners to subsequently include or exclude any highway from the county or highway district system in the same manner provided for the selection of the initial highway system as provided by law.

The highway district is free to include or exclude highways from the official map at its discretion, once a public hearing is held in accordance with the provisions of § 40-202(1)(a). The only two instances in which the statutes delineate an affirmative duty to include highways on the official map are when a county or highway district acquires an interest in real property for highway purposes, or when it validates a highway. Idaho Code §§ 40-202(a) and 40-203A.

Non-included roads continue to be public highways, even if they are not maintained. A road is not abandoned merely because it is not maintained. *Goedecke v. Viking Investment Corp.*, 70 Wash. 2d 507, 424 P.2d 307 (1967). When the county or highway district abandons or vacates a road, they cease to assert or exercise an interest, right, or title to the road, with the intent of never again asserting it. *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965). A highway can only be abandoned or vacated in accordance with the provisions of section 40-203.

The right-of-way for a highway, once dedicated and gained by the public, can only

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be lost by the statutorily provided methods, Idaho Code § 40-203(4), *Boise City v. Hon.*, 14 Idaho 272, 94 P. 167 (1908). The court stated in its own syllabus in that case, that:

[W]here the owner of land plats the same into lots, blocks, streets and alleys, and files such plat with the proper recorder of deeds, and sells lots therein with reference to such plat, he and his grantees are estopped from revoking the dedication of such streets and alleys.

A dedication of streets and alleys thus made is irrevocable, and the dedicator and his grantees are precluded from exercising any authority over or setting up any title to the same unless they are abandoned by the public; and that is true whether there has been any formal acceptance of such streets and alleys by the public authorities or not.

The case also holds that acts of filing and recording and selling the lots are sufficient to establish the intent on the part of the owner to make the donation of the same for public use.

Sincerely,

DANIEL G. CHADWICK
Acting Chief
Intergovernmental Affairs Division

June 29, 1987

John Myers, Clerk
Gooding County Board of Commissioners
P.O. Box 417
Gooding, ID 83330

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Recreation District and Hospital District

Dear Mr. Myers:

In your letter of May 20, 1987, you ask a question concerning the ability of a recreation district to levy and collect fees in lieu of ad valorem taxes. Additionally, you ask at what point can the fees be collected.

Idaho Code § 31-4318 allows a recreation district to levy a tax "in an amount not

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exceeding three (3) mills in any one (1) year on each one dollar (\$1.00) of the assessed valuation upon all of the taxable property within the district.” This tax must be certified and collected in accordance with the provisions of Idaho Code §§ 63-621 through 63-624 and 63-918. In lieu of this ad valorem tax, a recreation district may impose and collect fees. Idaho Code § 63-2201A. These fees can constitute either a per household fee or a fee for services provided by the district.

If the recreation district chooses the ad valorem taxation method, then a delay in the collection of those taxes will occur until December and June of the fiscal year following certification of the tax. If the district chooses to charge a per household fee in lieu of the tax, it should do so by duly adopted rules by its board of directors. This particular type of fee will be collected just as an ad valorem tax, and should be certified to the county commissioners.

If the district chooses to charge a service fee, these fees can be collected before or after the services are provided. Thus, no lengthy wait for collection of the fees would be necessary.

Three caveats must be made with respect to the collection of fees. First, the district cannot charge both an ad valorem tax and a fee. Secondly, service fees must be related to the cost of providing the service and cannot be used as a means of raising additional revenue for the district. Finally, a per-household fee cannot exceed the three-mill limitation imposed by § 31-4318.

You also ask questions concerning your hospital district and the fact that you are changing the type of services offered to those that would be provided by a clinic. The questions are as follows:

1. Since there really is no longer a hospital, is the hospital district still valid? If so, what in fact is its status? If not, should it be done away with and how would this be accomplished?
2. Where does the County stand in regard to equipment bought by the Hospital Foundation over the years and placed in the hospital for use by the hospital? Much of this equipment is now redundant and should be disposed of. Should the proceeds go back to the Foundations or were the items gifts and the proceeds go into the County General Fund or be used for the operations of the remaining clinic?
3. It is becoming apparent in our rural area that our approach in the first place was misdirected and that an ambulance district would have been much more appropriate. The question has arisen concerning amendment of the hospital district scope to include ambulance support, thereby leaving the district intact but charged primarily with improving ambulance medical service along with keeping some ability to support clinic services as they stand at this point.

Once a hospital district is created by election, the county commissioners are obligated to comply with the provisions of Idaho Code §§ 39-1325 and 39-1326, certifying the results of the election and naming a board of directors. This board then becomes a separate political subdivision of the state responsible for the operation of

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publicly financed hospital services within the district. Idaho Code § 39-1331.

The nature of the services to be provided by the district is defined by Idaho Code § 39-1319, which reads as follows:

A "hospital district" is one to furnish general hospital services or *medical clinic services* to the general public *and all other such services as may be necessary* for the care of the injured, maimed, sick, disabled or convalescent patients. As used in sections 39-1318 through 39-1353 [39-1353a], Idaho Code, "*medical clinic*" means a place devoted primarily to the maintenance and operation of facilities for outpatient medical, surgical and emergency care of acute and chronic conditions or injury. [Emphasis added.]

This section of law does allow for a clinic and/or ambulance services by a hospital district. Therefore, in answer to your first question, the status of the hospital district still is valid even with the limitations described in your letter.

Commencing on July 1, 1987, a hospital district can be dissolved pursuant to the provisions of 1987 Idaho Session Laws, chapter 87 (copy enclosed). These new provisions also provide for the disposal of district property as mentioned in your second question. You should discuss with your commissioners and prosecutor whether the district should be dissolved and any questions on the disposition of the property.

As to your third question, if the hospital district is to remain in place, the scope and nature of the services to be provided by the district is a question to be determined by the hospital board of directors. Idaho Code § 39-1331. This can range from full hospital services to merely ambulance or clinical services as set forth above.

If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

DANIEL G. CHADWICK
Acting Chief
Intergovernmental Affairs Division

July 9, 1987

James E. Montgomery
Chief of Police
Boise City Police Department
P.O. Box 500
Boise, ID 83701

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Re: Regulation of the Hours of Sale of Alcoholic Beverages

Dear Chief Montgomery:

In your letter of June 4, 1987, you request our advice concerning the authority of a city to regulate the hours of sale of beer and liquor by the drink. Specifically, your question asks:

Does a city council have the authority, under Idaho law, to establish bar closing hours which may be more restrictive than those hours established by a county ordinance?

The hours of sale of liquor and beer are regulated by two statutes. Idaho Code § 23-927 regulates the hours of sale of liquor, permitting such sales between the hours of 10:00 a.m. and 1:00 a.m. of the following day, with exceptions made for Sundays, holidays and other significant times. However, § 23-927 additionally provides that:

[a] county may, however, by ordinance, allow the sale of liquor by the drink on a Sunday, Memorial Day and Thanksgiving, and may also extend until 2:00 A.M. the hours of the sale of liquor by the drink.

The sale of beer is regulated by Idaho Code § 23-1012 which limits sales to between the hours of 6:00 a.m. and 1:00 a.m. of the following day. As with § 23-927, this provision also allows a county to extend the hours of sale to 2:00 a.m. Cities, however, are given concurrent authority to regulate the hours of sale of liquor and beer within their own boundaries. Idaho Code §§ 23-927 and 23-1014.

Although a county may extend the hours of operation for the sale of liquor and beer, the regulations are not enforceable within city limits. *Clyde Hess Distributing Co., et al. v. Bonneville County, et al.*, 69 Idaho 505, 210 P.2d 798 (1949). The legislature has the authority to make action by a county a condition precedent to action by a city, but such a regulation is not a general law for a municipality. *Id.* at 511-512. Thus, if a city so desires, it may extend its hours of sale of liquor and beer to 2:00 a.m., but only after a county has acted on the question through a county ordinance.

Concurrently, the city has the authority to restrict the hours of sale to something less than 2:00 a.m., such as the 1:00 a.m. closing time suggested in your letter. This action by a city is supported in the case of *Taggart v. Latah County*, 78 Idaho 99, 298 P.2d 979 (1956). In that case, the court held that where restrictions on the hours of sale merely add limitations, are not unreasonable or discriminatory, and do not act prohibitively, such restrictions fall within the proper exercise of police power by a city and are not in conflict with the general laws of the state. 78 Idaho at 104. The *Hess* case and the *Taggart* cases were expressly upheld in *Russell, et al. v. Teton City*, 102 Idaho 349, 630 P.2d 140 (1981).

Thus, in direct answer to your question, the city may establish closing hours more restrictive than those hours established by the county ordinance. Additionally, a city may adopt a 2:00 a.m. closing time, but only after the county has acted to extend the hours in its own ordinance.

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If you have any questions, please do not hesitate to contact our office.

Sincerely,

DANIEL G. CHADWICK
Acting Chief
Intergovernmental Affairs Division

July 14, 1987

Mr. Richard T. St. Clair
Secretary of Youth Harbor, Inc.
P. O. Box 44
Idaho Falls, Idaho 83402

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. St. Clair:

Your letter asked whether the law enforcement agency or the Department of Health and Welfare has legal custody and financial responsibility for minor children taken into custody by the law enforcement agency, but not yet remanded to the custody of the Department of Health and Welfare by a court order under the Child Protection Act (CPA).

Pursuant to Idaho Code § 32-1003, a parent is responsible for the necessary expenses of a child, and a third party may provide the necessities and recover the cost from the parents. *Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350 (1978). A court order vesting custody of a child in a third party does not relieve the parent of the primary duty of support. *Stafford v. Field*, 70 Idaho 331, 218 P.2d 338 (1950). If the parents are indigent, they may be eligible for benefits under the county indigency program as provided in title 31, chapters 34 and 35, Idaho Code.

Idaho Code § 16-1612 authorizes a peace officer to take a child into custody when the child is endangered in his surroundings and prompt removal is determined to be necessary in order to prevent serious physical or mental injury to the child. Although § 16-1612 uses the term "custody" and authorizes "custody" without a court order, the CPA in § 16-1602(1) defines "legal custody" as a relationship created by court order. It should be kept in mind that this relationship may be something different from the other type of "custody" relationship discussed in the CPA.

Whenever a peace officer takes a child into custody under Idaho Code § 16-1612, the act requires the officer to immediately take the child to a place of shelter. Idaho

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Code § 16-1613(a)(1). Appropriate places of shelter are prescribed by the courts by administrative order. (*See* Idaho Juvenile Rules, Rule 7.) The child may remain in shelter care for up to 48 hours without a shelter care hearing and court order. After the shelter care hearing, the court is authorized to enter an order of temporary custody. Idaho Code § 16-1614(e). The court is not restricted in the range of custodians for temporary custody pending the adjudicatory hearing. After the adjudicatory hearing the court is expressly authorized to commit a child to the Department of Health and Welfare by Idaho Code § 16-1610(b)(2).

The Idaho Department of Health and Welfare has been given specific responsibility in this area by Idaho Code § 56-204A, which provides that:

The state department is hereby authorized and directed to maintain, by the adoption of appropriate rules and regulations, activities which, through social casework and the use of other appropriate and available resources, shall embrace:

(a) Protective services on behalf of children whose opportunities for normal physical, social and emotional growth and development are endangered for any reason;

* * *

(d) Undertaking care of, and planning for children including those committed to the state department by the courts.

Such rules and regulations shall provide for:

* * *

(8) Specifying the conditions under which payment shall be made for the purchase of services and care for children, such as medical, psychiatric or psychological services and foster family or institutional care, group care, homemaker service, or day care.

Pursuant to statutory authorization the Department of Health and Welfare has adopted Rules and Regulations Governing Social Services contained in title 3, chapter 2, of the Rules and Regulations of the Idaho Department of Health and Welfare, particularly §§ 16 IDAPA 03.2301.06, 03.2325, and 03.2328.

Specific responsibility is placed upon the Department of Health and Welfare by Idaho Code § 56-204B, which provides that:

Temporary Shelter Care. — The state department shall provide places of shelter which may be designated by the magistrate courts as authorized by law for the placement of children for temporary care who have been brought into the custody of the magistrate courts or who have been taken into custody for their protection by peace officers. Such places of shelter may be maintained by the state department or may be licensed foster family homes or licensed foster institutional facilities employed or retained for shelter care by the state department.

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Idaho Code §§ 56-204B and 56-204A were adopted in 1963. However, § 56-204B was amended in 1974, changing probate courts to magistrate courts.

Under Idaho Code § 56-204B, the Department of Health and Welfare must either maintain places of shelter or contract with places to provide shelter care. Thus, the Department is responsible for the cost of shelter care, i.e., room and board. However, Idaho Code § 56-204A authorizes the Department to specify by rule the conditions under which other items, such as medical care, will be paid.

In answer to your specific questions, the children remain in legal custody of their parents until the court enters an order following the adjudicatory hearing. The parents will remain primarily responsible for the costs of shelter care and ancillary necessary expenses. The Department is obligated to pay for the costs of shelter care subject to reimbursement from the parents.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

July 23, 1987

Lewis County Commissioners
Lewis County Courthouse
Nezperce, Idaho 83845

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Sirs:

This is in response to your letter of December 8, 1986, asking which remedies are available when shelter home operators are suspected of taking all money shelter residents receive, rather than just those portions of the residents' public assistance grants designated for room and board. I am terribly sorry for the delay in this response. We asked the department of health and welfare for their views on this matter on December 15, 1986. Their response arrived here on June 29, 1987. We have reviewed their materials and can now respond to your inquiry.

The rules and regulations for shelter homes in Idaho, title 2, chapter 4, of the Rules and Regulations of the Department of Health and Welfare, § 16.02.4200.07.c, provide that:

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The facility cannot require the residents to purchase goods or services from the facility for other than basic room and board. For those residents who receive public assistance, the facility's basic room and board charge shall not exceed that portion of the resident's public assistance grant designated for room and board.

This subparagraph is contained in § 02.4200 governing the administration of a shelter home operation which prescribes the organizational structure, operating mechanism and policies for a shelter home. This does not authorize the department to intervene into this area; rather, the department's authority is to insure that these policies and procedures are in place before licensure. The department may not act upon an alleged violation of this particular policy unless there is specific information indicating a specific violation. Shelter homes are not audited by the Division of Welfare as are nursing home operations under the Medicaid program. They are annually inspected by the Division of Health, Licensing and Certification Bureau, which reviews for program content only.

Along the same lines, providers of shelter homes are not reimbursed as are providers of nursing homes, which involves an audit and review of their financial dealings. Rather, shelter home residents receive direct grants and are responsible for paying appropriate charges. In other words, the department lacks a mechanism to investigate general complaints of this nature. There is, however, no prohibition to the commissioners' authorizing the prosecuting attorney of the county to conduct an investigation if they have evidence of a violation of the rights of a shelter home resident. In fact, pursuant to § 02.4806, regarding resident funds, subparagraph 01 requires the shelter home to give access to records of the resident's funds upon request by the resident or his advocate or guardian. Therefore, another avenue that could be pursued is that if specific information exists which would indicate a criminal violation, a referral could be made to the county prosecutor.

In summary the department may only receive complaints and, during its annual inspection of the facility, determine whether or not the license of this particular shelter home operator should be revoked or suspended. As licensing is a property right which is afforded due process protections, the department would have to have substantial competent evidence showing the existence of a violation prior to initiating any license revocation proceeding.

If we can be of further assistance on this matter, please contact us.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 19, 1987

Senator Larrey Anderson
2639 Eastgate Drive
Twin Falls, Idaho 83301

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Involuntary Mental Commitments

Dear Senator Anderson:

The questions contained in Mr. Deibert's letter to you all focus, in one way or another, on two central issues: Who is responsible for initiating involuntary mental commitment proceedings? and: Who pays the attendant costs of such proceedings?

Question 1: Who Is Responsible for Initiating Involuntary Mental Commitments?

The best way to answer the first question is to trace the various scenarios under which involuntary mental commitments occur. Perhaps as many as half of all mental commitments are initiated by peace officers who detain a person on an emergency basis because they have "reason to believe that the person's continued liberty poses an imminent danger to that person or others, as evidenced by a threat of substantial physical harm." Idaho Code § 66-326(a). In the jargon of law enforcement officials, this is a "mental hold."

Once a mental hold takes place, the statutory clock starts ticking. Even the best-staffed prosecutor offices find it burdensome to meet the deadlines set out in the Code; in offices where a sole prosecutor may be in trial all day when the mental hold takes place, it becomes almost physically impossible to get the job done.

The 72-Hour Hold Proceeding, Idaho Code § 66-326.

The prosecutor who is informed of the mental hold may elect to proceed under Idaho Code § 66-326(b) and, within 24 hours of detention, obtain a temporary custody order (TCO) upon a showing to the court that the individual detained is "imminently dangerous."¹ Under this procedure, the patient must be examined by a designated examiner within 24 hours of the court order. The designated examiner, in turn, must "make his findings and report to the court" within 24 hours of the examination. Idaho Code § 66-326(c). If the designated examiner finds "that the person is mentally ill, and either is likely to injure himself or others or is gravely disabled, the prosecuting attorney shall file . . . a petition with the court requesting the patient's detention pending commitment proceedings. . . ." Idaho Code § 66-326(d). This additional detention period may extend no more than five days, by which time a hearing must be held.

Two points should be made about the role of the prosecutor in pursuing involuntary mental commitments under the "72-hour hold" procedure of Idaho Code § 66-326. First, the time constraints are severe. If any of the deadlines is missed, the person in

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detention must be released. The first 24 hours after detention occurs are particularly hectic: the police report must be filed in order to determine imminent danger; the prosecutor must find a designated examiner, contract with that person and make sure that an examination can be conducted within the next 24 hours; paperwork must be prepared and presented to the court for entry of the temporary custody order. Obviously, within these time constraints, the prosecutor can conduct only the most minimal investigation into the patient's financial condition and that of family members. This cursory investigation will form the basis of the court's order, under Idaho Code § 66-327(a), fixing responsibility for payment of the costs associated with commitment proceedings.¹

The second point to be made is that the discretion of the prosecutor under the 72-hour hold statute is tightly constrained. If the designated examiner finds that the detained person is mentally ill and either is likely to injure himself or others or is gravely disabled, then the prosecuting attorney shall file a five-day detention petition. Furthermore, it would not be consistent with the finding of mental illness and imminent harm to release the patient after the five-day detention order expires. It is our opinion that, under these circumstances, the prosecutor must also file the commitment application unless the prosecutor determines that family members or other responsible parties are available and willing to perform that service.

Involuntary Commitment Applications, Idaho Code § 66-329.

If the patient is not confined under a mental hold, the prosecutor's first notice of a problem will likely come from a concerned neighbor or relative of the patient. The prosecutor's first inquiry will be to determine if the patient or his or her relatives have adequate resources to pay for commitment and care of the patient. If so, the prosecutor will direct such parties to private counsel.

If, on the other hand, adequate financial resources cannot immediately be identified, the prosecutor will send the complaining party to the county clerk for a determination of indigency under chapter 34 or 35 of title 31 of the Idaho Code. It is our understanding that such determinations are expedited if the patient is in imminent peril.

The procedure outlined here is apparently the one used by your local prosecutor. According to Mr. Deibert's letter,

the practice that is being followed in Twin Falls County (and perhaps other counties) is that the Clerk of the District Court refers all individuals wishing to file a petition for commitment to the Prosecutor's Office. The Prosecutor's Office, at this time, does not accept petitions but instead refers the petitioner to seek private counsel or to seek determinations from the County Commissioners regarding indigency status of the proposed patient.

¹The prosecutor may also elect to proceed directly, within the first 24 hours, to file an application for involuntary mental commitment, pursuant to Idaho Code § 66-329. There are certain advantages to this procedure, and it is our understanding that some prosecutors use it almost exclusively.

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This procedure, in our opinion, is appropriate. It is not the prosecutor's job to compete with the private bar if any of the parties listed in Idaho Code § 66-329(a) wish to retain private counsel and file an application for involuntary mental commitment. However, if the county determines that the patient is indigent and that no other financially responsible party is available, then the prosecutor should file the application for involuntary commitment (assuming that the prosecutor has made the discretionary determination that the patient requires such care).

If the prosecutor, or any other party, files an application for involuntary mental commitment, then the provisions of Idaho Code § 66-329 are triggered. Subsections (b) through (f) spell out the requirements of the application, the need for two personal examinations by designated examiners and for a physical exam, and the procedure for a hearing on the merits of the application. The timetable for proceeding under this statute, while still greatly expedited, is somewhat more relaxed than that specified by Idaho Code § 66-326 (the 72-hour mental hold and five-day detention statute).

In sum, the prosecutor has certain clear-cut responsibilities in the area of involuntary mental commitments. If the patient is in emergency detention, and appears to be in imminent danger, then the prosecutor must proceed under the 72-hour mental hold provisions of Idaho Code § 66-326, culminating in the filing of an application for involuntary mental commitment. Alternatively, if the statutory conditions are met, the prosecutor may proceed immediately to file the application for involuntary mental commitment under Idaho Code § 66-329.

If the proposed patient is not in emergency detention, then the prosecutor will cause a determination of indigency to be made. The prosecutor is responsible for filing an application for involuntary mental commitment if the patient is in need of such commitment and is indigent and has no statutorily responsible relatives able to pay for the commitment proceeding. The prosecutor, of course, has the ultimate responsibility to enforce these laws even if the patient's relatives refuse to carry out their statutory responsibilities. Idaho Code §§ 31-2604(1) and (6). Under these circumstances, as outlined below, the prosecutor would undertake the civil commitment and later bring a separate action to reimburse the county.

Our conclusion appears to mirror the practice of your local prosecutor who, according to Mr. Deibert's letter, presently undertakes involuntary mental commitments whenever "the County has determined the proposed patient meets the requirements of indigency or when the proposed patient is in police custody."

Question 2: Who Pays the Costs of Commitment?

Your second question, in a variety of contexts, inquires as to who is responsible for the costs associated with commitment proceedings. The question is answered in detail by the specific provisions of Idaho Code § 66-327. That section fixes financial responsibility for the costs associated with commitment proceedings on:

1. the patient;
2. the patient's spouse;
3. the patient's adult children.

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As Mr. Deibert's letter suggests, a guardian ad litem appointed on behalf of the patient is empowered to pay the costs of a patient's commitment and treatment. See Idaho Code §§ 15-5-303 and -312, 66-322 and -355. Finally, if indigency is established, the costs are paid by the patient's county of residence, after taking into account all personal, family and third party resources, including state medicaid assistance under title XIX of the social security act. The court must consider the income and resources of the patient and must enter an order fixing responsibility for all or part of the commitment costs on the patient or on the county if the costs cannot be covered by the patient or by third party resources. Idaho Code § 66-327(a).

"Costs," for this purpose, include the fees of designated examiners, transportation costs, and all medical, psychiatric and hospital costs incurred prior to the time when the patient is dispositioned, transported to and admitted by the state facility. Thereafter, all usual and customary treatment costs become the responsibility of the Department of Health and Welfare.

Thus, the simple answer to Mr. Deibert's question is that the designated examiner sends his or her bill to whomever the court has designated as responsible for paying the costs of commitment. As Mr. Diebert further notes in his letter, these specific provisions for payment of medical exam and commitment costs dovetail neatly with the parallel statutes providing legal representation for the needy, Idaho Code § 19-851, et seq.

In practice, this neat statutory scheme is not so neatly administered. The prosecutor or the county commissioners may have only a few hours or minutes to determine whether or not the patient is indigent before the court order is signed fixing responsibility for commitment costs. Even assuming that indigency is established, responsibility may be difficult to determine within different county budgets (the medical indigency fund, the jail, the prosecutor's office). And the discovery of new evidence of assets does not always lead to a new court order, since the prosecutor challenging the old order probably drafted that order for the court's signature. Nonetheless, as Mr. Deibert points out, there is ample statutory authority for counties and the state to recoup moneys advanced on behalf of indigent patients if resources later become available. Idaho Code §§ 19-858, 31-3510A, 66-354.

In sum, the law is straightforward in listing the parties responsible for paying the cost of involuntary mental commitment proceedings, in requiring the counties to pay these costs if the patient is indigent, and in providing a mechanism for counties to recoup costs if resources become available. Problems and misunderstandings in administering the program arise mainly from the speed with which orders are entered and proceedings occur. The process cannot be slowed down because of the imminent peril facing the mentally ill and the liberty interests implicated by their enforced confinement. The solution lies not with the law but with the good will of the participants.

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I apologize for the delay in answering your opinion request. If I can be of further assistance, please contact me.

Sincerely,

JOHN J. McMAHON
Chief Deputy

August 21, 1987

Robert H. Remaklus
Cascade City Attorney
P.O. Box 759
Cascade, ID 83611

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Official Publication by Newspaper

Dear Mr. Remaklus:

In your letter of June 24, 1987, you address a question to our office as to whether *The Advocate* qualifies as a newspaper to publish legal notices under the provisions of § 60-106, Idaho Code. Your letter poses the question as follows:

After having completed 78 consecutive weeks of publication and obtaining a valid second class mailing permit from the United States Post Office, and having 200 bona fide subscribers, is a weekly newspaper required to maintain at least 200 subscribers for an additional 78 consecutive weeks before it is qualified to publish legal notices under the provisions of § 60-106, Idaho Code?

As an attachment to your letter, you included a copy of a letter from Bob Hall, Executive Director of the Idaho Newspaper Association, to Tom Grote, Publisher of the *Central Idaho Star News* in McCall, which concludes that *The Advocate* did not qualify under § 60-106 for legal publications. Mr. Hall claims in his letter that the 78-week period imposed by § 60-106 does not begin until there are 200 subscribers and the only proof of that is the granting of a second class postal permit. Mr. Hall concludes by stating that the time began to toll on May 29, 1987, and *The Advocate* could not legally publish public notices until December, 1988. We believe Mr. Hall's analysis and conclusion are incorrect.

Idaho Code § 60-106 sets forth the requirements of qualifications of newspapers printing legal notices. Rather than repeat the entire statute here, a copy is attached

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for your reference. This provision states that in order to qualify to print legal notices, a weekly newspaper must be in general circulation, published weekly for a period of 78 consecutive weeks. The statute details columns, page size, and type of printing, and states that a newspaper which is of smaller size pages, but has "... an equivalent amount of type matter, shall have at least 200 bona fide subscribers living within the county in which the newspaper is published. . . ." This requirement applies only to those newspapers which are of a smaller page size.

The statute contains only a generalized statement that there must be 200 bona fide subscribers without stating specifically when or during what period there must be 200 bona fide subscribers. In our opinion, if there are 200 bona fide subscribers "prior to the first publication of the legal notice or advertisement," this would be sufficient and the publication would be official. There is no statement within the statute which requires an additional 78 consecutive weeks with 200 or more subscribers before a newspaper is qualified to publish legal notices. We have not been able to find any case law which supports Mr. Hall's position in this matter. To reach the conclusion of Mr. Hall, it would be necessary to achieve the absurd result that if a newspaper in only a single 78-week period had a number of bona fide subscribers of less than 200, the 78-week period must start anew. This is not the intended result of the statute.

The newspaper could easily prove its number of subscribers from its subscription lists and records without reliance on the second class mailing permit. In *Land Fair v. Latah County*, 51 Idaho 65, 2 P.2d 317 (1931), the court indicated that subscription lists and records could be used to prove the number of subscribers. In the Idaho case of *Robinson v. Latah County*, 56 Idaho 759, 59 P.2d 19 (1936), the court held in construing other requirements of Idaho Code § 60-106 (formerly Idaho Code Annot. § 58-106), as soon as the requirements are met the newspaper is entitled to be considered as a newspaper which can publish legal notices. In this case, the court considered the circulation factor. It stated that, while actual circulation of a newspaper is an important element of the notice required by the statute, it is not decisive, with other factors to be considered.

Because the statute does not set forth the specific time period in which the 200 subscriber minimum must be reached, looking at all the factors together, it is reasonable to conclude that it is only necessary to have the 200 subscribers prior to the first date of publication of legal notice, as long as the 78 consecutive week publication and other style requirements are met.

If our office can be of additional assistance, please do not hesitate to contact me.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 9, 1987

The Honorable Marti Calabretta
Senator, District 3
P. O. Box 784
Osburn, Idaho 83849

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Political Caucuses in the State Legislature

Dear Senator Calabretta:

For ease of analysis, your questions have been restructured to address two major issues:

1. Does the Idaho Open Meeting Law apply to the state legislature, legislative committees, and legislative caucuses, and if so, what are its requirements?
2. Does the Idaho Constitution's prohibition against secret sessions of the legislature apply to legislative caucuses?

CONCLUSIONS:

1. The Open Meeting Law does not require legislative sessions or political caucuses to be open to the public. However, the Open Meeting Law does require open meetings of all standing, select or special committees of the legislature.
2. The Idaho Supreme Court is not likely to extend the Idaho Constitution's requirement that the "business" of each house be conducted openly to include meetings of political caucuses. Courts from other states have generally held that secret caucuses must be limited to the discussion of the private matters of the political party. However, the Idaho Supreme Court's traditional deference to the legislature in the running of its internal affairs, the court's narrow interpretation of Idaho's open meeting statutes, and the difficulty of enforcing any prohibition on discussion of public business in closed caucus, lead us to conclude that the Idaho Supreme Court is unlikely to prohibit closed caucuses or to prescribe what may be discussed in caucus. Any such limitations should be implemented by the legislators themselves.

ANALYSIS:

Question 1:

The Idaho Open Meeting Law is codified in Idaho Code §§ 67-2340 through 67-2347. As originally enacted in 1974, § 67-2346 reads:

The provisions of this act shall apply to each house of the legislature of the state of Idaho. All meetings of any standing, special or select committee of either house of the legislature shall be open to the public at all times, and any

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person may attend any meeting of a standing, special, or select committee, but may participate in the committee only with the approval of the committee itself.

1974 Idaho Sess. Laws, ch. 187, § 7.

In 1977, the legislature amended Idaho Code § 67-2346 to delete the sentence reading: “The provisions of this act shall apply to each house of the legislature of the state of Idaho.” 1977 Sess. Laws, ch. 173, § 4. The statutory heading of that amendment stated that the legislative purpose was “TO DELETE APPLICATION OF THE [Open Meeting] ACT TO THE STATE LEGISLATURE.” 1977 Idaho Sess. Laws, ch. 173. Thus, it is clear that the Open Meeting Law no longer applies to the legislature as a whole. Because the Open Meeting Law does not apply to the legislature as a whole, it also does not apply when the legislature arguably meets in a de facto manner, such as when a quorum of its members attend a political caucus.

In sum, the Open Meeting Law would apply to all standing special and select committees of the legislature, but not political caucuses or the legislature as a whole. See Idaho Code § 67-2346 which requires such committee meetings to be “open to the public *at all times*.” (Emphasis added.) One caveat should be noted, however. Certain committees enjoy a limited statutory exemption from the Open Meeting Law. See Idaho Code § 67-455 (Special Committee on Personnel Matters) and Idaho Code § 67-438 (JFAC).

Question 2:

Background

As stated above, the Open Meeting Law does not apply to the legislature as a whole or to political caucuses. However, the Idaho Constitution itself contains an open meeting requirement:

The business of each house, and of the committee of the whole shall be transacted openly and not in secret session.

Idaho Const. art. 3, § 12. The section requires all legislative sessions to be open to the public. By extension, a political caucus could arguably violate this section if it was de facto transacting the “business” of either house. Thus, we must initially define the word “business.” Idaho Const. art. 3, § 10, provides a starting point:

A majority of each house shall constitute a quorum to do business

Idaho Code § 67-2340, the preamble to the Open Meeting Law, sheds further light on the meaning of the word “business”:

[T]he legislature finds and declares that it is the policy of this state that *the formation of public policy is public business* and shall not be conducted in secret. (Emphasis added.)

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As a preliminary rule, therefore, we can say that when a majority of either house meets and formulates public policy, it is conducting the "business" of the legislature. However, it is necessary to further define exactly what is meant by "public business," and to decide whether the legislature only conducts public business when it meets formally, or whether an informal meeting such as a political caucus can also conduct public business.

Before coming to our conclusion, it is useful to compare the Idaho Constitution's "open sessions" requirement to those in other state constitutions. Fourteen state constitutions contain no provision at all regarding open sessions. Most state constitutions require open sessions, but make exceptions for executive sessions, for closed sessions when "secrecy" so requires, or when provided for by statute, resolution or rule. Only four states besides Idaho have a constitutional provision requiring *all* legislative sessions to be held openly, with no exceptions. Of these four states, our informal survey discloses that three (Montana, Oregon, and New Mexico) have long-standing traditions allowing closed legislative caucuses. In North Dakota, the legislature's political caucuses are open to the public.

This survey of other states is inconclusive and cuts both ways. On the one hand, Idaho is among the small group of states whose constitutional requirement of open sessions is the strongest in the land. On the other hand, most states having this requirement have not historically interpreted it to require open sessions when political caucuses discuss public business.

A look at early Idaho history also yields ambiguous results. Newspaper articles from the 1890's reveal that the early legislatures, some of whose members helped frame the Idaho Constitution, did meet in secret caucus. While it is hard to ascertain what was discussed at such caucuses, they appear to have been limited to party organization and nomination of legislative officers. In 1895, for example, Republicans met in closed caucus to nominate a candidate for U. S. Senator. As Republicans were the majority party, their candidate was sure to win confirmation. This action was highly controversial. Many people, both inside and outside the legislature, thought it improper to decide the senatorial race in secret caucus. In a letter printed in the January 10, 1895, issue of *The Statesman*, Representative Gamble stated:

I did not wish to be entangled in anything that might be regarded as of a doubtful character, and that said caucus was not only opposed to my conscientious views, but was not embraced in the instructions given me by the convention which nominated me for representative of Latah County.

Mr. Gamble would have preferred the senatorial race to be decided in open legislative session, and many of his fellow legislators felt the same; 18 of the 37 Republicans in the legislature refused to participate in the caucus. (It should be noted that many of those who refused to attend the caucus obviously had political reasons for so doing.)

The above history is equivocal at best. A survey of early history does not compel the conclusion that political caucuses in Idaho are forbidden to deal with public business. It does reveal, however, that shortly after statehood, serious questions were raised about the practice of having caucuses meet in secret even for the purpose of conducting party business.

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The Argument for Extending the Open Session Requirement to Political Caucuses.

Our research discloses no cases interpreting constitutional provisions similar to Idaho's; however, several states have applied their open meeting *statutes* to political caucuses.

The only case we have been able to find dealing with meetings of a *legislative* caucus comes from Colorado. In that case the Colorado Supreme Court held that political caucuses of the Colorado State Legislature violated the Colorado Open Meetings Law. The Colorado Open Meetings Law states:

It is declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Colo. Rev. Stat. § 26-6-401. In interpreting this language, the Colorado court held that "while a political caucus is not an official policy-making body of the General Assembly, it is, nonetheless, a de facto policy-making body which formulates legislative policy that is of governing importance to the citizens of this state." *Cole v. State*, 673 P.2d 345, 348-49 (Colo. 1983). In support of its decision, the court quoted testimony from Colorado State Senator Regis Groff:

Caucus positions are taken in the party caucus meetings. Caucuses . . . take binding positions . . . which means that when the caucus is over and the action is taken on the floor, the vote is predetermined . . . so in effect, in that particular case, what appears on the Senate floor is simply acting out the procedure, when, in fact, the issue has been settled in caucus.

Id. at 348. The court found that while positions taken at a political caucus are not binding, legislators are unlikely to change their votes on the floor because to do so would "adversely affect the legislator's relationship with other members of the caucus . . . in effect, the floor vote on a measure when a caucus position has been taken . . . is little more than a formality." *Id.* at 349.

It should be noted that the Colorado court did not expressly hold that a quorum was necessary for a caucus to violate the Open Meetings Law. Nevertheless, the caucus in *Cole* did involve a majority of the state senate, so that locking in votes at the caucus predetermined the vote on the senate floor.

The New York Supreme Court, Appellate Division, has reached a similar conclusion in the context of a political caucus at the city council level. The New York Public Meetings Law provides:

It is essential to the maintenance of a democratic society that the *public business* be performed in an open and public manner and that the citizens of this state be fully aware of and able to . . . attend and listen to the *deliberations and decisions that go into the making of public policy*. (Emphasis added.)

N.Y. Pub. Off. Law § 100.

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Thus, the New York law takes “public business” to include the deliberations and decisions that go into the making of public policy. The New York law applies to “public bodies,” and defines “public body” as “any entity, for which a quorum is required in order to conduct public business.” N.Y. Pub. Off. Law § 97(2). In *Sciolino v. Ryan*, 440 N.Y.S.2d 795 (App. Div. 1981), the court held that a city council political caucus that discussed public business would violate the Public Meetings Law if a quorum attended the caucus. The court recognized that decisions made at caucuses are not binding on the entire public body, but stated that:

The decisions of these sessions . . . although not binding, affect the public and directly relate to the possibility of a . . . matter becoming an official enactment.

Id., 440 N.Y.S.2d at 798. The court noted that the New York Public Meetings Law contained an express exemption for “political caucuses,” but held that such exemption must be narrowly applied to “the private matters of a political party, as opposed to matters which are public business yet discussed by political party members.” *Id.* at 798.¹

In another case, the New York court refused to find a violation of the Public Meetings Law where a political caucus consisting of less than a quorum met to discuss public business. The presence of a quorum was critical because:

[T]he existence of a quorum at an informal conference . . . permits the crystallization of secret decisions to a point just short of ceremonial acceptance.

Britt v. County of Niagara, 440 N.Y.S.2d 790, 793 (App. Div. 1981), quoting from Adkins, *Government in the Sunshine*, 22 Federal Bar News 317 (1975).

The Illinois Supreme Court has also held that a closed party caucus called to discuss matters on a city council’s formal agenda violated the Illinois Open Meetings Act. The court held that the Act would not prohibit “the *bona fide* social gatherings of public officials, or truly political meetings at which party business is discussed”; nonetheless, the Act prohibited “informal political caucuses where, as here, public business was deliberated and it appears that a consensus on at least one issue was reached outside of public view.” *People ex rel. Difanis v. Barr*, 414 N.E.2d 731, 734-35 (Ill. 1980).

The court in *Difanis* rejected the defendants’ argument that their pre-council meeting was only “a political caucus” and not “a formal meeting” of the city council:

There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by

¹It should be noted that in response to the *Sciolino* decision, the New York State Legislature amended the Public Meetings Law to specifically allow political caucuses to meet “without regard to . . . the subject matter under discussion, including discussions of public business.” New York Pub. Off. Law, § 108 (Supp. 1987).

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embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.

Id. at 734, quoting approvingly from *Sacramento Newspaper Guild Local 92 v. Sacramento County Board of Supervisors*, 263 Cal.App.2d 41, 50-51, 69 Cal.Rptr. 480, 487 (1968). The court did not decide whether a quorum was necessary for a caucus to violate the Act. *Id.* at 735. However, the Illinois Open Meetings Act normally applies even when fewer than a quorum are present. *People ex rel. Hopf v. Barger*, 332 N.E.2d 649 (1975).

The Delaware Court of Chancery has similarly held that a closed, informal party caucus which constituted a quorum of a city council and discussed "public business," violated Delaware's Sunshine Law. *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. 1977). The Delaware Sunshine Act defines "public business" as any matter over which the public body has (1) supervision, (2) control, (3) jurisdiction, or (4) advisory power. 29 Del.C. § 1002(b). Defendants in that case, the 11 Democrats on a 13-member city council, argued that applying the Delaware Sunshine Law to their political caucus would be "an unfair limitation on their ability as majority political party to function as a unified group." *Id.* at 362. The court replied: "As a practical matter, it obviously does." *Id.* But the court found that the burden of holding open meetings was "outweighed by the benefit that will flow to the citizenry by requiring those in control of public business to exercise it in an open manner." *Id.*

Applying the reasoning of the above decisions to the Idaho Constitution's open sessions requirement yields the conclusion that "public business" consists of the deliberations and decisions that go into public policy (*Sciolino*); decisions that affect the public and directly relate to the possibility of a matter becoming an official enactment (*Sciolino*); deliberations where a consensus on an issue is reached (*Difanis*); any matter over which the public body has supervision, control, jurisdiction, or advisory power (*McLaughlin*). Using these definitions of "public business," it can be argued that political caucuses, if comprised of a majority of either house, are capable of conducting public business and thus of violating the Idaho Constitution if conducted in secret.

The Argument Against Extending the Open Session Requirement to Political Caucuses

Despite this string of court decisions applying open meetings laws to political caucuses, there remain several powerful counter-arguments for not including caucuses in the constitutional prohibition against conducting legislative "business" in secret. In *People ex rel. Difanis v. Barr*, 397 N.E.2d 895 (Ill. App. 1979), the dissent argued strongly that closed caucuses should not be prohibited by the Illinois Open Meetings Act because the Act only applied to public *bodies*:

The emphasis by the legislature upon the functioning of the public body as organized for the conduct of business is apparent, i.e., its act as organized by law. By its terms, the statute makes no reference to, and imposes no limitation upon members who are acting as individuals outside the structure of the "body."

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Id. at 901. The dissent went on to argue that a political caucus has none of the characteristics of a legislative body:

In this case, the voluntary group meeting in what is termed a “caucus” has no attributes of public authority or structure. It appears that participation is voluntary, has no organizational structure, takes no action, and makes no decisions concerning the public matters.

Id. Under this line of reasoning, closed legislative caucuses would not violate the Idaho Constitution because they simply are not meetings of a “house” or of “the committee of the whole.” Instead, the “open sessions” provision would apply only to formalized legislative sessions, as organized for the conduct of business by law: i.e., the introduction, debate, and passing of bills.

A similar argument was made by the concurring justice in *Britt v. Niagara*:

A meeting of the legislators of one political party to discuss legislation is not a “meeting”, . . . Nor is a partisan caucus of legislators a “public body”, . . . *A party caucus is not* a committee or subcommittee or other similar body of the legislature — *the official public body. It is an unofficial meeting of legislators who belong to the same party.* No quorum is required and no official business may be conducted.

440 N.Y.S.2d at 794-95 (emphasis added). Applying the logic of the concurring justice in *Britt* to the Idaho constitutional provision, it can be argued that Idaho Const. art. 3, § 11, expressly applies only to each “house” of the legislature and to “the committee of the whole,” not to other subdivisions of the legislature, and certainly not to political caucuses of individual parties within the legislature.

One further consideration would militate strongly against any suit requesting the Idaho Supreme Court to dictate to the legislature what it can discuss and not discuss during closed caucuses. The Idaho Constitution prohibits one department of government from exercising any power properly belonging to another department. Idaho Const. art. 2, § 1. Accordingly, the court has been reluctant to interfere with the legislature’s exercise of powers expressly delegated to it by the constitution. *Diefendorf v. Galler*, 51 Idaho 619, 10 P.2d 307 (1932). However, when the legislature’s actions have violated the state or federal constitutions, the court has taken action. See *Cohn v. Kinsley*, 5 Idaho 416, 49 P. 985 (1897) (legislature must abide by constitutional provision requiring bills to be read on “3 several days”); *Hellar v. Cenarrusa*, 106 Idaho 586, 682 P.2d 539 (1984) (even though court recognized apportionment as a matter of legislative discretion and judgment, the court had power to declare legislature’s reapportionment plan unconstitutional). Because the prohibition against secret legislative sessions is contained in the state constitution, it must be assumed that the court would enforce it. It is only “in the absence of constitutional offense” that the court is bound to respect the legislature’s exercise of its powers. *Diefendorf v. Galler*, 51 Idaho at 635, 10 P.2d at 313.

It should be noted, moreover, that because of the court’s traditional reluctance to interfere in the legislature’s internal affairs, it would construe the constitutional provision as favorably as possible toward the legislature. Such a construction may

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well lead the court to decide that political caucuses do not transact legislative “business,” no matter what is discussed at the meeting.

This outcome is especially likely given the Idaho court’s reluctance to strictly enforce the Idaho Open Meeting Law. In *State v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981), the court held that actions taken at meetings violative of the Open Meeting Law would not “taint final actions subsequently taken upon questions conscientiously considered at subsequent meetings which do comply with the provisions of the [Open Meeting Law].” *Id.* 102 Idaho at 514, 633 P.2d at 579. If the court were to apply similar reasoning to the “open sessions” provision of the Idaho Constitution, it might well decide that political caucuses that discuss public business are permissible because the business is subsequently discussed and voted upon in open legislative session.

It must also be noted that the approach of the Idaho court on open meeting issues contrasts with that of state courts which apply their open meeting laws as “liberally” and “broadly” as possible. See *Holden v. Board of Trustees of Cornell University*, 440 N.Y.S.2d 58 (1981); *Cole v. State*, 673 P.2d 345 (Colo. 1983); *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. 1977). This liberal construction was certainly a factor in the cases discussed above holding that caucuses violated open meeting laws. Because the Idaho Supreme Court has not employed a liberal construction in favor of open meetings, it is less likely to hold that closed political caucuses violate the Idaho Constitution.

A final factor that would weigh against the court requiring open political caucuses is that such meetings routinely do discuss private party business. A court could not prohibit closed caucuses to discuss purely political business, especially in light of party members’ first amendment freedom of association rights. A court could order such closed caucuses not to conduct “public business,” but such an order would be practically impossible to implement, since the caucuses themselves would determine what was public business and what was party political business.

CONCLUSION:

It is a very close question as to whether the open sessions requirement of the Idaho Constitution would apply to meetings of party political caucuses. No case has been found precisely on point, though most state courts are eloquent in upholding the principle that public business should not be conducted behind closed doors.

It is not likely that the Idaho Supreme Court would require party political caucuses to submit to the open session requirement imposed by the Constitution on the legislature itself and the houses thereof. Four of the five states with strong open session requirements maintain a long history of closed political caucuses. We doubt that the Idaho Supreme Court — with its traditional deference to internal legislative affairs and its narrow interpretation of statutory open meeting requirements — would attempt to ban closed political caucuses or to prescribe the agenda of such caucuses.

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Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

September 10, 1987

The Honorable Lydia Justice Edwards
State Treasurer
Statehouse Boise, Idaho 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: S.B. 1223 — Legal Rate of Interest

Dear Ms. Edwards:

This is in response to your request for my interpretation of S.B. 1223, ch. 278, 1987 S.L., which amends the legal rate of interest upon judgments set forth in Idaho Code § 28-22-104. That section was amended to provide that the legal rate of interest upon judgments shall be five percent plus a base rate which is calculated annually by your office.

You have asked to which judgments that new legal interest rate applies. More specifically, you have asked whether the new interest rate applies to:

- a. judgments on cases that began prior to the effective date of July 1, 1987.
- b. judgments on cases that began on or after the effective date of July 1, 1987.

Section 18 of S.B. 1223 provides:

The provisions of this act shall take effect on July 1, 1987, provided however, that *Section 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987.* Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992. (Emphasis added.)

The amendments to Idaho Code § 28-22-104 regarding the legal rate of interest are found in section 7 of the act. Thus, by the terms of the act, those amendments to Idaho Code § 28-22-104 apply only to "causes of action which accrue on and after July 1, 1987." Accordingly, any judgment entered which applies to a cause of action which accrued after July 1, 1987, is subject to the new interest rate. However, any judgment

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entered which applies to a cause of action which accrued prior to July 1, 1987, is governed by the provisions of prior law.

"Cause of action" has been generally described as "a single core of operative facts which give rise to a remedy." *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (C.A. 7, 1985). Similarly, it was said in *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (C.A. 5, 1981), "A cause of action, in common legal parlance, is a state of facts which would entitle a person to sustain an action and to seek a judicial remedy on his behalf."

A number of Idaho cases have considered when a cause of action accrues. Normally, such cases have dealt with questions involving statutes of limitation. Statutes of limitation begin to run when "the cause of action shall have accrued." Idaho Code § 5-201. For example, an action for breach of a written contract must be brought within five years from the time the cause of action accrues. Idaho Code § 5-216.

In *Thomas v. Goff*, 100 Idaho 282, 596 P.2d 794 (1974), the Idaho Supreme Court considered this section as applied to an action for failure to make installment payments on a note. The note authorized the lender to accelerate all payments in the event of default. The Court held that if the lender had elected to accelerate payments, the cause of action upon future installments would have accrued at the time of the election to accelerate the future payments. However, if there was no election to accelerate payments, the statute of limitation applied to each installment separately and did not begin to run on any installment until it was due.

As another example, Idaho Code § 5-218 provides a three year statute of limitation for causes of action based upon fraud. Such a cause of action does not accrue until the time the fraud is discovered or should have been discovered in the exercise of reasonable diligence. *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 511 P.2d 828 (1973); *Full Circle Inc. v. Schelling*, 108 Idaho 634, 638, 701 P.2d 254 (Ct. App., 1985).

The foregoing examples point out that the question of when a cause of action accrues depends upon both the legal theory for the claim and upon the facts of the particular case.

As noted earlier, the amendments to Idaho Code § 28-22-104 which change the legal rate of interest upon judgments apply only to "causes of action which accrue on and after July 1, 1987." Thus, the question of whether the prior 18% rate, or the new statutory rate will apply to a particular judgment does not depend upon the date the judgment is entered. Rather, it will depend upon the date the underlying cause of action accrued. If the cause of action accrued prior to July 1, 1987, the prior interest rate will apply. If the cause of action accrued on or after July 1, 1987, the new rate will apply.

Sincerely,

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

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September 25, 1987

James B. Weatherby
Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: City Council Vacancies

Dear Jim:

In your letter of August 26, 1987, you ask several questions concerning successors in office to council members appointed to fill a vacancy. Specifically, you ask at what point is a successor elected and qualified to assume a council office when the person appointed to fill a vacancy either is defeated in the election or declines to seek election. You further ask that the answer be provided as it relates to a term which still has two years to run and to a term which expires and election is for a regular term.

Idaho Code § 50-704 provides the manner in which a vacancy to the city council is filled:

A vacancy on the council 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.

Idaho Code § 50-702 provides for the point at which councilmen elected take office: "Councilmen elected at each general city election shall be installed at the first meeting in January following election."

The general rule governing taking office upon election to fill an unexpired term is that the person who wins the election takes the office immediately upon election and qualification; generally within a reasonable time after the election. 67 C.J.S. Officers, § 79. However, where a statute provides otherwise, the person elected to fill an unexpired term takes office at the time prescribed in the statute. *Id. White v. Young*, 88 Idaho 188, 397 P.2d 756 (1964).

Reading §§ 50-702 and 50-704 together, it is clear that in Idaho the statutes provide a single, direct answer to the various scenarios posed in your question. Thus, a person elected to fill an unexpired term as provided by § 50-704 would assume office on the first meeting of the council in January following the election. The same would hold true for the person elected for a full term which commences in January following the election. That person also would not take office until the first meeting in January following the election.

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Each of these conclusions is consistent with the holding in *White v. Young, supra*, where the Idaho Supreme Court held that a county officer will take office at the time designated by statute.

If our office can be of further assistance, please call.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental Affairs Division

October 26, 1987

J. Ivan Legler
Pocatello City Attorney
P.O. Box 4169
Pocatello, ID 83205

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Use of Initiative and Referendum to Affect City Budgets

Dear Mr. Legler:

In your letter of October 2, 1987, you ask whether initiative and referendum can be used within a city in Idaho to disapprove, alter, or make a city budget. We believe the Idaho Supreme Court would hold that a city budget cannot be disapproved, altered or changed by initiative or referendum. There are a number of reasons for this opinion.

The budget and appropriation procedure for cities is set out in the law and is mandatory. *Graves v. Berry*, 35 Idaho 498, 207 P. 718 (1922); Idaho Code §§ 50-1002 and 50-1003. The legislature has provided a particular procedure that must be used to prepare a budget, appropriation bill and tax levy, including preparation of the budget by the city, publication of the budget, notice and hearing, and then passage of the appropriation bill. Idaho Code §§ 50-1002 to 50-1007.

As to the city referendum law, Idaho Code § 50-501 provides that a referendum cannot be commenced until an ordinance has been in effect for sixty (60) days. Because of the time schedule involving taxing districts, cities must submit their budget requests to the county commissioners before the second Monday in September. Idaho Code § 63-624. The county tax levies also must be set by the second Monday in September. Idaho Code § 63-901. Certified copies of the tax levies then are sent to the state by the third Monday in September, Idaho Code § 63-915.

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City budgets ordinarily are prepared and hearings held in June, July and August. The city appropriation bills often are passed in August or late in July. There is not sufficient time to wait sixty (60) days after passage of the appropriation bill, complete a petition for referendum, gain the necessary signatures, file the petition with the city, have the signatures checked, hold an election, and then go back and advertise, pass a budget and appropriation bill within the time limited by law for budget, appropriation and levy of taxes. Thus, the referendum process is not available to affect the city budget process.

The case of *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983), provides guidance on whether an initiative can be used to affect the budget process. There, it was held that building restrictions which were part of the local planning and zoning ordinance could not be amended by initiative. The planning and zoning law provides that these powers are to be exercised by the city council and/or planning and zoning commission. The law provides specific procedures for exercise of these powers, including notice, hearing and specific findings. These procedures must be followed if the powers are to be exercised. The procedures cannot be bypassed through the use of initiative.

This same reasoning would be applicable in the case of setting budgets. The law gives budgetary power to city officials and a particular procedure is required to use the power. Initiative and referendum could not be used to replace this procedure unless the legislature specifically provides that this can be done.

In the New Jersey case of *Cuprowski v. City of Jersey City*, 242 A.2d 873, 101 N.J. S.15 (1968), a referendum was attempted by the populace of the city to disapprove the city budget. The court, among other things, made the following statements in regard to the use of initiative and referendum for the purpose of disapproving, changing, or making a city budget:

. . . action relating to subjects of permanent and general character are usually regarded as legislative, and those providing for subjects of temporary and special character are regarded as administrative.

* * *

Obviously, details which are essentially of a fluctuating sort, due to economic or other conditions, cannot be set up in and by an ordinance to be submitted to vote of the people under initiative and referendum statutes, which restricts submission to people to measures of permanent operation. 5 McQuillin, *Municipal Corporations*, (3d ed.), § 16.55, p.255.

* * *

To say that administrative determinations are subject to referendum could defeat the very purpose of local government. To give a small group of the electorate the right to demand a vote of the people upon every administrative act of the governing body would place municipal governments in a straight-jacket and make it impossible for the city's officers to carry out the public's business.

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* * *

The mandatory provisions of N.J.S.A. 40A:1-1 et seq. (Local Budget Law) relative to itemizing and estimating appropriations, along with the requirement of holding a public hearing by which the public can examine and voice objections, all emphasize the paramount importance which the Legislature attributed to the budget.

A survey of the cases dealing with the question of whether a city budget is a legislative or administrative function shows that such action has been uniformly held to be administrative. *Denman v. Quin, supra*; *State ex rel. Keefe v. St. Petersburg*, 106 Fla. 742, 144 So. 313, 145 So. 175 (Fla. Sup.Ct. 1933); *Keigley v. Bench City Recorder, supra*; 122 A.L.R. 769 (1939).

* * *

When the resolution here in question is tested by the rules stated above, it becomes obvious that it is not subject to a referendum vote by the people. Moreover, a city's budget can only be fixed at a certain amount for a comparatively short length of time; hence, the resolution in question does not connote permanency and the conclusion is evident that a city budget is an administrative rather than a legislative act.

* * *

The consensus of judicial opinions throughout the land is that the preparation, a approval and adoption of a municipal budget is administrative in character.

* * *

[W]here the Legislature speaks in clear, positive and unambiguous language it can provide for initiative and referendum in budgetary matters. *Spencer v. Alhambra*, 44 Cal.App.2d 75, 111 P.2d 910 (Cal.D.Ct.App.1941). But in the absence of such clear, positive and unambiguous mandate by the Legislature, the majority view is that appropriations and budgetary ordinances or resolutions are not subject to initiative and referendum. . . .

Many other cases have held similarly. Among them are *West Hartford Taxpayers Association v. Streeter*, 462 A.2d 379, 190 Conn. 736 (1983); *State ex rel. Keefe v. City of St. Petersburg*, 145 So. 175, 196 Fla. 742 (1933); *Denman v. Quin*, 116 SW2d 783 (Tex.Civ.App.1938); *Keivley v. Bench City Recorder*, 89 P.2d 480, 97 Utah 69, 122 A.L.R. 756 (1939); *Gilet, et al. v. City Clerk of Lowell*, 27 NE2d 748, 306 Mass. 170 (1940); also see, 5 *McQuillin on Municipal Corporations*, §§ 16.55 to 16.58.

In Idaho, one additional problem could arise if a budget could be changed by initiative, and that is the possibility of an increase in the budget. If the budget was increased and there were not sufficient tax levies made at the time, art. 8, § 3, of the Idaho Constitution on debt limitation might well be contravened by such action.

For these reasons, it is likely that the courts will not allow initiative or referendum to be used in a city to disapprove, alter or make a city budget unless the law specifical-

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ly provides for it.

If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

WARREN FELTON
Deputy Attorney General
Intergovernmental Affairs

October 27, 1987.

The Honorable Lydia Justice Edwards
Idaho State Treasurer
Statehouse
Boise, Idaho 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Investment of Public Health District Funds

Dear Ms. Edwards:

This is in response to the question of whether public health districts are required to place their funds with the State and, if so, whether they should participate in the joint exercise of powers pool or in the idle funds pool. As discussed herein, health districts are required to deposit their funds with the state. I would recommend that they continue to use the joint exercise of powers pool for their investments.

The public health districts are created by chapter 4, title 39, Idaho Code. The general nature of health districts is described in Idaho Code § 39-401 which provides in pertinent part:

It is legislative intent that health districts operate and be recognized not as state agencies or departments, but as governmental entities whose creation has been authorized by the state, much in the manner as other single purpose districts. Pursuant to this intent, and because health districts are not state departments or agencies, health districts are exempt from the required participation in the services of the purchasing agent or employee liability coverage, as rendered by the department of administration. However, nothing shall prohibit the health districts from entering into contractual [contractual] arrangements with the department of administration, or any other department of state government or an elected constitutional officer, for these or any other services.

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* * *

It is also legislative intent that the matters of location of deposit of health district funds, or the instruments or documents or payment from those funds shall be construed as no more than items of convenience for the conduct of business, and in no way reflect upon the nature or status of the health districts as entities of government.

Thus, while public health districts are not state agencies, the legislature authorizes the districts to contract with constitutional officers such as the treasurer. The statutes governing the location of deposits with the state are not intended to imply that health districts are state agencies.

The provisions of the act governing deposits are set forth in Idaho Code §§ 39-414 and 39-422. Idaho Code § 39-414(5) provides:

(5) All moneys or payment received or collected by gift, grant, devise, or any other way shall be deposited to the respective division or subaccount of the public health district in the public health district account authorized by section 39-422, Idaho Code.

Idaho Code § 39-422 provides in pertinent part:

(a) There is hereby authorized and established in the trust and agency fund in the state treasury a special account to be known as the public health district account for which the state treasurer shall be custodian. Within the public health district account there shall be seven (7) divisions or subaccounts, one (1) for each of the seven (7) public health districts. Each division within the account will be under the exclusive control of its respective district board of health and no moneys shall be withdrawn from such division of the account unless authorized by the district board of health or their authorized agent.

(2) The procedure for the deposit and expenditure of moneys from the public health district account will be in accordance with procedures established between all district boards and the state auditor. All income and receipts received by the districts shall be deposited in the public health district account.

The foregoing statutes require all income and receipts of the public health districts to be deposited in the public health district account. The account is established in the trust and agency fund in the state treasury.

The trust and agency fund is described in Idaho Code § 57-803(c) as follows:

(c) The trust and agency fund is hereby created and established in the state treasury. The trust and agency fund is to be used to account for money which the state administers as a trustee pursuant to law or trust agreement which restricts the use of the money to a specified purpose, and for money which the state holds and disburses as an agent. The trust and agency fund shall also be

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used by state agencies to account for cash bonds, suspense type items, to hold money pending distribution to an individual, business or governmental agency, and to hold tax or other payments which are in dispute.

By placing the public health district account in the trust and agency fund, the legislature recognized that the funds would be administered by the state treasurer as trustee pursuant to law or trust agreement.

The current practice of investing public health district funds pursuant to joint exercise of powers agreements appears to be consistent with the statutory requirements and legislative intent. Funds must initially be deposited in the public health district account. However, as noted above, Idaho Code § 39-401 allows public health districts to enter into agreements with constitutional officers such as the state treasurer. Joint exercise of powers agreements are used for investment of funds of non-state agencies. Thus, such agreements correctly reflect the non-state agency nature of public health districts. Such agreements also provide the mechanism whereby the public health districts may earn income on their funds. Without such agreements, it would be doubtful whether the districts could earn such interest since their share would then be administered pursuant to Idaho Code § 67-1210 as "idle moneys in the state treasury." That section provides that "the interest on all such investments, unless specifically required by law, shall be paid into the general account of the state of Idaho."

In summary, the statutes permit public health districts to enter into joint exercise of powers agreements with the state treasurer. Such agreements satisfy statutory requirements, recognize the non-state agency nature of public health districts, and permit public health districts to earn interest on their funds.

Should you have any questions regarding this letter, please contact me.

Sincerely,

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

October 30, 1987

The Honorable Skip Smyser
Idaho State Senator
District 11A
Rt. 1, Box 1357
Parma, Idaho 83660

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Senator Smyser:

You have asked for legal guidance on the following issues:

1. How does the city of Caldwell disband its municipal irrigation system?
2. If there is a way for the city to disband the municipal irrigation system, does the Pioneer Irrigation District inherit the delivery problems now facing the city's system?
3. Does the city of Caldwell have the right to sell or lease its water to third parties?
4. Assuming the city has the right to sell or lease the water to third parties, would those third parties be obliged to provide water to the patrons of the city's irrigation system?

CONCLUSIONS:

1. The city of Caldwell may disband its municipal irrigation system by passage of a city ordinance.
2. If the city of Caldwell disbands its municipal irrigation system, it will become the obligation of the Pioneer Irrigation District and the lateral ditch water users' associations created by chapter 13, title 42, Idaho Code, or the irrigation lateral districts authorized by I.C. § 43-1505, to deliver irrigation water to those users within the city of Caldwell entitled to its use.
3. Because the irrigation water delivered by the municipal irrigation system is owned by the Pioneer Irrigation District for the benefit of its members, the city of Caldwell does not have the right to sell or lease that water to third parties.

ANALYSIS:

The city of Caldwell formed its municipal irrigation system by passage of Resolution No. 4 of the Caldwell City Council, approved by the mayor on May 5, 1941. Recorded Instrument No. 267036, Canyon County Recorder, January 15, 1942.

Resolution No. 4 was enacted pursuant to the provisions of chapter 248 of the 1939 Session Laws of the state of Idaho, which it incorporated by reference. The resolution provided for the city to contract with the Pioneer Irrigation District regarding the water supply for the city of Caldwell and also established the boundaries of the municipal system.

The resolution states that the lands within the municipal irrigation system are situated entirely within the boundaries of the Pioneer Irrigation District and the boundaries of the city of Caldwell. The resolution calls for a contract to be entered into between the city of Caldwell and the Pioneer Irrigation District. The contract is to provide for furnishing of water to the city for irrigation purposes, for the levy and

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collection of tolls and assessments therefore, and for other matters in connection with the operation of the Caldwell irrigation system as provided by chapter 248 of the 1939 Session Laws, and especially by section 3 thereof. The contract is incorporated into the resolution by reference. The resolution states that it is the resolution required by section 26 and section 27 of chapter 248 of the 1939 Session Laws.

At the time of passage of Resolution No. 4, chapter 248 of the 1939 Session Laws was codified as chapter 13, title 50, Idaho Code. Sections 3, 26 and 27 referred to in the resolution were codified as sections 50-1303, 50-1326 and 50-1327 respectively. In 1967, the legislature enacted a comprehensive recodification of the municipal corporation laws of Idaho. 1967 Sess. Laws, ch. 429, p. 1249. The recodification repealed former chapter 13, title 50, and re-enacted its provisions with minor modifications as chapter 18, title 50, Idaho Code.¹ As a result of the recodification, sections 3, 26 and 27 of chapter 248 of the 1939 Session Laws referred to in the 1941 Resolution are now codified respectively as sections 50-1805, 50-1831 and 50-1832, Idaho Code.

I.C. § 50-1805 (Supp. 1987) reads in pertinent part as follows:

50-1805. Contracts for distribution of water, collection and remission of irrigation district assessments. — Every city incorporated under the laws of the state of Idaho shall have the power to enter into a contract in writing with an irrigation district organized or hereafter organized under the laws of the state of Idaho, . . . whereby such city shall assume the duty of the distribution of such water to the persons within such city having the right to the use thereof, and to receive such water at such place as shall be provided for in such contract. Such city may enter into a contract with any irrigation district to act as the agent of the irrigation district and be empowered to collect any or all assessments or charges which such irrigation district shall be authorized by law to levy upon all or any part of the lands within such city. . . . Such city shall be entitled to compensation, for collecting assessments and making payments to the irrigation district, in the amount equal to the actual cost which the city incurred in collecting and making such payments. . . . Nothing in sections 50-1801 through 50-1835, Idaho Code, shall be construed to make said city primarily liable for any such irrigation district assessments to be collected or obligations, except for the faithful remittance of the funds collected; provided, however, that under contracts where water rights are pooled for delivery and a uniform method of allocating the assessments and charges of the district has been adopted as authorized by section 50-1805A, Idaho Code, the city shall be primarily liable for all such irrigation district assessments to be collected, including operation, maintenance, and principal and interest on bonded or contract indebtedness.

In summary, the provisions of I.C. § 50-1805 incorporated by reference in the city's 1941 Resolution state that under the contract between the city and the irrigation district, the city shall assume the duty of distribution of the irrigation district water to

¹The recodification also repealed former chapter 12, title 50, Idaho Code, and merged the provisions of chapter 12 with those of chapter 13 to form the new chapter 18, title 50, Idaho Code. The former chapter 12 sections appear in chapter 18 as sections 50-1802, -1803, -1804, -1806, -1809, and — 1810.

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the persons within the boundaries of the city having the right to use the water. The contract may also authorize the city to collect any assessments or charges which the irrigation district is authorized to levy upon lands within the city. The city is to remit the assessment to the irrigation district annually or more frequently as may be provided in the contract, less any commission contracted to be paid for the collection. The city is not primarily liable to the irrigation district for payment of the assessment. Through a 1981 amendment to I.C. § 50-1805, a city may become primarily liable for all irrigation assessments to be collected if the city has entered into a contract pursuant to I.C. § 50-1805A under which the water rights of the district members within the city boundaries are pooled for delivery purposes. 1981 Sess. Laws, ch. 31, § 1, p. 48.

I.C. §§ 50-1831 and 50-1832, also referred to in the 1941 Resolution, read as follows:

50-1831. Adjustment and settlement of accounts with irrigation system in operation. — Any city operating an irrigation system under the provisions of sections 50-1801 through 50-1835 shall cause the accounts between themselves and any irrigation or canal company or irrigation district, as the case may be, to be adjusted and settled at the time such city shall commence to operate a city irrigation system under the provisions of this act.

50-1832. Ordinances or resolutions establishing boundaries. — Any city desiring to acquire and operate or acquire or operate a city irrigation system under the provisions of sections 50-1801 through 50-1835 for any part or all of such city shall pass and publish an ordinance describing the exterior boundaries of such irrigation system. Thereafter the boundary of such irrigation system may, from time to time, be contracted, extended or enlarged by ordinance of such city; a copy of such ordinance duly certified to be correct by the city clerk shall be recorded in the office of the recorder of the county wherein such city is situated.

I.C. § 50-1831 requires the accounts between the city and the irrigation district to be adjusted and settled at the time the city commences operation of a city irrigation system. I.C. § 50-1832 provides that a city operating an irrigation system under the provisions of sections 50-1801 through 50-1835 may thereafter contract, extend or enlarge the boundaries of the irrigation system by ordinance of the city.

I.C. § 50-1832 refers to the ability of a city to contract the boundaries of its irrigation system by passage of a city ordinance but not to the termination of the system. Although the statutes do not describe the procedure for terminating the system, they also do not prohibit a city from discontinuing the system through repeal of the originating ordinance or resolution.²

²The provisions of I.C. § 50-1803, which provide that if the city council determines that all or a part of the system need not be continued the city may sell or lease all or part of its canal or irrigation company's stock so long as the water can be transferred in accordance with the statutory requirements, are not applicable because Caldwell's municipal irrigation system does not utilize water represented by shares of stock in a canal or irrigation company.

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The city of Caldwell created its municipal irrigation system by passage of a resolution rather than an ordinance. The predecessor to I.C. § 50-1832 authorized the establishment of a municipal irrigation system through passage of either an ordinance or a resolution. 1939 Sess. Laws, ch. 284, § 27, p. 599. It is possible, therefore, that disbanding of the city irrigation system could occur through passage of a resolution. Use of a resolution, however, is strongly discouraged because of the subsequent removal from § 50-1832 of any reference to resolutions, except in the section title.

Because § 50-1832 gives a city the authority to create a municipal irrigation system through passage of an ordinance, a city also has the implied power to disband a municipal irrigation system by ordinance. *See* 6 McQuillin Mun. Corp. (3rd Ed) § 21.10. The provisions of chapter 18, title 50, Idaho Code, do not prohibit the disbanding of a city irrigation system. In disbanding the irrigation system, the city may not, however, authorize impairment of a contract or deprivation of property without due process of law. *Id.* §§ 21.10 and 21.15. If the city of Caldwell disbands its irrigation system, it will be necessary that the city cause any accounts with the Pioneer Irrigation District to be adjusted and settled. *See* I.C. § 50-1832.

It is recalled that the 1941 Resolution provided for a contract between the city and the Pioneer Irrigation District. The Caldwell city engineer provided this office with a copy of the most recent agreement with the Pioneer Irrigation District. The agreement is for the distribution of water and the collection and remission of irrigation district assessments for the period from April 15, 1980, to October 15, 1980.

The agreement provided for the district to deliver irrigation water to designated points in the city. The city, in turn, agreed to distribute the water from the irrigation works and systems of the district to the persons having the right to the use of the water within the municipal irrigation system.

The city also agreed to maintain and operate and make all necessary and proper improvements and repairs to the ditches and other means of distribution at the expense of the city. In view of the water distribution services to be rendered by the city, the district agreed that the 1980 district assessments for operation and maintenance within the city boundaries would be two-thirds of the amount levied on other district lands. The parties further agreed that the agreement did not affect the making of additional levies and assessments against the district lands within the city boundaries as required for payment of bond and interest and other charges.

The obligations of the city under the 1980 agreement were consistent with the provisions of I.C. § 50-1805 which authorizes a city to act as the agent of an irrigation district for the distribution of water and the collection of assessments or charges which the irrigation district is authorized to levy upon the lands within the city.

It is our understanding that the 1980 agreement is the last such written agreement between the city and the irrigation district. It is further our understanding that since 1980 the city has operated the municipal irrigation system without having a written contract with the district. If these assumptions are correct, the city and the district have apparently been proceeding from year to year based upon an unwritten understanding which either party should be free to discontinue at any time.

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If the city passes an ordinance disbanding the municipal irrigation system, it will no longer be authorized to contract with the district for the distribution of irrigation water within the boundaries of the city.

It will thereafter be the obligation of the Pioneer Irrigation District and the lateral ditch water users' associations created by chapter 13, title 42, Idaho Code, or the irrigation lateral districts organized pursuant to I.C. § 43-1505, to deliver irrigation water to those users within the city of Caldwell entitled to its use. The district holds title to the water rights of the district in trust for the water users entitled to its use, including those within the boundaries of the city. *See* I.C. §§ 42-101, 42-914 and 43-316. The district water distributed to lands within the boundaries of the city is dedicated to those lands and its delivery may not be discontinued except upon failure of the water users to pay required district assessments. *See Idaho Const.* art. 15, § 4; *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 545, 547, 381 P.2d 440 (1963).

According to the 1980 contract between the Pioneer Irrigation District and the city of Caldwell, there are six delivery points within the city, consisting of five laterals and the golf course, to which the district delivers water. If the city disbands its irrigation system, it appears that it would become the responsibility of the water users either to form one or more irrigation lateral districts pursuant to I.C. § 43-1505 or to activate one or more lateral ditch water users' associations created by chapter 13, title 42, Idaho Code, to convey the water from the district delivery points to the respective premises of the water users.

Lateral ditch water users' associations are empowered by I.C. §§ 42-1301 through 42-1309 to elect officers, to elect a lateral manager, to adopt rules and regulations, to borrow money and pledge assets, to assess water users for necessary repairs, improvements and maintenance, and to discontinue delivery of water for the nonpayment of assessments.

I.C. § 43-1505 authorizes irrigation lateral districts, by contract, to be formed within the boundaries of an irrigation district in the same manner as an irrigation district is formed under chapter 1, title 43, Idaho Code. An irrigation lateral district shall have all the powers of the original irrigation district to issue bonds and to levy assessments and taxes for the purpose of constructing, operating and managing water in distributing systems by means of laterals, sublaterals, ditches, flumes and pipelines.

Sincerely,

PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 2, 1987

Kenneth D. Smith
State Brand Inspector
Department of Law Enforcement
2118 Airport Way
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Certification of Brand Inspectors as Peace Officers and the Requirement That
They Attend the P.O.S.T. Academy

Dear Mr. Smith:

You have asked for our opinion as to whether brand inspectors should be considered peace officers and, if so, whether such inspectors are required to obtain P.O.S.T. certification which would include their successful completion of the P.O.S.T. Academy.

Conclusion

After reviewing this matter, it is our conclusion that state brand inspectors do qualify as peace officers in the state of Idaho, and as such, they are expected to obtain P.O.S.T. certification and complete attendance at the P.O.S.T. Academy in a timely manner.

Analysis

Within chapter 11 of title 25, Idaho Code, the legislature has outlined the duties of the state brand inspector and his deputies. Idaho Code § 25-1109 outlines those duties, as they relate to law enforcement, as follows:

The state brand inspector and his deputies shall also have power and the duty to enforce all of the laws of the state for the identification, inspection and transportation of livestock and sheep and all laws of the state designed or intended to prevent the theft of livestock and sheep and shall have all of the authority and powers of peace officers vested in the director of the department of law enforcement, with general jurisdiction throughout the state.

Chapter 11 of title 25, Idaho Code, prescribes other duties of brand inspectors relating to the prevention and detection of certain crimes and the enforcement of penal laws. Fulfillment of these duties would necessarily require modern peace officer training in the laws of arrest, search and seizure, interviewing, preservation of evidence and the use of force. For example, brand inspectors may inspect any livestock in transit and impound such livestock when necessary. Idaho Code § 25-1405. Brand inspectors are required to enforce brand inspection laws and are authorized to arrest anyone found to be unlawfully in possession of such livestock. Idaho Code § 25-1414. In fact, chapters 11-15, 17, 19, 22 and 23 of title 25, Idaho Code, all contain penal laws

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relating to livestock which require enforcement by state brand inspectors.

We now turn to the question of whether brand inspectors must comply with the provisions of the Peace Officers Standards and Training Act. Idaho Code § 19-5101(d) defines peace officer as:

any employee of a police or law enforcement agency which is part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.

It is evident that the duties of brand inspectors fall well within the definition of the term "peace officer" quoted above. These duties, by statute, primarily consist of the detection and prevention of crime, i.e., the theft of cattle and livestock. In accomplishing this, state brand inspectors, whose agency is within the department of law enforcement, are specifically responsible for enforcing penal laws within title 25 and title 18 of the Criminal Code.

Once the conclusion is reached that Idaho state brand inspectors qualify as peace officers, it logically follows that such inspectors must be certified to act as peace officers within this state. Idaho Code §§ 19-5109(b) requires peace officers who are employed after January 1, 1974, to be P.O.S.T. certified within one year of employment. A peace officer who does not fulfill this requirement is statutorily prohibited from "exercising any power granted by any statute of this state to peace officers" Idaho Code § 19-5109(c). Moreover, P.O.S.T. rule 6.1.1 states:

Each and every officer must successfully complete the P.O.S.T. Basic Training Academy course within twelve (12) months from the date of their employment as a regularly employed officer.

This requirement of P.O.S.T. certification within one year of employment therefore applies to any brand inspector who was hired after January 1, 1974. Any inspector hired prior to that time is exempt from certification as set forth by Idaho Code § 19-5104(b).

In conclusion, we find that Idaho state brand inspectors qualify as peace officers under Idaho Code § 19-5101(d). Therefore, they must be properly certified in accordance with P.O.S.T. regulations, one of which requires their successful completion of the P.O.S.T. Academy within one year of the beginning of their employment.

Sincerely,

PETER C. ERBLAND
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 31, 1987

Jerry M. Conley, Director
Idaho Fish and Game
600 South Walnut, Box 25
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Fish and Game Violations — Citizens Against Poaching

Dear Mr. Conley:

QUESTION PRESENTED:

For several years the Idaho Department of Fish and Game has worked with Citizens Against Poaching (CAP). CAP is a private group that provides rewards to citizens who furnish information on fish and game violations. This program has been a tremendous success but is in jeopardy due to lack of funds. The department requests a legal guideline as to whether any of the following would be in violation of Idaho Constitution art. 3, § 19 (prohibiting local and special laws), art. 8, § 2 (prohibiting loan of state's credit) or art. 4, § 20 (providing for specific departments in executive branch of government).

1. Whether the department could provide a grant to CAP to be used solely for the payment of rewards?
2. Whether the department could enter into a professional services contract with CAP to pay the rewards?
3. Whether legislation could be enacted that would allow CAP to receive the proportion of civil penalties resulting from convictions generated by information provided through CAP?
4. Whether legislation could provide that \$.50 to \$1.00 be added to the cost of a hunting or fishing license, said monies designated to go to the CAP program?

CONCLUSION:

Idaho Constitution art. 3, § 19, and art. 8, § 2, would not be violated by legislation establishing a program to be administered by CAP. However, it would violate art. 4, § 20, to delegate to CAP the administration of a state program. CAP is not an executive department entitled to exercise functions, powers and duties of the executive branch. Thus, if legislation is enacted creating a reward program, it must be administered by an executive department such as the Department of Fish and Game. Appropriations for the program should also be made directly to the department. However, the department could enter into agreements with private entities such as CAP to provide services to the department in the administration of a state reward program.

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ANALYSIS:

The Idaho Constitution defines the general structure of state government and the structure of the executive branch of government. Idaho Constitution art. 2, § 1, provides in pertinent part:

The powers of government of this state are divided into three distinct departments, the legislative, executive and judicial; . . .

The executive department of government is defined in art. 4, Idaho Constitution. Idaho Constitution art. 4, § 20, provides:

All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two (2) years. [Emphasis added.]

Idaho Constitution art. 4, § 20, has not yet been construed by the Idaho Supreme Court. However, it specifically provides that all executive and administrative officers, agencies and instrumentalities of the executive branch of state government and their respective functions, powers, and duties must be allocated only among the state elected officials and no more than twenty designated departments. Idaho Code § 67-2402 enumerates the departments to which the executive power has been allocated. The language of the institutional and statutory provisions does not permit the legislature to allocate functions, powers and duties of the executive branch to non-governmental entities such as CAP.

Therefore, if the Department of Fish and Game desires to establish a state-funded program to provide rewards for reporting fish and game violations, we would recommend the department seek legislation empowering it to administer such a program. The department would also need an appropriation to administer the program.

Once the reward program is established, the department would determine the best means to implement it. If outside groups, such as CAP, can provide services more effectively than the department can directly, the department may want to contract with such third parties to assist in carrying out the program.

With the foregoing analysis in mind, we can address the specific questions you have asked.

- I. Whether the department could provide a grant to CAP to be used solely for the payment of rewards?

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As discussed above, following legislative establishment of a reward program, the department could contract with third parties such as CAP to assist in the conduct of the program. The contractor could receive compensation for its services and could receive payment or reimbursement for rewards paid.

We would recommend the use of contracts rather than grants to clearly reflect that the program is a state program rather than a private program. We understand there may be a need to keep confidential the identity of some informants. Therefore, in developing legislation the department may wish to provide for non-disclosure of state financial records that would identify an informant.

2. Whether the department could enter into a professional services contract with CAP to pay the rewards?

As discussed in response to question 1 above, contracts with third parties to assist the department in implementing a program would be permissible.

3. Whether legislation could be enacted that would allow CAP to receive the proportion of civil penalties resulting from convictions generated by information provided through CAP?

It would not be permissible for CAP to be designated in legislation as the recipient of a portion of civil penalties. However, it would be permissible to provide that any person providing information leading to the imposition of a civil penalty would be entitled to a reward for providing such information. The resources of the state cannot be used in support of any particular private party. In *Village of Moyie Springs, Idaho v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767 (1960), the court quoted with approval from the Supreme Court of Florida as follows:

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. 82 Idaho at 347.

Thus, while the state may establish a reward program for persons supplying information regarding fish and game violations it may not appropriate money to any particular private organization.

4. Whether legislation could provide that \$.50 to \$1.00 be added to the cost of a hunting or fishing license, said monies designated to go to the CAP program?

The legislature could provide for an increase in hunting and fishing license fees to fund a state reward program. However, as discussed in response to question 3, it would not be permissible to appropriate funds for the benefit of a private organization such as CAP.

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We have also considered whether legislation establishing a program to be administered by CAP would be unconstitutional on other grounds. Art. 3, § 19, Idaho Constitution, prohibits the legislature from passing local or special laws in certain cases. As noted in the early case of *Butter v. Lewiston*, 11 Idaho 393, 83 P. 234 (1905), this section prohibits enactment of special laws only on subjects enumerated therein; it leaves the legislature the master of its own discretion in passing special laws on subjects not prohibited by the constitution. Idaho Constitution art. 3, § 19, does not apply in this case.

Art. 8, § 2, Idaho Constitution, prohibits loaning the credit of the state. However, “credit” was construed in *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972), to mean some new financial liability upon the state which results in the creation of state debt. The case also pointed out that a loan of state funds is not a loan of state credit. Since a proposed program to appropriate funds to CAP would not create state debt, it would not violate Idaho Constitution art. 8, § 2.

SUMMARY:

In summary, art. 3, § 19 (prohibiting local and special laws), and art. 8, § 2 (prohibiting loan of state’s credit), would not be violated by a legislative program to be administered by CAP. However, art. 4, § 20, would preclude legislation delegating to CAP the administration of a state program because CAP is not an executive department entitled to exercise functions, powers and duties of the executive branch. If legislation is enacted creating a reward program, it must be administered by an executive department such as the Department of Fish and Game. Appropriations for the program should be made to the department. The department could enter into agreements with private entities such as CAP to assist in administration of the state reward program.

Sincerely,

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

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