

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
AND
SELECTED INFORMAL
GUIDELINES
FOR THE YEAR
1988**

Jim Jones
Attorney General

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Jim Jones
Attorney General

A DEDICATION TO THE DEDICATED

This year's volume of attorney general opinions and legal guidelines is dedicated to the people who make it possible — the staff of the Idaho Attorney General's office. It is a dedicated, talented and hard working group of individuals, indeed. Although most of the staff members could command higher salaries in the private sector, they enjoy the challenge and appreciate the non-monetary rewards of serving the citizens of Idaho.

Chief Deputy Jack McMahon has set high standards for the state's legal staff. Besides being a legal scholar and common sense administrator, Jack is a thoroughly good person. He has certainly earned the respect of his counterparts in other states. Another person who has become a nationally recognized expert is Solicitor General Lynn Thomas, who knows as much about capital litigation and DNA technology as anyone in the country.

Clive Strong, Chief of the Natural Resources Division, has also received national recognition. In July he was presented the prestigious Marvin Award by the National Association of Attorneys General. Pat Kole is as talented in negotiating and litigating as he is in shepherding legislation through the Idaho Legislature. As Chief of Legislative Affairs he has had great success in gaining approval of our legislative initiatives.

Mike Kane and his predecessors, Marc Haws and Peter Erbland, have done a tremendous job in maintaining good relations with the county prosecutors and advancing the interests of the criminal justice system. Dave High has done an outstanding job of advising those who control Idaho's funds and in overseeing the reestablishment of an effective consumer protection effort. Dan Chadwick has established and maintained an unprecedented rapport with local governmental agencies. Mike DeAngelo and his staff have done a super job of representing the Idaho Department of Health and Welfare.

The attorneys who work under the division chiefs, especially assistant division chiefs Cathy Broad, Lee Caldwell and Myrna Stahman, are of uniform high quality, as is the non-lawyer staff. Russ Reneau's investigative unit is highly regarded in law enforcement circles. Could one manage anyone nicer and more accommodating than Lois Hurless? Who could handle calls and inquiries with more finesse than Sandy Rich. Tresha Griffiths has performed yeomen service by getting the attorney general lined out on a daily basis for many years.

One could go on and on, praising the virtues of the present staff. The long and short of it is that it is a highly professional group that has represented the state well in legal matters. I couldn't be prouder or more appreciative of this marvelous group and that is why this volume of opinions has been dedicated to them.

**JIM JONES
ATTORNEY GENERAL**

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1988

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Jim Jones — Attorney General
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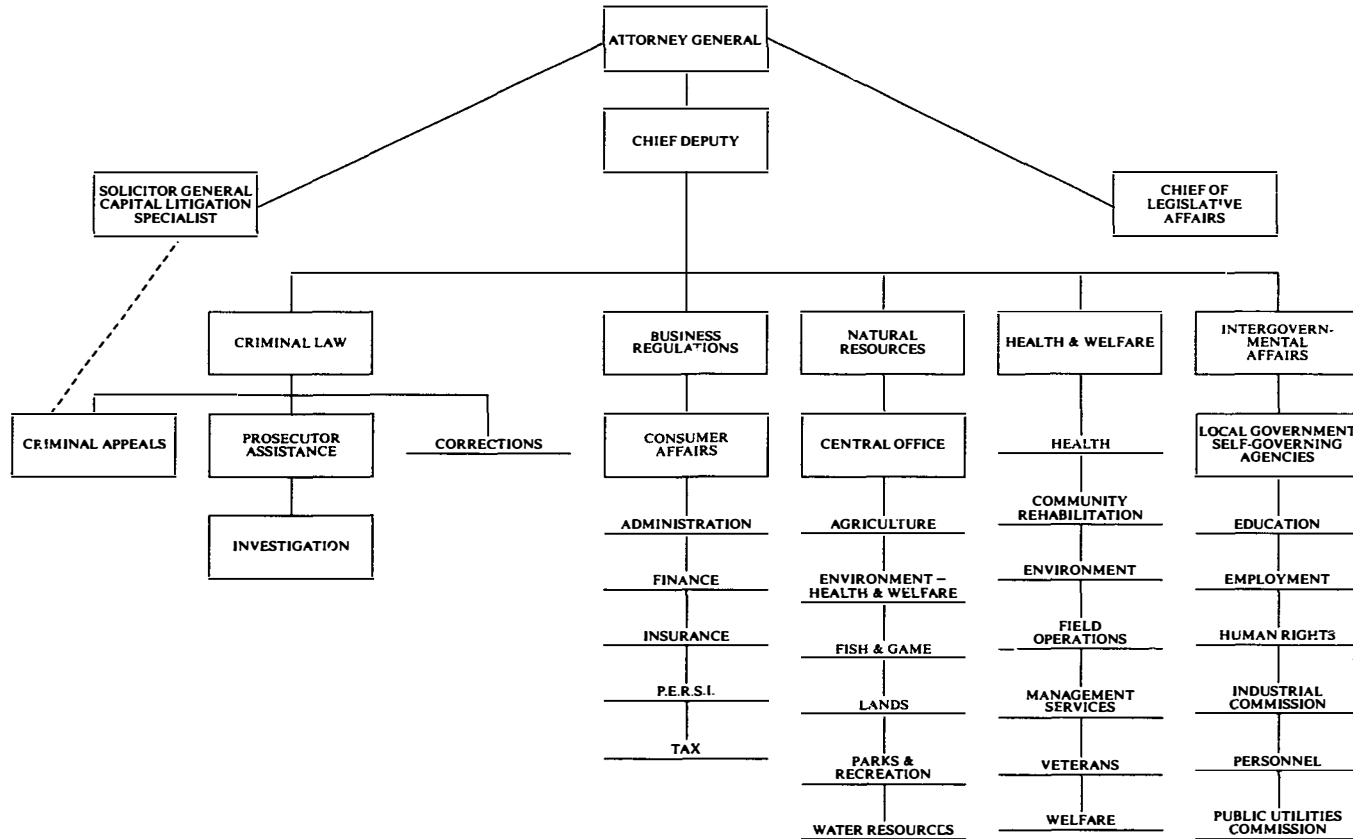
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**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1988**



Jim Jones
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 88-1

TO: W. Floyd Ayers, Chairman
Idaho Endowment Fund Investment Board
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

- 1) Can the Endowment Fund Investment Board enter into a securities lending agreement under art. 9, § 11, of the Idaho Constitution?
- 2) Does the Endowment Fund Investment Board have authority under Idaho Code § 57-722 to sell covered call options against securities held in the funds?
- 3) If the Fund has authority to sell covered call options, would the monies derived from the sale of said calls be treated as income to be distributed, or as securities gains, remaining as part of the corpus, pursuant to Idaho Code § 57-724?

CONCLUSION:

The Idaho Endowment Fund Investment Board could constitutionally enter into securities lending agreements and sell covered call options provided legislation is enacted permitting such transactions. Covered call options must be used in a manner consistent with the board's fiduciary obligations. Sale of calls should be accounted for as securities gains.

ANALYSIS:

Idaho Constitution, art. 9, § 11, sets forth the primary constitutional limitation upon permissible investments of the permanent endowment funds. That section provides:

§ 11. Loaning permanent endowment funds. — *The permanent endowment funds other than funds arising from the disposition of university lands belonging to the state, shall be loaned on United States, state, county, city, village, or school district bonds or state warrants or on such other investments as may be permitted by law under such regulations as the legislature may provide.* (Emphasis added.)

The leading case construing this section's limitations upon investments is *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969). In that case, the Idaho Supreme Court held that §§ 9(6) and 9(8) of S.B.1277 (S.L., 1969), which permitted purchase of stock and conversion of bonds, violated Idaho Const., art. 8, § 2, and art. 9, § 11.

In construing Idaho Const., art. 9, § 11, the court found that the legislature was limited to authorizing *loans* of endowment funds in view of the operative verb “shall be loaned” which is used in that section. In defining loan, the court held:

In this situation we believe the important word “loan” must not be loosely construed to include all types of “investment.” Instead, the word “loan,” as used in Idaho Const., art. 9, § 11 and as extended in scope by the 1968 amendment, must carry the meaning that *there must be a guarantee of full repayment of principal as well as interest. There must be an unconditional promise to repay the principal sum originally lent.* (Emphasis by court.)

93 Idaho at 223, 458 P.2d at 219.

Thus, investments which the legislature may authorize are limited to loans in which there is a “guarantee of full repayment of principal as well as interest.”

Securities Lending Agreements

In securities lending agreements, an owner of securities agrees to lend the securities to another party. The other party agrees to later return the securities plus any interest or dividends paid on the securities while borrowed plus an additional sum for the right to borrow the securities.

In such transactions, the borrower guarantees unconditional repayment of principal, e.g., the bonds, plus interest plus an additional sum. Also, many custodian banks handling such transactions for customers will indemnify customers against loss in such transactions. Thus, it is our understanding that security lending agreements are safe investments which provide additional income to owners of securities.

Such a transaction is consistent with the “loan” limitation of Idaho Const., art. 9, § 11, as interpreted in *Engelking*. The transaction includes “a guarantee of full repayment of principal as well as interest.”

As noted previously, Idaho Const., art. 9, § 11, provides that permanent endowment funds shall be loaned on investments “as may be permitted by law under such regulations as the legislature may provide.” Idaho Code § 57-722 enumerates the endowment fund investments currently permitted by law. That section does not provide for securities lending. However, amendment of that section to permit securities lending would not violate Idaho Const., art. 9, § 11.

Covered Call Options

You have also asked if the Idaho Endowment Fund Investment Board could sell covered call options. The use of covered call options is not currently authorized by chap. 7, title 57, Idaho Code. However, as discussed hereafter, such legislation would not be contrary to the Idaho Constitution.

A covered call option is an agreement in which the seller of the option owns securities such as stocks or treasury bonds. The seller grants to the option buyer the option to purchase the securities on or before a certain date at a fixed price. The option buyer pays the option seller a sum of money ("premium") for the option.

The buyer of the option may profit if the price of the security involved, such as a treasury bond, appreciates in value. For example, the buyer will profit if the option is exercised at a time when the market value of the treasury bonds exceeds the agreed purchase price by more than the price paid for the option. Conversely, the seller of the option will profit if the option is not exercised at a price exceeding the agreed purchase price by more than the price paid for the option. In such transactions, the seller, in effect, agrees to offer securities for sale at an acceptable price for the term of the option.

The sale of covered call options would not violate the constitutional requirement that "endowment funds. . . shall be loaned." If endowment funds have been loaned to purchase a security such as a bond, the funds would remain loaned if the board sold a covered call option. The option would simply be an agreement establishing acceptable terms of sale of the bond during the period of the option. When call options are sold upon bonds or notes held by the endowment board, the legal rights of the board are substantially the same as when the board holds bonds in which the issuer retains a call option.

For example, bonds are frequently issued with call provisions. An issuer of 20 year bonds may include a provision in the bond agreement that the bonds may be called at par beginning 10 years after issuance of the bonds. This does not change the character of the agreement to something other than a loan. As discussed previously, *Engelking* held that to constitute a loan:

. . . there must be a guarantee of full repayment of principal as well as interest. There must be an unconditional promise to repay the principal sum originally lent.

The 20 year bond in the example above would satisfy the court's definition of loan. Exercise of the option to call the bond would result in repayment of the sum originally lent. Exercise of the option to call the bonds would not affect interest earnings to the date of call. Likewise, the sale of a covered call option would not change the character of an investment to something other than a loan if the option exercise price provides "an unconditional promise to repay the principal sum originally lent."

Thus, if authorized by the legislature, the endowment board could use covered call options. However, this advice must be qualified by two caveats discussed below. First, we would recommend that calls not be sold at exercise prices which would not repay the principal sum originally lent. Second, speculation in covered calls is not a permissible use.

As discussed previously, *Engelking* required endowment investments to include “an unconditional promise to repay the principal sum originally lent.” If the exercise price of the option plus the option premium are not sufficient to repay the sum originally lent, the option agreement would not satisfy this requirement. Accordingly, we recommend that options be sold only if the exercise price and premium would be sufficient to repay the sum originally lent.

We recognize that an argument can be made that the option exercise price need not be high enough to guarantee repayment of the principal sum originally lent. *In State ex rel. Moon v. State Board of Examiners*, 104 Idaho 640, 662 P.2d 221 (1983), the court recognized that the board can sell investments at a loss, noting:

For example, the Fund frequently holds bonds, which if held to maturity would yield a certain profit, but which if sold before maturity at a loss, and with the proceeds elsewhere reinvested, would yield a higher long range profit. This flexibility and opportunity for higher profit would likely not be exercised if the legislature would be forced to make up the loss on the sale of the bonds.

104 Idaho at 642.

Similarly, the courts might hold that it is permissible to sell options with exercise prices below the prices paid for securities in order to provide flexibility and the opportunity for higher long range profit. However, the courts could view covered call options as agreements modifying the original terms of the underlying loan agreements. If viewed this way, it is unlikely that the courts would allow use of covered calls at exercise prices below the principal sum originally lent. To do so would eliminate the “unconditional promise to repay the principal sum originally lent.” The promise in the underlying bond to repay the original investment would be replaced by the option to repay something less than the original investment.

Such a distinction might be considered to be an anachronism by the modern investment community. However, Idaho courts would likely reach such a result based upon the language of the constitution and the definition of “loan” stated in *Engelking*.

Also, it should be noted that a finding that call options are permissible requires that they be considered in terms of their relationship to the underlying securities. Call options could not be sold on securities which are not owned by the endowment fund. Such transactions by themselves are not loans. Rather they are speculative investments of a type not permitted by fiduciaries. However, as noted above, if a call option is viewed as an agreement to add additional terms to the underlying security, the courts would likely require the exercise price to be sufficient to provide an “unconditional promise to repay the principal sum originally lent.” Prudence requires that we recommend that covered call options be sold only if the exercise prices and premiums would be sufficient to repay the principal sums originally lent.

The second caveat regarding use of covered calls is that they may not be traded in a speculative manner. Whether use of call options is prudent depends upon the manner in which they are used.

Covered call options are sometimes used by portfolio managers to mitigate the effects of price changes in the market value of securities held. For example, assume an investor owns a bond with a market price of \$1,000. The owner might sell an option for \$20 giving the option buyer the right to purchase the bond for \$1,000 within the next 30 days. If the market price of the bond appreciated four percent (4%) in 30 days to \$1,040, the option buyer would exercise his option. The option buyer would now own the bond worth \$1,040. The seller would have received \$1,020 (\$1,000 for the bond plus \$20 for the option).

In the example above, the option seller received only half of the appreciation in the value of the bond. However, assume the market value of the bond dropped four percent (4%) in 30 days. The bond would now have a market value of \$960. The option buyer would not exercise the option to purchase the bond for \$1,000 and the option seller would continue to own the bond. The option seller would have a bond worth \$960 plus \$20 which was received from the sale of the option.

In the first example, the option seller lost half of the four percent (4%) appreciation in the value of the bond. In the second example, the option seller avoided half of the four percent (4%) loss in market value of the bond. Thus, covered call options can be used as a means of mitigating the effects of changes in the market value of securities held.

Such a use of covered call options is consistent with fiduciary duties and is consistent with the intent of the constitutional provisions. For example, in *Moon v. State Board of Examiners*, 104 Idaho 640, 662 P.2d 221 (1983), the court considered Idaho Const., art. 9, § 3, provisions regarding the public school fund which constitutes the majority of the state's endowment funds. Therein, the court said:

The Fund is a trust of the most sacred and highest order. *See State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939); I.C. § 57-715. In *United States v. Fenton*, 27 F.Supp. 816 (D.Idaho 1939), the court stated:

“The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State.” 27 F.Supp. at 818.

104 Idaho at 642.

Similarly, in *Moon v. Investment Board*, 96 Idaho 140, 143-144,, 525 P.2d 335 (1974), the court quoted from the constitutional debates in part as follow:

Mr. McConnell: Mr. Chairman, I think no fund is more sacred than the school fund, and perhaps there is no other fund so sacred; it should be guarded in every manner possible, and by having this provision in here, the children will always be made sure there will be that much money to their credit, and we will have that much at stake in our schools. But if there is no provision for making this fund good in every way, it may be squandered, and the first thing we know our school fund will be so small that we can only maintain the schools by local taxation.

The Endowment Fund Investment Board clearly has fiduciary responsibilities of the highest order deriving from the Idaho Constitution. The board is charged with the responsibility to preserve the fund over time. This responsibility is also recognized by Idaho Code § 57-715 which provides:

Permanent endowment funds of the state of Idaho are hereby declared to be trust funds of the highest and most sacred order and shall be controlled, managed and invested by the board and the investment manager(s) or custodian(s) in accordance with the highest standard, and as hereinafter provided.

Idaho Code § 57-723 provides that the board and its investment managers shall be governed by the Idaho Prudent Man Investment Act. That act provides in pertinent part at Idaho Code § 68-502:

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, *a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds*, considering the probable income as well as the probable safety of their capital. (Emphasis added.)

The statutory provisions are consistent with the trust nature of the endowment funds and the fiduciary obligation to preserve and protect the fund reflected in the constitutional provisions.

As discussed previously, an investment program can be designed utilizing covered call options in a manner which reduces portfolio risk resulting from market fluctuations. Such a program to reduce portfolio risk would be consistent with the constitutional goal of preserving the endowment funds.

However, the constitutional provisions regarding the endowment board's fiduciary duties would not sanction speculation in covered call options. It would not be permissible, in our opinion, to trade covered call options in the manner a speculator might. For example, a speculator might sell and repurchase call options on a short term

basis in an effort to outsmart the markets at every turn. Such trading could produce large profits or large losses depending upon the skill and luck of the speculator.

Such a trading approach would not be consistent with the endowment board's fiduciary responsibilities even if the call options were "covered." As noted previously, Idaho Code § 68-502 requires Idaho fiduciaries to manage investments "not in regard to speculation, but in regard to the permanent disposition of their funds."

The endowment board manages funds of "a trust of the most sacred and highest order." *Moon v. Board of Examiners*. Legislation could be enacted authorizing the use of covered call options. However, it would certainly be interpreted in light of the board's constitutional fiduciary obligations. Those obligations are at least as great as those generally applied to fiduciaries in Idaho by Idaho Code § 68-502.

In summary, if legislation were enacted authorizing use of covered call options, such legislation would be constitutional. Covered calls should be used only if the exercise price of the call plus premium would be sufficient to repay the principal sum originally lent. The board would need to establish policies ensuring that covered call options were not used in a speculative manner. They could be used as part of a general risk strategy related to the permanent disposition of endowment funds.

Accounting for Covered Call Options

You have also asked if money derived from the sale of covered call options should be treated as income or as securities gains pursuant to Idaho Code § 57-724. That section currently has no provisions specifically addressing covered call options. If legislation is proposed authorizing sale of covered call options, we would recommend that the legislation include provisions regarding the accounting for such sales.

In our opinion, receipts from the sale of covered call options should be treated as securities gains rather than income. The sale of a covered call option is the sale of the right to a portion of potential appreciation of the underlying security. The call buyer obtains no interest income and the seller does not give up interest income for the period of the option. If the option buyer exercises the option, payment of the exercise price at time of settlement must be accompanied by payment of accrued interest on the underlying bond or note through and including the exercise settlement date. Thus, sale of covered call options does not involve the sale of any income interest in the underlying securities.

If receipts from the sale of covered call options were accounted for as income, the principal of the endowment funds would gradually be depleted. Previously, we discussed covered call option examples involving a four percent (4%) increase and a four percent (4%) decrease in the market value of the underlying securities. In the appreciation example, the covered call seller, starting with \$1,000, received \$1,000 upon exercise of the call plus \$20 from the sale of the call. In the declining market

example, the covered call seller continued to hold a bond worth \$960 and received \$20 from the sale of the option.

In the examples, the market value gains and losses were equal. Thus, if both transactions occurred in sequence, the principal of the fund should remain at \$1,000. However, if the call option sales were accounted for and distributed as income, the principal of the fund would be depleted. In the appreciation example, after distributing the premium, the endowment fund would still have principal of \$1,000 with which to buy the second bond. However, after the depreciation example, the fund would own a bond worth only \$960. The \$20 received from each call option sale would have been distributed, leaving a portfolio value of \$960. Accounting for the transactions in this way would therefore deplete the fund over time, contrary to the constitutional purpose previously discussed of preserving and maintaining the fund over time.

If use of covered call options becomes authorized by legislation, sales of the options should be accounted for as securities gains.

AUTHORITIES CONSIDERED:

Constitutions:

Idaho Constitution, art. 9, § 3.

Idaho Constitution, art. 9, § 11.

Statutes:

Idaho Code § 57-722.

Idaho Code § 57-723.

Idaho Code § 57-724.

Idaho Code § 68-502.

Cases:

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

State ex rel. Moon v. State Board of Examiners, 104 Idaho 640, 662 P.2d 221 (1983).

United States v. Fenton, 27 F.Supp. 816 (D.Idaho 1939).

DATED this 16th day of February, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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

MARILYN T. SCANLAN
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 88-2

TO: R. Keith Higginson
Director, Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

- 1) Is the embankment surrounding the southern edge of Mud Lake a dam as defined in Idaho Code § 42-1711(b)?
- 2) Are there any liability implications for the State of Idaho if the Idaho Water Resource Board exempts the Mud Lake embankment from the dam safety regulations?
- 3) Would these liability implications be altered by having the landowners surrounding Mud Lake and the holders of water rights from Mud Lake accept responsibility for the embankment as a dike rather than a dam?

CONCLUSION:

- 1) Yes. The embankment surrounding the southern edge of Mud Lake is a dam as defined in Idaho Code § 42-1711(b) because the embankment is an artificial embankment storing in excess of 50 acre feet of water.

2) Idaho Code § 42-1710 mandates the regulation of all dams. The statute provides no discretion to exempt dams from regulation; there is discretion to determine the degree of regulation. If the Idaho Water Resource Board adopted regulations which violated the statutory duty, the board potentially could be liable for any personal or property damage caused as a direct result of the violation of the statutory duty. None of the immunity provisions of Idaho Code § 6-904 or of Idaho Code § 42-1717 provides the board a shield from this liability.

3) This alternative would not eliminate the liability of the board.

ANALYSIS:

Question No. 1

The answer to the first question — i.e., whether the embankment surrounding the southern edge of Mud Lake is a “dam” as defined in Idaho Code § 42-1711(b) — largely depends upon the facts regarding the construction of the embankment. The facts as the office understands them are gathered from written materials provided by the Idaho Department of Water Resources and from discussions with your staff.

Mud Lake, situated in a depressed basin area in northern Jefferson County, is a natural lake with no natural outlet for drainage of water. Camas and Beaver Creeks provide surface water to the basin, and ground water percolating from irrigation of the Egin Bench to the northeast also provides inflow.

Beginning in the 1920's, the early settlers sought to reclaim the land by separating Mud Lake from the surrounding marshes by the construction of dikes around portions of Mud Lake. The individual landowners gradually linked the dikes together to form a thirteen mile long embankment in a crescent shape around the southern end of Mud Lake. The dikes caused Mud Lake to change in shape and in storage capacity. The embankment is about ten feet high, and the average storage capacity is 37,930 acre feet when water reaches a height of eight feet on the embankment.

The first question asks whether this embankment is a dam for purposes of the Idaho Dam Safety Act, Idaho Code § 42-1709 et seq. Idaho Code § 42-1711(b) defines a dam, in part, as follows:

“Dam” means any artificial barrier, together with appurtenant works, constructed for the purpose of storing water or that stores water, which is ten (10) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum storage elevation, or has or will have an impounding capacity at maximum storage elevation of fifty (50) acre feet or more.

This definition is in the disjunctive. An artificial barrier that stores water is a dam if the barrier is ten (10) feet or more in height, *or* if the impounding capacity at maximum storage elevation is fifty acre feet or more, unless an exception applies. Here, none of the exceptions applies.

The embankment here clearly stores water in excess of 50 acre feet. It would therefore be a “dam” if the embankment is an “artificial barrier.” While the initial construction by man of the embankment would normally indicate that the embankment is an artificial barrier, recent litigation concerning Mud Lake casts some doubt on this conclusion.

In *Marty v. State*, Jefferson County Civil No. 1-3504 (Dist.Ct. December 17, 1987) (order granting partial summary judgment), the district court concluded that “Mud Lake must be considered as a natural as opposed to an artificially created body of water so far as the rules of law and rights of the public or of individuals are concerned.” *Id.* at 5. Thus, this decision makes the statutory definition of dam ambiguous. Did the legislature intend the department to regulate man-made structures as dams under the Idaho Dam Safety Act if such structures have acquired the attributes of a natural embankment for tort law purposes?

The rules of statutory construction are well known. The primary goal in statutory construction is to ascertain and give effect to the legislative intent. *Summers v. Dooley*, 94 Idaho 87, 89, 481 P.2d 318, 320 (1971). If a statute is ambiguous, a court will “go outside the language of the statute itself to ascertain and to effectuate the legislative intent. . . . Indicia of legislative intent may be ‘collected from the context [of a statute], from the occasion and necessity of the law, from the mischief felt, and the remedy in view.’” *Noble v. Glenns Ferry Bank, Ltd.*, 91 Idaho 364, 367, 421 P.2d 444, 447 (1966) (quoting *Offield v. Davis*, 100 Va. 250, 40 S.E. 910, 912 [1902]).” *St. Benedict’s Hospital v. County of Twin Falls*, 107 Idaho 143, 148, 686 P.2d 88, 93 (App. 1984).

The legislative intent in this instance can perhaps best be seen in the recent amendments to the definition of a dam in Idaho Code § 42-1711(b). In 1987, the Idaho legislature added five categories that were to be exempt from dam regulation:

- (1) Barriers constructed in low risk areas as determined by the director, which are six (6) feet or less in height, regardless of storage capacity.
- (2) Barriers constructed in low risk areas as determined by the director, which impound ten (10) acre-feet or less at maximum water storage elevation, regardless of height.
- (3) Barriers in a canal used to raise or lower water therein or divert water therefrom.
- (4) Fills or structures determined by the director to be designed primarily for highway or railroad traffic.

(5) Fills, retaining dikes or structures, which are under jurisdiction of the division of environment, department of health and welfare, designed primarily for retention and treatment of municipal, livestock, or domestic wastes, or sediment and wastes from produce washing or food processing plants.

See Act of March 25, 1987, ch.98, 1987 Idaho Sess. Laws 192. The statement of purpose for ch.98 stated, in relevant part, as follows:

The Dam Safety Program will continue to concentrate on regulation of dams and tailing structures in accordance with the Safety of Dams Statutes, Idaho Code (§§ 42-1709-1721) particularly the dams that pose a threat to the public or could cause extensive property damage. The amendment would improve the efficiency of the program without any change in costs by excluding 40 small, insignificant dams in remote areas. By raising the size limits of dams regulated, fewer small dams would require review and approval, except for those in high risk (developed) areas in the state.

The department's letter dated December 18, 1987, makes it clear that the Mud Lake embankment was not one of the "insignificant dams" that were intended to be exempt from regulation:

The department has included the [Mud Lake] structure on the inventory of dams since at least 1971. It was evaluated in the Corps of Engineers Phase I inspection program and *designated a large dam located in a significant risk area*. Because the structure confines a terminal lake, only a part of the water stored would be released during failure. The area potentially subject to flooding during failure is divided into cells by the roads and canals radiating outward from the structure. A single break would flood several hundred to a few thousand acres of farm land. Some homes could be affected but water levels would not exceed 2-3 feet on the first floor elevation. (Emphasis added.)

Given the risk of failure of the Mud Lake embankment and the history of its construction, this type of structure certainly seems to be of the type the legislature intended the department to regulate under the Idaho Dam Safety statute. This conclusion is further supported by the fact that the area was recently subject to substantial flooding that resulted in the filing of the *Marty* case.

This conclusion is not contrary to the district court's order in the *Marty* case. First, that order did not purport to decide the jurisdiction of the department under the Idaho Dam Safety statute. Rather, the district court's conclusion that the Mud Lake embankment had become a natural barrier was used to support the district court's ultimate conclusion that the doctrine of strict liability did not apply to the action for damages before the district court. Second, the district court relied on three cases and one treatise on water rights for reaching the conclusion that the Mud Lake embankment had become a natural barrier. See *Wilber v. Western Properties*, 540 P.2d 470 (Wash.App. 1975); *Ramada*

Inns v. Salt River Valley Water Users' Ass'n; 523 P.2d 496 (Ariz. 1974); *Los Angeles County Flood Control District v. Mindlin*, 106 Cal.App.3d 698, 165 Cal.Rptr.233 (1980); 1 S. Wiel, *Water Rights in the Western States*, § 60 (3rd Ed. 1911). None of these cases or treatise supports a conclusion that the artificial channel or water body that has some characteristics of a natural water body is no longer subject to regulation under a statute such as the Idaho Dam Safety statute. The *Los Angeles County Flood Control District* case concerned the valuation of real property in an eminent domain case 106 Cal.App.3d at 703, 165 Cal.Rptr. at 235-236. The *Wilber* and *Ramada Inns* cases were both damage actions involving claims based on strict liability. 540 P.2d at 474; 523 P.2d at 499.

Significantly, the court in the *Ramada Inns* case made clear that its holding should not be applied too broadly. The court expressly cautioned the defendant water users as follows: "[B]ut this does not mean that the water belongs to the public as do wholly natural waters . . . , nor do we imply that the water users are relieved from the duty to maintain and repair the canal." 523 P.2d at 498 (citations omitted).

Therefore, we conclude that the Mud Lake embankment is a dam within the meaning of Idaho Code § 42-1711(b). The board and the department have the authority and duty to regulate it under the Idaho Dam Safety statute.

Question No. 2

The answer to this question depends on the nature of the duties imposed on the board and on the department in the administration of the Idaho Dam Safety Act and on the immunity provisions of Idaho Code § 42-1717 and the Idaho Tort Claims Act, Idaho Code §§ 6-901 et seq. The determination of the duties of the board and of the department requires a review of Idaho Code §§ 42-1710, 42-1714, and 42-1717.

Idaho Code § 42-1710 mandates that the department "shall supervise" all dams in the state of Idaho. The plain meaning of the language expresses a legislative intent to create a mandatory program for the supervision of all dams. The text of Idaho Code § 42-1717 supports this conclusion by outlining in detail the director's duties in carrying out the dam safety program; at least six of these duties are prescribed with the mandatory "shall."

Idaho Code § 42-1714 requires the board to "adopt and revise . . . such rules and regulations . . . as may be necessary for the carrying out of the provisions of sections 42-1710 through 42-1721, Idaho Code." The board does not have authority to adopt regulations that are inconsistent with the statutory definition of a dam contained in Idaho Code § 42-1711(b). See *Holly Care Center v. State, Department of Employment*, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986). Thus, if the board adopted regulations that exempted the embankment surrounding Mud Lake from the definition of a dam, the board's action would be in violation of its strict statutory duty.

Your second question asks whether such conduct would expose the board to liability if a person suffers personal injury or property damage as the direct result of this violation of statutory duty. The answer to this question is governed by Idaho Code § 42-1717, which states in relevant part:

No action shall be brought against the state, the water resource board, the director, or the department of water resources or their respective agents or employees for the recovery of damages caused by the partial or total failure of any dam, reservoir or mine tailings impoundment structure or through the operation of any dam, reservoir or mine tailings impoundment structure upon the ground that such defendant is liable by virtue of any of the following:

- (a) The approval of the dam, reservoir or mine tailings impoundment structure.
- (b) The issuance or enforcement of orders relative to maintenance or operation of the dam, reservoir or mine tailings impoundment structure.
- (c) Control and regulation of the dam, reservoir or mine tailings impoundment structure.
- (d) Measures taken to protect against failure during an emergency.
- (e) The use of design and construction criteria prepared by the department.
- (f) The failure to issue or enforce orders, to control or regulate dams, or to make measures to protect against dam failure.

The six exceptions listed above are sweeping in scope. Nonetheless, it is our opinion that none of them is intended to absolve the board from liability in the event that the board affirmatively announced its intention to exempt particular dams from regulation.

Much the same result is reached if the situation is analyzed under the Idaho Tort Claims Act, Idaho Code § 6-901 et seq. That act makes liability the rule for negligent acts of governmental entities, with certain specific exceptions. *Sterling v. Bloom*, 111 Idaho 211, 214-215, 723 P.2d 755, 758-759 (1986). The first exception in Idaho Code § 6-904, commonly called the “discretionary function” exception, is the only one that arguably would apply to the board’s adoption of a regulation exempting the Mud Lake embankment from dam safety regulation. However, case law makes it clear that acts of an administrative agency in violation of a statute or valid regulation generally are not within this exception. *Oppenheimer Industries v. Johnson Cattle Co.*, 112 Idaho 423, 425, 732 P.2d 661, 663 (1987).

We conclude that the board is not shielded by the immunity provisions of the Dam Safety Act or the “discretionary function” exception of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program.

Question No. 3

The discussion in Question No. 2 makes clear that the board would be liable if a person suffered personal or property damage as the direct result of a board refusal to carry out its statutory duty. If the state attempts to transfer this responsibility by contract, as this question suggests, the issue would be whether the contract is void as against the public policy expressed in the Idaho Dam Safety statute. Our answer to Question No. 2 again makes clear that the board has no authority to contract away its statutory duty.

AUTHORITIES CONSIDERED:

Idaho Statutes:

Act of March 25, 1987, ch.98.

1987 Idaho Sess. Laws 192.

Idaho Code § 6-901 et seq.

Idaho Code § 6-904.

Idaho Code § 42-1709 et seq.

Idaho Code § 42-1710.

Idaho Code § 42-1711.

Idaho Code § 42-1714.

Idaho Code § 42-1717.

Idaho Cases:

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

Marty v. State, Jefferson County Civil No. 1-3504 (Dist.Ct. December 17, 1987).

Oppenheimer Industries v. Johnson Cattle Co., 112 Idaho 423, 732 P.2d 661 (1987).

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

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

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

Other Cases:

Los Angeles County Flood Control District v. Mindlin, 106 Cal.App.3d 698, 165 Cal.Rptr. 233 (1980).

Ramada Inns v. Salt River Valley Water Users' Ass'n, 523 P.2d 496 (Ariz. 1974).

Wilber v. Western Properties, 540 P.2d 470 (Wash.App. 1975).

Other:

I S. Wiel, *Water Rights in the Western States*, § 60 (3d ed. 1911).

Statement of Purpose for Act of March 25, 1987 Idaho Sess. Laws 192.

DATED this 4th day of March, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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Deputy Attorney General
Natural Resources Division

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

ATTORNEY GENERAL OPINION NO. 88-3

TO: Mr. R. Keith Higginson, Director
Department of Water Resources
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STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does art. 8, § 3, of the Idaho Constitution require voter approval of municipal debt incurred to finance improvements to the Cascade water system?

CONCLUSION:

Under current law as expressed in *Asson v. City of Burley* and *City of Pocatello v. Peterson*, the proposed improvements to the Cascade water system would be ordinary and necessary expenses and therefore art. 8, § 3, would not require voter ratification of the debt.

ANALYSIS:

The issue is whether the City of Cascade must first receive approval from its voters before incurring the legal obligation to pay for improvements to its water system. Art. 8, § 3, of the Idaho Constitution requires that all debt exceeding a municipality's yearly income must first be approved by the voters. Only those expenses that are ordinary, necessary and authorized by law are exempt from the election requirement. Since cities are authorized by law to maintain a domestic water system, Idaho Code § 50-323, the only issue is whether the improvements are an ordinary and necessary expense.

Idaho Constitution, art. 8, § 3, provides in pertinent part:

No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, . . . *Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . .* and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to

any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; . . . [Emphasis added.]

The original draft of art. 8, § 3, presented to the Idaho Constitutional Convention was intended to prohibit absolutely any indebtedness without two-thirds voter approval. The delegates were acutely aware of problems with large municipal debt. In the nineteenth century local and state governments routinely backed private enterprises to encourage settlement. With the recurring recessions of the late nineteenth century, many municipalities were left holding the bills for failed private industry. Moore, *Constitutional Debt Limitations on Local Government in Idaho, Article 8, Section 3, Idaho Constitution*, 17 Idaho L.Rev. 55, 57-58 (1980). Consequently, the debates concerning the passage of art. 8, § 3, focused on the extent of debt limitation. In other words, the issue was not whether municipal liability should be restricted, but rather how strict the limitation should be. 1 *Debates on the Idaho Constitutional Convention*, at 584-94.

The “ordinary and necessary” language was inserted in art. 8, § 3, only after much debate. The exception was to insure that counties and cities would be “allowed in contingencies to abate them [the emergencies] immediately without waiting for an election to be ratified by two-thirds.” *Id.* at 592. The delegates also did not “want to leave any part of the ordinary legitimate expenses of running county [or city] government in doubt.” *Id.* at 591. The fear was that yearly income fluctuations might cause a temporary shortfall that, without the ordinary and necessary language, would require the expense of an election. It did not make sense to expend \$900 for an election to approve a debt of \$500 incurred in the ordinary course of county or city government. *Id.*

The early twentieth century antipathy toward municipal debt is best reflected in *Feil v. City of Coeur d’Alene*, 23 Idaho 32, 129 P. 643 (1912). In *Feil*, the voters rejected the city’s proposal to finance a much needed watersystem. *Id.* at 57. In order to circumvent the constitutional requirement of voter approval, the City of Coeur d’Alene proposed the modern day equivalent of a revenue bond. The city argued that because the bonds were payable *only* from the revenue generated by the water system, not from the general funds of the city, the proposed bonds were not a general indebtedness covered by art. 8, § 3. *Id.* at 35. In rejecting the “special fund” doctrine, the Idaho Supreme Court held that:

[T]he framers of the constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Id. at 50. In other words, the court refused to distinguish revenue bonds from general obligation debt - both were subject to the restrictions of art. 8, § 3.

In *Feil*, there was no statutory authority for the special fund doctrine. In a later case, *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932), the court considered the constitutionality of two ordinances passed under statutes permitting revenue bonds. The court held the statutes, and consequently the ordinances, to be unconstitutional. *Id.* at 500-503.

It was not until 1949 that the constitution was amended to permit revenue bonds for municipal water and sewer systems. H.J.R. No. 9, S.L. 1949, p.598, ratified in the 1950 general election. According to the Attorney General's Explanation of Purpose printed on the ballot:

The purpose of the proposed amendment is to allow municipalities to issue bonds and other securities without limitation as to amount for the purpose of purchasing or constructing water systems, sewage systems, water and sewage treatment plants and off-street parking facilities. The bonds and securities would be retired exclusively from the revenues derived from the charges for the use of such facilities and will not be considered general obligations of the municipality issuing them.

The Attorney General's Explanation of Purpose, as quoted in the Idaho Sunday Statesman, November 5, 1950, at p.18. The year after ratification, the legislature passed the Revenue Bond Act, which granted municipalities the authority to issue revenue bonds, as distinct from general obligation bonds. S.B. No. 7, S.L. 1951, at 57-65.

When art. 8, § 3, was amended in 1950 to include revenue bonds, the "ordinary and necessary" clause was not changed. That clause reads: "Provided, that *this section* shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. . . ." (Emphasis added.) Thus, the ordinary and necessary clause of "this section" of the constitution applies to projects financed by general obligation debt as well as to the enumerated projects for which governmental entities are authorized to issue revenue bonds.

The Idaho Supreme Court adopted this analysis in the *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970). There the court characterized the issue as "whether the repair and improvement of the municipal airport by the City of Pocatello is an ordinary and necessary expense falling within the pertinent constitutional provision." 93 Idaho at 776. In order to reach that issue the court assumed, albeit *sub silentio*, that the "ordinary and necessary" exception modified the entire § 3 of art. 8. Therefore, the process for analyzing the constitutionality of municipal debt under art. 8, § 3, is to determine, first, whether the municipality has the legal authority to incur the debt; if not, of course, the discussion is at an end. Second, we determine whether the debt exceeds yearly income; if not, the project can be financed out of the annual budget and no

constitutional problems arise. Next, we determine whether the expense is ordinary and necessary. If it is found to be ordinary and necessary, there is no requirement of an election. If, however, the expense is not ordinary and necessary, voter approval is required (two-thirds for general obligation debt, a simple majority for the enumerated revenue bond projects).

Before the law can be applied to the Cascade water project, “ordinary and necessary” must be defined. The Idaho Supreme Court most recently discussed ordinary and necessary in *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), *cert. denied*, 469 U.S. 870 (1984). The court reviewed the rationale of early Idaho cases and concluded: “Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be: *new* construction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities.” *Id.* at 441-442 (emphasis in original). Thus, the early cases distinguished between construction of new facilities (the financing of which requires voter approval) and the repair of existing structures, which is an ordinary and necessary expense of government and thus exempt from the requirement of voter approval. *Compare, Woodward v. City of Grangeville*, 13 Idaho 652, 92 Pac. 840 (1907) (purchase of a new water system requires voter ratification); *Hickey v. City of Nampa*, 22 Idaho 41, 124 Pac. 280, (1912) (repairs to water system are ordinary and necessary). *Compare, Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 510, 531 P.2d 588 (1975) (“expenditures made for the purpose of improving the structure of the hospital so that it will comply with state safety standards is an ordinary and necessary expense”); *General Hospital, Inc., v. City of Grangeville*, 69 Idaho 6, 13-14, 201 P.2d 750 (1949) (construction of hospital needs two-thirds voter approval). *Compare, Thomas v. Glindeman*, 33 Idaho 394, 398, 195 P. 92 (1921) (maintenance of streets is ordinary and necessary); *McNutt v. Lemhi Co.*, 12 Idaho 63, 71, 34 P. 1054 (1906) (construction of wagon road requires two-thirds voter approval).

The *Asson* court, however, did not adopt the bright-line distinction of new construction versus repairs. In reviewing *City of Pocatello*, *supra*, the *Asson* court found other factors relevant:

In its opinion [in *City of Pocatello v. Peterson*] the court stressed the upkeep and maintenance aspect of the city’s expenditure. The court noted that the passenger terminal was an “unsound structure.” Thus, while construction of a “wholly new terminal building” (see dissent of McFadden, J., *Id.* at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court’s emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the “repair or maintenance” line of case authority. The court may have considered the expenditure in light of the city’s obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense.

Asson, supra, at 442. Justice Bakes, who, like the *Asson* majority, accepted the continuing validity of *City of Pocatello*, enumerated the factors underlying the court's 1970 decision:

This court [in *City of Pocatello v. Peterson*] considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was authorized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to art. 8, § 3.

Asson v. City of Burley, supra, at 445 (Bakes, J., dissenting).

Recent cases construing the "ordinary and necessary" clause, therefore, do not make a simple distinction of whether the project is the construction of a new building or the repair of an old one. Rather, the court will find an expense to be "ordinary and necessary" if a governmental entity has had a long-standing involvement in a given enterprise; if the existing facilities are obsolete and in need of repair, partial replacement or reconditioning; if failure to upgrade facilities would jeopardize the safety of the public; and if failure to do so would create potential legal liability.

Finally, in deciding whether the contracts of WPPS nuclear power plants #4 and #5 were ordinary, the *Asson* court also found it pertinent to discuss the amount of the expense:

It was a colossal undertaking, fraught with financial risk. It was open-ended: the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness — yet no ownership, and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

Asson v. City of Burley, supra, at 443. The *Asson* discussion of the size of the indebtedness harks back to the earlier cases where "[t]he court often looked to the amount of the expense in proportion to the city or county's revenue for that year." *Id.* at 441. *Asson*, however, does not provide any guidance to evaluate the amount of debt, as a ratio to the annual budget, which would be deemed extraordinary.

Therefore, in determining whether an expense is ordinary and necessary, one must look to the *nature* and the *amount* of the expense. Repairs to an existing structure clearly are ordinary and necessary. If the municipality proposes to finance a new structure, one must also consider whether the structure replaces an inadequate existing facility and whether the expense is exorbitant, whether the project is for an on-going municipal obligation, and whether the municipality may face legal liability if the facility is not maintained.

Facts of Cascade

The City of Cascade currently is faced with a water system fraught with serious problems. The water cannot consistently meet the turbidity standards of the state's drinking water regulations. Feasibility Study of Water Supply and System Improvements for the City of Cascade (hereinafter "Feasibility Study"), at 4. Contamination by *Giardia lamblia* from an adjacent water system is a possibility, which would render Cascade's only water treatment plant inoperable. *See, id.* at 4,9. There is currently insufficient water pressure and volume to provide adequate fire flow protection. *Id.* at 3,9. Furthermore, Cascade is dependent on only one source of water. A routine pipeline or mechanical failure would shut off Cascade's water supply. *Id.* at 9.

In order to resolve these problems, the Feasibility Study recommends the following system wide improvements: (1) distribution improvements to the upper pressure distribution system to address the "considerable low pressure problems and an inability to provide adequate fire flow protection," *id.* at 3; (2) improvements to the existing water treatment plant to address the "increased potential for contamination of Cascade's only water source [from *Giardia lamblia*] and the impact this would have on tourism," *id.* at 4; and (3) addition of a new well in southeast Cascade to provide the necessary "separate and backup source of water supply for the city of Cascade," *id.* at 9. The total cost of the improvements is \$465,583, with costs divided as follows: (1) \$56,400 for the upper zone distribution system improvements; (2) \$180,845 for the water treatment facility improvements; and (3) \$228,338 for the water supply improvements. *Id.* at Appendix B.

The issue is, therefore, whether the financing of the proposed water system improvements requires ratification by the Cascade voters. Relying on the three-step analysis discussed above, we note first that the city has the legal authority to operate a municipal water system under Idaho Code § 50-323. Second, it is clear that the costs will exceed Cascade's annual budget. The city does not have any reserve capital improvement funds in its current yearly budget. *Id.* at 20. The only remaining issue is whether the expenses are "ordinary and necessary" under *Asson, supra* and *City of Pocatello, supra*.

Even under the older case law, cited with approval in *Asson, supra*, at 440-442, the proposed work to the upper pressure zone distribution system and to the treatment plant are clearly repairs and maintenance to an existing system. As such, they are ordinary and necessary, and therefore not subject to voter approval.

The addition of a groundwell, however, is not as clearly characterized as “repair or maintenance.” If the court had not defined “ordinary and necessary” in *City of Pocatello* and *Asson*, then the applicable authority would be the constitutional language requiring majority approval for extensions to water systems. Under *City of Pocatello* and *Asson*, however, new construction or extensions that are ordinary and necessary are not subject to voter ratification. The balancing test of *City of Pocatello* and *Asson* supports characterizing the new well as ordinary and necessary. The \$228,000 cost is significantly less than the \$1.44 million price for the ordinary and necessary airport in Pocatello. The total proposed debt is less than the *yearly* payments for any city in *Asson*. Like the Pocatello airport, the water system is an on-going municipal obligation. Although the well has not been built, it is better characterized as a system wide improvement more similar to Pocatello’s airport than to the unbuilt electrical generating plant of *Asson*. Indeed, the Cascade facts are even more persuasive than those of *City of Pocatello*. The service in Cascade is a water system, an absolute necessity to every municipality. The municipal liability for an inadequate and potentially contaminated water system is as significant, if not more so, than the potential liability for an obsolete airport. *See, Asson, supra*, at 442. Therefore, the new well would also be ordinary and necessary under current Idaho law.

AUTHORITIES CONSIDERED:

Constitutions:

Article 8, § 3, Idaho Constitution.

Idaho Statutes:

Idaho Code § 50-323.

Cases:

Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 469 U.S. 870 (1984).

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 510, 531 P.2d 588 (1975).

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

Feil v. City of Coeur d’Alene, 23 Idaho 32, 129 P. 643 (1912).

General Hospital, Inc. v. City of Grangeville, 69 Idaho 6, 13-14, 201 P.2d 750 (1949).

Hickey v. City of Nampa, 22 Idaho 41, 124 Pac. 280 (1912).

McNutt v. Lemhi Co., 12 Idaho 63, 71, 84 P. 1054 (1906).

Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932).

Thomas v. Glindeman, 33 Idaho 394, 398, 195 P. 92 (1921).

Woodward v. City of Grangeville, 13 Idaho 652, 92 Pac. 840 (1907).

Other:

Attorney General's Explanation of Purpose, as quoted in the Idaho Sunday Statesman, November 5, 1950, at p.18.

Feasibility Study of Water Supply and System Improvements for the City of Cascade, at 4.

H.J.R. No. 9, S.L. 1949, p.598, ratified in the 1950 general election.

1 Debates on the Idaho Constitutional Convention, at 584-94.

Moore, *Constitutional Debt Limitations on Local Government in Idaho*, Article 8, Section 3, *Idaho Constitution*, 17 Idaho L.Rev. 55, 57-58 (1980).

S.B. No. 7, S.L. 1951, at 57-65.

DATED this 19th day of May, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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ATTORNEY GENERAL OPINION NO. 88-4

TO: R. Keith Higginson, Director
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 Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988)?
2. Does an application for assignment of a water right to the water supply bank and subsequent acceptance of the right into the bank toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988), or does Idaho Code § 42-1764 (Supp. 1988) require that the water right be subsequently rented out of the bank and beneficially used to prevent forfeiture?

CONCLUSIONS:

1. The filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right does not toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988).
2. There are two possible interpretations of Idaho Code § 42-1764 (Supp. 1988), which provides for the tolling of the forfeiture period for non-use of water placed in the water supply bank. On its face, section 42-1764 seems to require that a water right be accepted and subsequently rented out in order to toll the forfeiture provisions of section 42-222(2); however, when the section is interpreted in light of the entire Water Supply Bank Act, it is possible to argue that the forfeiture period should be tolled whenever a water right is placed into the bank. Because of the ambiguity within the Act, it is not possible to predict which interpretation a court might adopt.

ANALYSIS:

Your letter of June 14, 1988, requests guidance on three questions concerning forfeiture of water rights. After reviewing the questions presented, we find that the issues raised in the first two questions subsume the third question. Further, your letter indicates

that the questions, while general in nature, have arisen in reviewing the application of the Canyon View Irrigation Company to place natural flow water rights from the Snake River basin into the water supply bank. The policy of this office is to provide opinions only on questions of law; therefore, we have reformulated your first two questions to focus solely on issues of law. We express no opinion on the nature and extent of any water rights claimed by Canyon View Irrigation Company.

Question 1:

Idaho Code § 42-222(2) (Supp. 1988) provides, in part, as follows with respect to forfeiture of water rights:

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter....

Thus, failure to apply water to beneficial use over a five-year period will result in forfeiture of the water right. However, upon the filing of an application for extension of time to put water to beneficial use before the end of the five-year forfeiture period, the director of the department of water resources is authorized to extend the time for forfeiture for nonuse for a period not to exceed five additional years. Idaho Code § 42-222(2) (Supp. 1988).

Forfeiture statutes reflect a well-settled rule of public policy “that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.” *Graham v. Leek*, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943).¹ By making nonuse of water for five consecutive years grounds for forfeiture under section 42-222(2), the Idaho Legislature intended to implement this policy. In light of this strong public policy, exceptions to the forfeiture statute should not be lightly inferred.

The language of section 42-222 does not manifest any intent by the legislature to toll the running of the forfeiture statute upon the filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right (hereinafter called “application for transfer”), and no Idaho case law has been found so interpreting the section. In the absence of some manifestation to the contrary, we assume the legislature intended the ordinary import of the words it used. *Nicolaus v. Bodine*, 92

¹ Idaho Code § 42-222(2) is the successor of other less lenient forfeiture statutes. For example, in 1899 the Idaho Legislature required that the right to use water “be for some useful or beneficial purpose, and when the appropriator or his successor in interest cease[d] to use it for such purpose, the right cease[d].” Act approved Feb. 25, 1899, § 3, 1899 Idaho Sess. Laws 380. This early statute is illustrative of the policy underlying forfeiture.

Idaho 639, 641, 448 P.2d 645, 647 (1968). Furthermore, section 42-222 contains language which shows that when the Idaho Legislature wants to toll the running of the forfeiture statute, it will do so by an express provision. For example, through a 1988 amendment, the forfeiture statute is expressly tolled for “all water rights appurtenant to land contracted in a federal cropland set-aside program....” Idaho Code § 42-222(2) (Supp. 1988). Thus, since there is neither an express nor implied manifestation by the Idaho Legislature to toll the provisions concerning forfeiture for nonuse when an application for transfer is filed under section 42-222(1), we conclude that a filing of an application for transfer does not toll the running of the forfeiture period.²

Question 2:

The second question asks whether the forfeiture provisions of Idaho Code § 42-222(2) (Supp. 1988) are tolled by filing an application for assignment of a water right to the water supply bank and subsequent acceptance of the right into the bank or, conversely, whether Idaho Code § 42-1764 (Supp. 1988) requires that the water right be subsequently rented out of the bank and beneficially used to prevent forfeiture. An answer to this question requires an analysis of the statute creating the water supply bank.

Idaho Code §§ 42-1761 to 42-1766 (Supp. 1988) create the water supply bank. Section 42-1762 authorizes the water resource board to “purchase, lease, rent or otherwise obtain water rights to be credited to the water supply bank.” This section further provides that “[t]he water rights may be retained in the water supply bank for a period as determined by the board, all under such provisions as are specified in the terms of the purchase or lease.”

Idaho Code § 42-1763 (Supp. 1988) provides for the leasing or renting of “[d]ecreed, licensed or permitted water rights” out of the water supply bank to end users. The same section also states that “[t]he terms and conditions of any such lease or rental must be approved by the director of the department of water resources.”

Section 42-1764 limits the tolling of the forfeiture period to leases or rentals “acquired pursuant to section 42-1763” that have been “approved.” Since section 42-1763 is limited to leases or rentals to end users and since the only approval specified in the Water Supply Bank Act concerns leases or rentals to end users pursuant to section 42-1763, it appears that the legislature intended to limit the tolling of the forfeiture period under section 42-1764 to those leases or rentals of water from the bank to an end user that have been approved by the director. This conclusion is further supported by the fact that section 42-1764 does not by its terms refer to section 42-1762, which is the provision authorizing the board to “purchase, lease, rent or otherwise obtain water rights” for the water supply bank.

² Although the forfeiture period may have run, an individual may be able to claim a defense to forfeiture at the end of the forfeiture time period. The Idaho courts have recognized several defenses to forfeiture. See *Jenkins v. State*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

Because of the grammatical structure of the second sentence of section 42-1764, however, the argument that the forfeiture period is only tolled when water committed to the water supply bank is withdrawn and put to use by a lessee is not without doubt. The sentence states: "Leases or rental of water rights acquired pursuant to section 42-1763, Idaho Code, shall not be subject to forfeiture under section 42-222(2), Idaho Code, provided that the rental agreements have been approved." This statement is a non sequitur. The subject of this sentence is the phrase "leases or rental." Section 42-222(2) does not affect leases or rentals, however; it affects water rights. Despite this grammatical problem, the specific reference back to section 42-1763 still lends support to the conclusion that the legislature intended to toll the forfeiture period only for approved leases from the water supply bank.

Another interpretation problem with section 42-1764 is that the last sentence of section 42-1763 is also the first sentence of section 42-1764. This repeat of a sentence in a successive section is not easily explained. Arguably, this redundancy supports the interpretation that the second sentence of section 42-1764 was intended to limit the tolling of the forfeiture period to those leases approved pursuant to section 42-1763. An interpretation that results in a redundancy is not favored, however. *State v. Kozlowski*, 143 Ariz. 137, 692 P.2d 316 (Ct. App. 1984). Thus, if the first sentence of 42-1764 is not treated as a redundancy, then it must have a different meaning from the last sentence of section 42-1763. The context of sections 42-1761 to 42-1764 suggests that it may refer to leases or rentals either to the water supply bank or from the water supply bank.

Because of these two ambiguities, a court could interpret section 42-1764 in light of apparent legislative purpose and public policy. *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981); *Black v. Reynolds*, 109 Idaho 277, 707 P.2d 388 (1985); 2A N. Singer, *Sutherland Statutory Construction* § 45.09 (4th ed. 1984). According to section 42-1761, the purposes of the water supply bank are to "make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies." These legislative policy considerations support a broad interpretation of the Water Supply Bank Act that would result in a tolling of the forfeiture statute when a water right is "approved" by the board for placement into the water supply bank.

A water user would not want to place his water right in the water supply bank if he risked forfeiture by making the placement. Yet, the construction that the tolling of the forfeiture period occurs only upon approval of a lease from the bank could lead to this result in some situations. Thus, if the apparent statutory policy is to be fully achieved, the acceptance and retention of water rights by the water supply bank should be sufficient to toll the forfeiture period without requiring the subsequent lease or rental and use of the water by an end user.

In conclusion, there are two possible interpretations of section 42-1764. On its face, it seems to provide that the forfeiture provisions of section 42-222(2) are tolled only when

a water right is accepted and subsequently rented out to another user, and then only if the director has approved the rental. On the other hand, an examination of the statutory language and of the purposes of the water supply bank seems to indicate that the forfeiture period should be tolled whenever a water right is placed into the water supply bank. Because both interpretations are plausible, we are unable to provide a definite answer to your question and suggest that you seek legislative clarification on this matter.

Authorities Considered:

1. *Idaho Statutes*

Idaho Code § 42-222 (Supp. 1988).

Idaho Code § 42-1761 through -1766 (Supp. 1988).

Act of Feb. 25, 1899, § 3, 1899 Idaho Sess. Laws 386.

2. *Idaho Cases*

Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985).

Graham v Leek, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943).

Jenkins v. State, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

Nicolaus v. Bodine, 92 Idaho 639, 641, 448 P.2d 645, 647 (1968).

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

3. *Other Cases*

State v. Kozłowski, 143 Ariz. 137, 692 P.2d 316 (Ct. App. 1984).

4. *Other Authorities*

2A N. Singer, Sutherland, Statutory Construction § 45.09 (4th ed. 1984).

Minutes of Idaho House of Representatives Resource and Conservation Committee, February 9, 15, 19 and 23 (1979).

Minutes of Idaho Senate Resources and Environment Committee, March 16 and 21 (1979).

Water Supply Bank Rules, IDAPA 37.D.1.-2,6. (October, 1980).

DATED this 4th day of October, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

CLIVE J. STRONG
STEVE STRACK
PHIL RASSIER

Deputy Attorneys General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 88-5

TO: Gary F. Arnold, Executive Director
Industrial Commission
Industrial Administration Building
317 Main Street
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the Idaho Industrial Commission have authority to enforce the provisions of Idaho Code § 72-301 requiring employers to secure payment of workers' compensation benefits against Indian employers doing business within a reservation?
2. Would the answer to Question 1 be different if the employer were a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors?

CONCLUSIONS:

1. Federal law authorizes the application of state workers' compensation laws to all United States territory within a state, including Indian reservations. Accordingly, the Idaho Industrial Commission has the authority to enforce the requirements of Idaho Code § 72-301 against Indian employers doing business

within a reservation; however, the doctrine of sovereign immunity precludes the Idaho Industrial Commission from bringing an action against a tribal government or a tribally-owned business.

2. The status of an employer as a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors does not change the conclusion that the employer is subject to state workers' compensation laws. Therefore, the Idaho Industrial Commission has the authority to enforce the requirements of Idaho Code § 72-301 against such employers.

ANALYSIS:

All employers within the legislative jurisdiction of the state of Idaho are required to comply with the state's workers' compensation laws unless otherwise specifically exempted from coverage. *See* Idaho Code §§ 72-102, 72-203, and 72-212. Since federal lands do not generally come within the legislative jurisdiction of a state, state workers' compensation laws would not apply to employers doing business on federal lands absent specific federal legislation providing otherwise. The same rule applies to Indian reservations because those lands are held by the United States in trust for a particular Indian tribe. Thus, the relevant inquiry is whether Congress has granted such jurisdiction to the states.

Because neither existing state nor federal law provided workers' compensation coverage for nonfederal employees working on federal property, Congress passed a law in 1936 to fill this gap. *See* 40 U.S.C.A. § 290 (1978) and related legislative history at S.R. No. 2294, 74th Congress, 2d Session. The law extends application of a state's workers' compensation laws to all lands owned or held by the United States within the exterior boundaries of a state by providing as follows:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America hereby vests in the several States within whose exterior boundaries such place may be,

insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however*, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further*, That nothing in this section shall be construed to modify or amend subchapter I or chapter 81 of Title 5 [the United States Employees' Compensation Act].

40 U.S.C.A. § 290 (1978). This statutory provision operates of its own force without the necessity of any legislative action by a state. *Capetola v. Barclay White Co.*, 139 F.2d 556, 559 (3rd Cir. 1943), *cert. denied*, 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087 (1944).

Since 1960 and the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), the courts have consistently held that federal laws of general application throughout the United States apply with equal force to Indians on reservations and their property interests. As is frequently the case, however, this general rule is subject to certain exceptions. A federal statute of general applicability will not apply to the activities or property interests of Indians on reservations where: (1) Congress expressed an intent that the law not apply to Indians on their reservations; (2) application of the law would abrogate treaty rights guaranteed to Indians; or (3) the law concerns rights of tribal self-governance in purely intramural matters. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

With respect to the first exception, neither the legislative history of 40 U.S.C.A. § 290 (1978) nor the circumstances surrounding its passage indicate any congressional intent to exclude Indian reservations from those federal lands to which the statute applies. Moreover, application of state workers' compensation laws to all federal lands, including Indian reservations, is consistent with the strong public policy of providing benefits for workers disabled by industrial accidents and fills a gap in the workers' compensation field by furnishing protection against the death or disability of those working on federal property. Both federal and state courts have already recognized that section 290 authorizes application of state workers' compensation laws to all United States territory within a state, including Indian reservations. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982); *Johnson v. Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 631 P.2d 548, 551 (Ariz. App. 1981), *appeal dismissed* for want of substantial federal question *Johnson v. Kerr-McGee Oil Industries, Inc.*, 454 U.S. 1025, 102 S.Ct. 560, 70 L.Ed.2d 469 (1981); *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 144 Ariz. 129, 696 P.2d 223, 227 (Ariz. App. 1985).

The second exception that must be considered is whether application of the state's workers' compensation laws to tribal members on a reservation would abrogate treaty

rights guaranteed to a tribe. This exception applies only to matters specifically covered in treaties, such as fishing and hunting rights. For the exception to apply here, a treaty would need to include language either exempting a tribe from federal laws of general applicability throughout the United States or precluding application of a state's workers' compensation laws to that tribe. *See United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981).

Because we have not been asked to construe the questions presented in light of a treaty with a particular Indian tribe, we can only generally assess whether the treaty abrogation exception would bar application of Idaho's workers' compensation laws to Indian reservations within this state. We are of the opinion that the courts would not construe application of section 290 as abrogating tribal rights of self-governance secured by treaty. This opinion is based primarily on the rationale of *Johnson v. Kerr-McGee Oil Industries, Inc.* where the Arizona court considered whether application of section 290 abrogated the Navajos' right of self-governance secured by the treaty of June 1, 1868, 15 Stat. 667. In finding no interference with treaty rights, the court stated:

The Workmen's Compensation Act eliminates litigation and places on business the burden of caring for injured employees, or, when killed, their dependents. [Citation omitted.] The act provides security for members of the employee's family as well as the employee during periods of disability. [Citation omitted.] It also provides the procedure by which claims arising out of industrial accidents may be promptly resolved. [Citation omitted.] The Workmen's Compensation Act does not conflict with the treaty nor with tribal rights under the treaty. *Cf. Navajo Tribe v. National Labor Relations Board*, 288 F.2d 162 (D.C. Cir. 1961), *affirmed* [*cert. denied*] 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961) (the provisions of the National Labor Relations Act are applicable to businesses and business operations existing on the Navajo reservation).

631 P.2d at 551. The U.S. Supreme Court was presented with an appeal in the *Johnson* case and summarily dismissed the appeal for want of a substantial federal question. Summary decisions of the Supreme Court are considered decisions on the merits that bind lower federal courts until later doctrinal developments indicate to the contrary. Additionally, as discussed below, we do not believe that application of state workers' compensation laws to tribal members on a reservation abrogates treaty-guaranteed rights of tribal self-government because establishing a procedure for addressing industrial-related death or disability claims is not a necessary incident of self-government.

The third exception bars application of a statute of general applicability where the federal statute in question would affect tribal rights of self-governance in purely intramural matters. Stated somewhat differently, this exception focuses on whether the law in question improperly infringes upon or frustrates tribal self-government. *See Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251, 254 (1959).

The Court of Appeals for the Ninth Circuit has stated that the tribal self-government exception is designed to except only those purely intramural matters essential to reservation government. See *United States v. Farris*, 624 F.2d at 893; *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d at 1116. Conditions required for tribal membership, inheritance rules and rules governing domestic relations are examples of matters considered by the courts to be of a purely intramural nature. With regard to whether workers' compensation claims could be considered a purely intramural matter, the Ninth Circuit has said:

The language of 40 U.S.C. § 290 unambiguously permits application of state worker's compensation laws to all United States territory within the state. Claims by Indians against non-Indian employers are not matters of "self-governance in purely intramural matters" sufficient to avoid the rule that Indians are subject to such federal laws of general application [citation omitted], and the exercise of state jurisdiction over such claims does not, even minimally, infringe upon or frustrate tribal self-government.

Begay v. Kerr-McGee Corp., 682 F.2d at 1319.

In reaching this conclusion, it is important to note that the Ninth Circuit was not presented with a situation where the tribal governing body for the reservation in question had enacted a comprehensive workers' compensation scheme. Although some tribal entities may voluntarily elect to obtain industrial insurance or participate in a state workers' compensation program, see *Tibbetts v. Leech Lake Reservation Business Committee*, 397 N.W.2d 883, 888-89 (Minn. 1986); and *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 696 P.2d at 228, we are not aware of any tribal government that has adopted a comprehensive workers' compensation scheme. This opinion does not consider the questions presented in the context of a duly enacted tribal workers' compensation ordinance.

Based upon the rationale of *Johnson v. Kerr-McGee* and *Begay v. Kerr-McGee* set forth above, we believe that where state workers' compensation laws have been applied to bar an otherwise valid tort action brought by an Indian employee, the same laws can also be applied to an Indian employer, particularly where the claimant is a non-Indian employee. While an argument could be made that a work related claim arising between a tribal member employee and a tribal member employer is an intramural matter, it is unlikely a court would find that workers' compensation laws that apply to all employers and employees, regardless of their ethnic status, concern a purely intramural matter or are somehow essential to tribal self-government. Moreover, it is unlikely a court would find that tribal interests in self-government would change significantly or somehow be improperly infringed upon or frustrated simply because a tribal member is an employer rather than an employee.

Improper infringement on tribal interests in self-government is also unlikely where the state can demonstrate a legitimate interest in seeing that all employees are covered by

industrial insurance. The requirement that employers comply with state workers' compensation laws is designed to place the burden of caring for injured employees, or their dependent families, on business to avoid the likelihood that these individuals would be unable to provide for themselves during the period of the injured employee's disability. This requirement furthers the valid public purpose of avoiding a "no insurance" situation.

Although we believe the rationale of *Johnson v. Kerr-McGee* and *Begay v. Kerr-McGee* applies to all employers on a reservation, the doctrine of sovereign immunity will preclude an action to enforce otherwise applicable workers' compensation laws against an Indian tribe or a tribally-owned business unless either Congress or the tribe has unequivocally provided for a waiver of sovereign immunity. Section 290 alone does not waive tribal sovereign immunity. *Tibbetts v. Leech Lake Reservation Business Committee*, 397 N.W.2d at 886; *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 696 P.2d at 228. We are not aware of any other congressional action that could be construed as waiving tribal sovereign immunity for purposes of enforcing a state's workers' compensation laws against a tribe or tribally-owned business. Further, there is no case law addressing claims by either non-Indian or Indian employees against Indian employers other than a tribe or tribally-owned enterprise.

Because we conclude that none of the three exceptions discussed above will bar application of section 290, it is our opinion that Idaho workers' compensation laws apply to all employers doing business on a reservation; however, because of the tribes' sovereign immunity, neither tribal governments nor tribally-owned enterprises are subject to suit.

In response to the second question presented, it is our opinion that the status of an employer as a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors does not change the conclusion that the employer is subject to state workers' compensation laws. Therefore, the Idaho Industrial Commission may enforce the requirements of Idaho Code § 72-301 against such employers.

AUTHORITIES CONSIDERED:

Federal Statutes:

40 U.S.C.A. § 290 (1978).

Idaho Statutes:

Idaho Code § 72-102 (Supp. 1988).

Idaho Code § 72-203.

Idaho Code § 72-212 (Supp. 1988).

Idaho Code § 72-301 (Supp. 1988).

Federal Cases:

Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 (9th Cir. 1982).

Capetola v. Barclay White Co., 139 F.2d 556, 559 (3rd Cir. 1943), *cert. denied*, 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087 (1944).

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960).

Navajo Tribe v. National Labor Relations Board, 288 F.2d 162 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961).

United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981).

Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251, 254 (1959).

States Cases:

Johnson v. Kerr-McGee Oil Industries, Inc., 129 Ariz. 393, 631 P.2d 548, 551 (Ariz. App. 1981), *appeal dismissed* for want of substantial federal question
Johnson v. Kerr-McGee Oil Industries, Inc., 454 U.S. 1025, 102 S.Ct. 560, 70 L.Ed. 2d 469 (1981).

Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883, 888-89 (Minn. 1986).

White Mountain Apache Tribe v. Industrial Commission of Arizona, 144 Ariz. 129, 696 P.2d 223, 227-28 (Ariz. App. 1985).

Other Authorities:

U.S. Senate Report No. 2294, 74th Congress, 2nd Session.

DATED this 7th day of October, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

MERRILEE CALDWELL
Deputy Attorney General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 88-6

TO: R. Keith Higginson, Director
Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?
2. Section 42-220, Idaho Code, provides that a water right permit confirmed by the issuance of a license becomes appurtenant to, and shall pass with a conveyance of the land for which the right of use is granted. What is the effect, if any, of this provision upon the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner?

CONCLUSIONS:

1. Idaho Code § 42-114 (Supp. 1988) does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock.
2. Idaho Code § 42-220 has no effect on the ownership of the water right in the situation posed by your question.

ANALYSIS:*Question No. 1*

Courts have had difficulty in fitting stock watering from natural watercourses into the appropriative water rights doctrine. Recently, the legislature enacted legislation addressing this issue. Idaho Code § 42-114 (Supp. 1988). The first question asks us whether this statute precludes issuance of a water right permit to a landowner for stock watering if the land is or is intended to be leased to another person for the grazing of livestock.

Idaho Code § 42-114 states as follows:

Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

As used in this section, the 'watering of domestic livestock' means the drinking of water by domestic livestock from a natural stream, ground water source or other source.

The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.

The statute further provides that "watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." This sentence addresses an issue of particular importance to the livestock industry in a state that depends on summer grazing on lands administered by the U.S. Forest Service and by the Bureau of Land Management. In such a case, the owner of the cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without any ownership in the underlying place of use.

Some of the correspondence received by the department concludes that this clause provides a negative implication, i.e., that a landowner/lessor who does not personally own the livestock grazed on his land is not a proper party to apply for and receive a permit/license to appropriate water for instream livestock watering on his land. Some statements in the legislative history arguably support this view.

Idaho Code § 42-114 was enacted in 1986. Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498. The statement of purpose recites: "This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land

management agencies.” This statement is repeated at several committee hearings. Minutes of House Resources and Conservation Committee (February 17, 1986). Minutes of Senate Resources and Environment Committee (March 19, 1986). In addition, the following statement appears in the legislative history: “Representative Brackett presented this legislation because he has heard so much discussion and questions as to who should file for water permits regarding domestic livestock.” Minutes of House Resources and Conservation Committee (March 3, 1986).

None of these statements from the legislative history convinces us that Idaho Code § 42-114 should be read to require ownership of the cattle by the permittee/licensee. First, this interpretation rests on the assumption that the title holder of a water right in Idaho must make the actual beneficial use of the water appropriated under a permit/license and that beneficial use of the water by a lessee or permittee of the landowner is insufficient to maintain a water right held by the title holder/landowner. While a lower court in Nevada has accepted this analysis, *State v. Morros*, Elko County Civil Nos. 19404 and 19511, slip op. at 11 (D. Nev. Feb. 5, 1987), *appeal filed*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10224 (June 1988), such is not the law in Idaho.

The appropriative water rights doctrine was created to address the arid conditions of the western states. The doctrine as developed by the courts recognized the necessity to transport waters from distant sources of supply to places of use for mining, agricultural and other beneficial uses. Significantly, much of the early mining and agriculture occurred on vacant public domain. Miners staked placer claims and courts recognized such claims even though title to the land remained in the United States. *Irwin v. Phillips*, 5 Cal. 140 (1855). In 1866, Congress confirmed in legislation the right of the public to go on the public domain and to appropriate water for “mining, agricultural, manufacturing, or other purposes.” Act of July 26, 1866, ch. 262, 14 Stat. 251, 253.

In like manner Idaho courts recognized that water may be appropriated for beneficial use on land not owned by the appropriator. For example, in *First Security Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930), the bank's predecessor in interest had been decreed a water right for use on unsurveyed public land. When the land was surveyed, that portion of the land within section 36 passed to the state, and the bank's predecessor thereafter leased the land from the state. After the bank acquired the land, it sought to transfer the water right for the leased land to other land owned by the bank. The Idaho Supreme Court concluded that the bank possessed a water right and that the bank could transfer it to other land. 49 Idaho at 745-747, 291 P. at 1066. Thus, a bifurcation of ownership of the land and of the water right used on the land is allowed under Idaho law. *See also*, *Sanderson v. Salmon River Canal Co. Ltd.*, 34 Idaho 145, 199 P. 999 (1921); *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919).

Your question asks whether the landowner/lessor can hold the stock water right used by a lessee. It presents the issue of what relationship is allowed under Idaho law among the landowner, title holder of the water right, and the water user. Four different fact patterns are apparent. First, the landowner holds title to the water right and makes

beneficial use of the water. This consolidation of all roles in one person is obviously allowed by Idaho Law and needs no further discussion. Second, a person other than the landowner holds title to the water right and makes beneficial use of the water on landowner's land. Idaho courts confirmed the existence of a water right in that situation in *First Security Bank*. Third, a person other than the landowner holds title to the water right; the landowner makes actual beneficial use of the water. This situation occurs frequently in Idaho. Canal companies, irrigation districts and other organizations routinely hold valuable water rights. The title holder — the canal company or irrigation district — does not itself make beneficial use of the water. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 75, 81 (1945). Individual landowners who hold shares in the canal company or who own land within the irrigation district make beneficial use of the water. Fourth, the landowner holds legal title to the water right; a person other than the landowner makes actual beneficial use of the water on landowner's land. Your question asks whether the fourth fact pattern is allowed by Idaho law. We are not aware of an Idaho decision that answers your question. Since Idaho courts have recognized the relationships stated in the second and third fact patterns, we believe Idaho courts would recognize the slightly different relationship stated in the fourth fact pattern. If the legislature had intended to limit the circumstances when it would allow different persons to be the title holder to the water right and the user of the water right, its intent to do so would have to be clearly expressed in section 42-114. We find nothing in the section to express such a limitation.

Second, Idaho Code § 42-501 specifically recognizes the appropriation of water for stock watering by the Bureau of Land Management, U.S. Department of the Interior. The interpretation of Idaho Code § 42-114 suggested by the correspondence received by the department would prohibit the appropriation of water for stock watering by the Bureau of Land Management that Idaho Code § 42-501 authorizes. Since repeals by implication are not favored, *Doe v. Durtschi*, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986), it is unlikely that a court will find that the legislature intended a repeal of Idaho Code § 42-501 by enactment of Idaho Code § 42-114.

Based upon the foregoing analysis, we conclude that Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use.

Question No. 2

This question asks what effect the appurtenance provision of Idaho Code § 42-220 has on the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner. Idaho Code § 42-220 states:

Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.

Although Idaho Code § 42-220 was first enacted in the Act of March 11, 1903, 1903 Idaho Sess. Laws 223, 233, we are unaware of any court decision that discusses the issue raised by your question.

The effect of Idaho Code § 42-220 on ownership may be analyzed from two perspectives. First, the effect of issuance of a license to a permit holder when no change in ownership of the water right or of the underlying land occurs. Second, the effect of a change in ownership of the underlying land after the department has issued a license.

The first effect is answered in our response to the first question. Idaho courts have long recognized a bifurcation of ownership of a water right and of the underlying land. Furthermore, in *Sanderson v. Salmon River Canal Co. Ltd.*, 34 Idaho 145, 199 P. 999 (1921), the court construed an appurtenance provision relating to Carey Act projects now codified at Idaho Code § 42-2025. The court concluded that the appurtenance provision did not make the water right inseparable from the underlying land. 34 Idaho at 160, 199 P. at 1003. Similarly, Idaho Code § 42-220 cannot be read to make the water right inseparable from the underlying land or to change the long standing court interpretation of our appropriative water rights doctrine.

The second effect is more difficult to answer. The use of the word “all” in the statute appears to state that in a land conveyance situation the grantee of the land receives the water right as an appurtenance even though the grantor did not possess the water right in the first instance. This confiscatory result is not a reasonable interpretation of the statute because that interpretation would deprive water right holders of property without due process of law. *Sanderson v. Salmon River Canal Co., Ltd.*, 34 Idaho 145, 160-161, 199 P. 999, 1003 (1921). Furthermore, that interpretation is not consistent with *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053 (1912). In *Paddock*, the court concluded that an express limitation in a deed regarding the quantity of water rights conveyed to a grantee operated to reserve the excess appurtenant water rights to the grantor. 22 Idaho at 504-505, 126 P. at 1055. Although the water rights described in *Paddock* were apparently decreed in *Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd.*, Canyon County Civil Case No. 1323, *aff'd*, 14 Idaho 450, 94 P. 761 (1908), *aff'd in part, rev'd in part*, 16 Idaho 525, 102 P. 481 (1909), the court in *Paddock* failed to discuss the application of section 3262 of Idaho Revised Code (1908) to the facts of that case; section 3262, a predecessor of Idaho Code § 42-220, required “all rights to water confirmed ... by any decree of court ... [to] pass with a conveyance of, the land for which the right of use is granted.” Nonetheless, the conclusion of the court in *Paddock* clearly indicated that a grantor of land had authority to retain to himself appurtenant water rights.

A more logical interpretation of Idaho Code § 42-220 is that it codifies the common law rule concerning the conveyance of appurtenances with a conveyance of land. This common law rule provides:

In the absence of any language in a deed indicating a contrary intention on the part of the grantor, everything that is properly appurtenant to the land granted thereby — that is, everything which is essential or reasonably necessary to the full beneficial use and enjoyment of property and *which the grantor has the power to convey* — is to be considered as passing to the grantee.

23 Am. Jur. 2d *Deeds* § 65 (1988) (footnotes omitted) (emphasis added). *See also Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (a division of land produces a proportional division of the water right, absent a reservation of the water right). This common law rule creates a presumption in favor of the passing of appurtenances upon the conveyance of the underlying land. However, if a grantor of the land does not have the power to convey the water right or if a grantor reserves the appurtenant water rights, Idaho Code § 42-220 does not cause the water right to pass to a grantee of the land.

The question of whether a particular grantor has the power to convey a stock water right held by another may involve an interpretation of many different documents such as leases, federal regulations and statutes, or state regulations and statutes. The determination of such factual issues may be quite difficult. However, your question does not raise these difficult factual issues because it stipulates that the water right is owned by a person other than the underlying landowner. In that case the landowner does not have the power to convey the water right. Therefore, Idaho Code § 42-220 would not change the ownership of the water right — it remains with the licensee.

Under the fact pattern you pose, the issue becomes what happens to the water right if the new landowner denies the licensee access to the place of use. The licensee would have three options: (1) sell the water right to the new landowner, (2) transfer the water right to other land for himself or for a third party, or (3) lose the water right by forfeiture, if the nonuse of the water right continues for five years when water is available under the priority of the water right. Finally, none of these options may be available to the licensee if the facts of the particular conveyance of land also constituted an abandonment of the water right.

AUTHORITIES CONSIDERED:

Idaho Statutes:

Act of March 11, 1903, 1903 Idaho Sess. Laws 223.

Section 3262 of Idaho Revised Code (1908).

Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.

Idaho Code § b42-114.

Idaho Code § 42-220.

Idaho Code § 42-501.

Idaho Code § 42-2025.

Idaho Cases:

Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd., Canyon County Civil Case No. 1323, *aff'd*, 14 Idaho 450, 94 P. 761 (1908), *aff'd in part, rev'd in part*, 16 Idaho 525, 102 P. 481 (1909).

First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930).

Paddock v. Clark, 22 Idaho 498, 126 P. 1053 (1912).

Rayl v. Salmon River Canal Co., 66 Idaho 199, 157 P.2d 76 (1945).

Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911).

Sanderson v. Salmon River Canal Co., Ltd., 34 Idaho 145, 199 P. 999 (1921).

Sarrett v. Hunter, 32 Idaho 536, 185 P. 1072 (1919).

Other Statutes:

Act of July 26, 1866, ch. 262, 14 Stat. 251.

Other Cases:

Irwin v. Phillips, 5 Cal. 140 (1855).

State v. Morros, Elko County Civil Nos. 19404 and 19511 (D. Nev. February 5, 1987), *appeal filed*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10224 (June 1988).

Other:

Minutes of House Resources and Conservation Committee (February 17, 1986; March 3, 1986).

Minutes of Senate Resources and Environment Committee (March 19, 1986).

23 Am. Jur. 2d *Deeds* § 65 (1988).

Statement of Purpose for Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.

DATED this 21st day of October, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 88-7

TO: Steve J. Tobiason
Prosecuting Attorney
Nez Perce County
P.O. Box 1267
Lewiston, ID 83501

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

When the boundary of the state of Idaho is defined in part by the Snake River, what is the extent of Idaho's civil and criminal jurisdiction over activities occurring on the river?

CONCLUSION:

When the boundary of the state of Idaho is defined in part by the Snake River, that boundary is located in the middle of the main navigable channel of the river. Idaho's full civil and criminal jurisdiction extends to all activities occurring on the Idaho side of the main navigable channel unless the Idaho legislature has specifically provided otherwise.

ANALYSIS:

You have asked this office to advise you on the extent of Idaho's civil and criminal

jurisdiction over activities occurring on the Snake River. Under the tenth amendment to the United States Constitution, powers not delegated to the United States by the Constitution, or otherwise prohibited by it to the states, are reserved to the states. Among the sovereign powers reserved to the states is the power to create a legal code, both civil and criminal, and to enforce that code against individuals and entities within the territorial jurisdiction of each respective state. *Alfred L. Snapp and Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995, 1003 (1982). Only a legislature can yield a state's sovereign powers. *Smith v. State*, 64 Wash. 2d 323, 330, 391 P.2d 718, 723 (1964). Further, it cannot be assumed that a state has relinquished its sovereignty. *United States v. Brown*, 552 F.2d 817, 820 (8th Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977).

Because Idaho's jurisdiction depends upon whether activities occur within the territorial limits of the state, consideration must first be given to understanding the nature of a boundary delineated by an interstate navigable river.

The Snake River marks part of the boundary between the state of Idaho and the states of Washington and Oregon. As described in art. XVII, § 1 of the Idaho Constitution, the boundary formed by the Snake River runs as follows:

Beginning at a point in the middle channel of the Snake river where the northern boundary of Oregon intersects the same; then follow down the channel of Snake river to a point opposite the mouth of the Kooskooskia or Clearwater river

The Organic Act of the Territory of Idaho, ch. 117, 12 Stat. 808, contains identical language. Similarly, the Idaho Admission Bill, ch. 656, 26 Stat. 215, describes the boundary as, "thence down the mid-channel of the Snake River to the mouth of the Clearwater River"

The territorial boundary of Idaho marked by the Snake River has been addressed by the courts. In the early case of *Scott v. Lattig*, 227 U.S. 229, 33 S.Ct. 242, 57 L.Ed. 490 (1913), the U.S. Supreme Court noted:

Bearing in mind, then, that [the] Snake river is a navigable stream, it is apparent, first, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream - the thread being the true boundary of the state - passed from the United States to the state

227 U.S. at 243, 33 S.Ct. at 244, 57 L.Ed. at 496. More recently, the Court of Appeals for the Ninth Circuit stated that the Idaho boundary is located "in the middle channel of the Snake River." *Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Board*, 709 F.2d 1250, 1251 (9th Cir. 1983).

Although the boundary in question has been variously described as located at “the middle channel of the Snake river,” “the mid-channel of the Snake River,” and the “thread” of the river, it is well settled that where a boundary between states is marked by a navigable river, the boundary line is the middle of the main navigable channel of the river. *Iowa v. Illinois*, 147 U.S. 1, 8, 13 S.Ct. 239, 241, 37 L.Ed. 55, 57 (1893). See, e.g., *Louisiana v. Mississippi*, 202 U.S. 1, 49, 26 S.Ct. 408, 421, 50 L.Ed. 913, 930 (1906); *Washington v. Oregon*, 211 U.S. 127, 134, 29 S.Ct. 47, 48, 53 L.Ed. 118, 119 (1908), *aff’d on rehearing*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909); *Louisiana v. Mississippi*, 466 U.S. 96, 99, 104 S.Ct. 1645, 1647, 80 L.Ed.2d 74, 78 (1984). This rule, known as the rule of the “thalweg,” is based upon recognition of the importance of preserving to each state equality in navigation of a river. *Arkansas v. Mississippi*, 250 U.S. 39, 45, 39 S.Ct. 422, 424, 63 L.Ed. 832, 835 (1919).

Determining that the “live thalweg,” or middle of the main navigable channel, is the legal boundary between states does not fix the location of the boundary physically or factually. As the U.S. Supreme Court acknowledged, a boundary defined as the “live thalweg” may vary from time to time, depending upon the course of the river as its bed and channel change due to the gradual processes of erosion and accretion. *Louisiana v. Mississippi*, 466 U.S. at 100-01, 104 S.Ct. at 1648, 80 L.Ed.2d at 78-79. Case law has established the proposition that the “live thalweg” is defined by the ordinary course of traffic on the river, *i.e.*, by factually establishing the course commonly taken by vessels navigating a particular reach of a river. *Id.*, at 101, 104 S.Ct. at 1648, 80 L.Ed.2d at 79. Thus, the actual physical boundary of the state of Idaho for a particular reach of the Snake River must be determined on a case-by-case basis after consideration of available evidence.

In recognition of the potential conflict, confusion and difficulties attendant to establishing the precise physical location of the state’s boundary on the Snake River, the Idaho legislature has authorized certain limited reciprocal agreements with the states of Washington and Oregon. The reciprocal agreements authorized by the legislature extend only to the right to fish, hunt or trap in the waters or on the islands of the Snake River. See Idaho Code § 36-1001 *et seq.* The Idaho legislature has not otherwise acted to compromise its exclusive jurisdiction over other activities occurring on the Snake River within the territorial limits of the state. Consequently, persons or entities engaging in other activities on the Idaho side of the Snake River must comply with all applicable laws of the state of Idaho.

AUTHORITIES CONSIDERED:

I. *Constitutions*

United States Constitution, 10th Amendment.

Idaho Constitution, art. XVII, § 1.

2. *Federal Statutes*

The Organic Act of the Territory of Idaho, ch. 117, 12 Stat. 808.

Idaho Admission Bill, ch. 656, 26 Stat. 215.

3. *Idaho Statutes*

Idaho Code § 36-1001 *et seq.* (Supp. 1988).

4. *Federal Cases*

Alfred L. Snapp and Son, Inc. v. Puerto Rico, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995, 1003 (1982).

Arkansas v. Mississippi, 250 U.S. 39, 45, 39 S.Ct. 422, 424, 63 L.Ed. 832, 835 (1919).

Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Board, 709 F.2d 1250, 1251 (9th Cir. 1983).

Iowa v. Illinois, 147 U.S. 1, 8, 13 S.Ct. 239, 241, 37 L.Ed. 55, 57 (1893).

Louisiana v. Mississippi, 202 U.S. 1, 49, 26 S.Ct. 408, 421, 50 L.Ed. 913, 930 (1906).

Louisiana v. Mississippi, 466 U.S. 96, 99-101, 104 S.Ct. 1645, 1647-48, 80 L.Ed.2d 74, 78-79 (1984).

Scott v. Lattig, 227 U.S. 229, 243, 33 S.Ct. 242, 244, 57 L.Ed. 490, 496 (1913).

United States v. Brown, 552 F.2d 817, 820 (8th Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977).

Washington v. Oregon, 211 U.S. 127, 134, 29 S.Ct. 47, 48, 53 L.Ed. 118, 119 (1908), *aff'd on rehearing*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909).

5. *Other Cases*

Smith v. State, 64 Wash. 2d 323, 330, 391 P.2d 718, 723 (1964).

DATED this 5th day of December, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

STEVE MENDIVE
MERRILEE CALDWELL

Deputy Attorneys General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 88-8

TO: Mack W. Richardson, Jr., Director
Department of Law Enforcement
6050 Corporal Lane
Boise, Idaho 83704

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does Idaho Code § 23-1003 exempt the holder of a brew pub license from the requirement to have a wholesaler's license when the licensee sells beer to other retail outlets in addition to retailing at the brewery and at one remote location?

CONCLUSION:

Yes. Idaho Code § 23-1003 allows an Idaho licensed brewer who produces fewer than 30,000 barrels of beer annually to obtain a "brewer's retail beer license" or a "brewer's pub license." While the two licenses differ in the types of beer products allowed to be sold by a licensee, both licenses permit the licensee to "sell at retail" at his own brewery and at one remote location, while further permitting the licensee to "sell to retailers" without having to be licensed as a wholesaler.

Although the legislature failed to amend the Idaho Code § 23-1055(d) requirement that retailers purchase beer for resale only from licensed dealers or distributors, it is our opinion that an Idaho court would find this requirement repealed by implication to the extent it conflicts with § 23-1003(d) and (e) and the exemption granted to small breweries from other requirements of a wholesaler's license.

ANALYSIS:

I. *Construction of Idaho Code § 23-1003.*

In interpreting the provisions of § 23-1003, we are guided by the basic rule of statutory construction that we give effect to the legislature's intent. *Umphrey v. Sprinkel*, 682 P.2d 1247, 106 Idaho 700 (1983). In determining the application of a statute, the initial determination is whether its meaning is clear or ambiguous. If it is clear, one reads Idaho Code § 23-1003 establishes a three-tiered system requiring brewers, dealers and wholesalers of beer to obtain licenses from the Director of the Idaho Department of Law Enforcement. Section the legislative intent. *St. Benedict's Hospital v. County of Twin Falls*, 107 Idaho 143, 148, 686 P.2d 88, 93 (Ct. App. 1984).

Idaho Code § 23-1003 establishes a three-tiered system requiring brewers, dealers and wholesalers of beer to obtain licenses from the Director of the Idaho Department of Law Enforcement. Section 23-1003(a) provides:

Before any brewer shall manufacture, or any dealer or wholesaler import or sell, beer within the state of Idaho he shall apply to the director for a license so to do. . . .

In 1987, the legislature amended § 23-1003 by creating two new types of licenses available only to Idaho licensed brewers who produce fewer than 30,000 barrels of beer annually. 1987 Sess. Laws, ch. 22, added subsections (d) and (e) to provide as follows:

(d) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, upon payment of a retailer's annual license fee, may be issued a brewer's retail beer license for the retail sale of the products of his brewery at his licensed premise or one (1) remote retail location, or both. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, but need not be licensed as a wholesaler. [Codification errors led to the misspelling of the word "his" twice in subsection (d) in the Idaho Code 1988 Supplement. This opinion adheres to the correct spelling found in the Session Law.]

(e) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, may be issued a brewer's pub license. Upon payment of a retailer's annual license fee, and subject to the fees in sections 23-1015 and 23-1016, Idaho Code, a brewer may, at his licensed brewery, at one (1) remote retail location, or both, sell at retail the products of any brewery by the individual bottle, can or glass. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, on the products of his brewery, but need not be licensed as a wholesaler.

Both subsections distinguish “selling beer at retail” from “selling beer to a retailer.” This distinction is significant, because in each subsection, the sentence which limits places of sale to the licensee’s brewery, or one remote location, or both, applies only to “retail sale” (in subsection (d)) or, equivalently, to “sell at retail” (in subsection (e)).

Thus, from the clear wording of the 1987 amendments, it appears that § 23-1003(d) and (e) place limitations only upon *direct retail sales* by the brewer, prescribing the types of beer products that a brewer can directly sell at retail and defining where such direct retail sales can take place. These subsections do not place limitations upon the licensee’s ability to *sell to retailers*. They only require that the brewer pay wholesale taxes on all the beer products produced and sold, whether directly at retail or to retailers. Both subsections expressly relieve the brewer of the requirement of obtaining a wholesaler’s license.

The legislative history of § 23-1003(d) and (e) supports our interpretation that these subsections exempt brew pub license holders from the requirement of obtaining a wholesaler’s license as a precondition to selling brew to retailers. State Representative Phil Childers explained his understanding of this issue to the House Commerce, Industry and Tourism Committee:

Representative Childers told the Committee that this legislation would do away with the occupational restriction of the strict 3-tiered system. It would allow small local breweries to *brew, distribute and retail* their product, up to 30,000 barrels per year. Lifting this restriction could provide a boost to Idaho’s economy, and they would meet all local and state health, safety and tax requirements. (Emphasis added.)

House Commerce, Industry and Tourism Committee Minutes, February 3, 1987. *See also*, the January 27, 1987, minutes from the same committee:

Representative Childers said that this legislation would make allowances for the strict 3-tiered system that prevents a brewer from being a *distributor* or retailer. (Emphasis added.)

The legislative history of § 23-1003(d) and (e) thus indicates that the legislature intended to allow small breweries to “brew, distribute and retail” without having to obtain the usual wholesaler or retailer licenses or be bound by the restrictions of the three-tiered system that accompany those licenses. Reading the language of § 23-1003(d) and (e) to require small brewers to apply for a wholesaler’s license before distributing beer to retailers would be contrary to the clear statutory language and to the express legislative intent.

II. *Conflict With Idaho Code § 23-1055.*

A problem is presented by the fact that when the legislature enacted the legislation

creating the brewer's retail beer license and brewer's pub license, it did not amend § 23-1055(d), which provides that it shall be unlawful:

for any retailer licensed in this state to purchase beer for resale except from a dealer or wholesaler licensed in this state.

As § 23-1055(d) is written, a retailer who purchases beer from a brewer retail beer licensee or a brewer pub licensee pursuant to § 23-1003(d) or (e) violates § 23-1055(d) if the licensee has not also obtained a wholesaler's license.

The apparent conflict between § 23-1003(d) and (e) and § 23-1055(d) gives rise to the principle of repeal by implication, described by the Idaho Supreme Court in *Jordan v. Pearce*, 91 Idaho 687, 691, 429 P.2d 419, 423 (1967):

"Repeals by implication are not favored; but if inconsistency is found to exist between the earlier and the later enactments, such that the legislature could not have intended the two statutes to be contemporaneously operative, it will be implied that the legislature intended to repeal the earlier enactment." (Citations omitted.)

See also, Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986). Repeal by implication need not result in repeal of the entire earlier enactment. As the Idaho Supreme Court held in *Paullus v. Liedkie*, 92 Idaho 323, 326, 442 P.2d 733, 736 (1968), "a later enactment will impliedly repeal an earlier one only to the extent of any conflict between the two."

Despite the fact that repeals by implication are disfavored by Idaho courts, it is our opinion that a court would find § 23-1003(d) and (e) to be irreconcilable with § 23-1055(d) and deem § 23-1055(d) repealed by implication to the extent that the two statutes conflict. The language of § 23-1003(d) and (e) and the legislative history of those subsections indicate that the legislature intended to allow small breweries to obtain special permits for limited direct retail sale and unlimited distribution through sales to retailers, without having to obtain a wholesaler's license and without having to be bound by the wholesale license restrictions of the three-tiered system applicable to large breweries.

AUTHORITIES CONSIDERED:

Idaho Statutes:

Idaho Code § 23-1003.

Idaho Code § 23-1055.

Session Laws:

1987 Sess. Laws, ch. 22, p.29.

Idaho Cases:

DOE v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

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

Paullus v. Liedkie, 92 Idaho 323, 442 P.2d 733 (1968).

Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967).

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

DATED this 12th day of December, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

ERIC E. NELSON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 88-9

TO: Ray Winterowd, Administrator
Division of Family and Children's Services
Department of Health and Welfare
450 West State Street, 10th Floor
Boise, Idaho 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the Idaho Administrative Procedure Act apply to eighteen month permanency planning administrative hearings held pursuant to the Adoption Assistance and Child Welfare Act of 1980, 42 USC 675(5)?

CONCLUSION:

No. The Administrative Procedure Act, section 67-5207, Idaho Code, et seq., applies to contested cases. Eighteen month permanency planning dispositional hearings do not fall within the scope of "contested cases" as defined in the Administrative Procedure Act.

ANALYSIS:

Federal Public Law 96-272 was enacted by Congress in 1980 to address the national problem of "foster care drift," i.e., the serial placement of children in numerous foster homes without clear planning efforts directed toward a permanent resolution. The statute, called the Adoption Assistance and Child Welfare Act, makes available to the state additional federal funds for foster care services conditioned upon the meeting of certain criteria specified in the statute and promulgated regulations of the U.S. Department of Health and Human Services. Among other requirements, the state must insure that reviews of case plans be conducted for each child in the state's responsibility who is placed in out-of-home care and that dispositional hearings determining case plan permanency goals be held within eighteen months of such placement and periodically thereafter. 42 USC 475(5)(B) and (C).

Eighteen month permanency planning dispositional hearings shall determine "the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption or should because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis)...." 42 USC 475 (5)(C).

Procedural safeguards to be observed, as specified in the Act, concern parental rights relating to the removal of the child from the parental home, a change in the child's placement, and any determination affecting visitation privileges of parents. The federal agency, the Department of Health and Human Services, expressly declined to promulgate rules in this area. That department's response to public rule making comments on this issue are:

The Department has opted to give the States the responsibility for development of standards, procedures, and guidelines in implementing this program... .

The Department believes that the realities of program operations in dealing with State courts and other review bodies necessitates decision-making at the State agency level. Therefore, while strongly encouraging the use of (the) voluntary sector in the periodic and dispositional reviews, the Department does not believe it is in the best interest of the program to mandate specific requirements. We believe it is better left to the judgment of the State agencies, courts and legislatures to determine the method of review 48 Fed. Reg. 100, 23107 (May 23, 1983)

Internal policies of health and human services state the following:

States are free to determine the nature and method of procedural safeguards. These may include prior written notice, verification that notice was received, notification in the language of the recipient to assure understanding, right to review, comment and object to any intended change, right to be represented by counsel before the agency or courts, procedures to assure that objections of parents will be considered by the agency and can be appealed through agency review or hearing processes. Human Development Services, PI 82-06, dated June 3, 1982. Department of Health and Welfare Policy Memorandum 87-7. IDAPA 16.03.2851.

Idaho has implemented the stated procedural safeguards as a portion of a more comprehensive right to hearing process. Department of Health and Welfare Policy Memorandum 87-7, IDAPA 16.03.2851.

P.L. 96-272 also gives the state the option of having the dispositional hearings held by a family, juvenile, or other court of competent jurisdiction, or by an administrative body appointed or approved by the court. 42 USC 475(5)(C). Idaho has utilized a system or process of administrative hearings determined by the administrative director of the courts to be consistent with the requirements and intent of the federal law. Neither Idaho statutes nor court rules have a procedure for such appointment or approval. However, this court administrative sanction has been determined by federal auditors to be adequate court "approval" to meet the requirements of the statute.

Administrative hearings conducted pursuant to 42 USC 475(5)(C) involve individual children who are placed in the custody of the state under one or more of the following acts: Child Protective Act, sections 16-1601 et seq., Idaho Code; Youth Rehabilitation Act, sections 16-1801 et seq., Idaho Code; Hospitalization of Mentally Ill, sections 66-317 et seq., Idaho Code; and Treatment and Care of the Developmentally Disabled Act, sections 66-401 et seq., Idaho Code.

Each petition filed under these acts may result in a court order of custody placed in, or committed to, the Department of Health and Welfare for a finite period. Such custody or commitment orders can not be extended by administrative action alone. They can be extended only by court action. Under each of these acts, responsibility for development of case planning and for implementation of the plan rests with the Department of Health and Welfare. Sections 16-1610, 16-1623(h), 16-1814, 66-337, 66-413, Idaho Code. Termination of parental rights, necessary prior to any adoptive placement, is not possible under any of these acts, but must be done under the Termination Act. Sections 16-2001, et seq., Idaho Code. Such a termination of parental rights can be effected only by court order, not administrative action.

The Administrative Procedure Act, section 67-5201, et. seq., Idaho Code, applies to "contested cases." A "contested case," as statutorily defined, "means a proceeding,

including but not restricted to rate making and licensing, in which the *legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing.*" (Emphasis added.) Idaho Code section 67-5201(2).

The Department of Health and Welfare does not have the duty or authority under the Child Protection Act to enter an order affecting custody of the named child, but may determine where a child in the legal custody of the department will reside. The department has similar authority under the other enumerated acts. These exercises of authority may be denominated orders. While the department does have authority through its personnel to determine where a committed child shall live, it does not have authority, by itself, to determine the future status of that child as defined in 42 USC 475(5)(C). Such determination can only be made by a court after an opportunity for hearing.

Planning responsibilities and authority of the Department of Health and Welfare are limited to the grant of custody ordered by the court. By contrast, eighteen month permanency planning dispositional hearings necessitate planning without such limitation of time. Administrative hearing officers are not acting as the Department of Health and Welfare, or the department's agent, in making eighteen month dispositional hearing decisions. The federal statute makes it clear that such decisions must be made by the court or persons with court sanction, *not by the agency.*

Departmental regulations prescribe procedural safeguards consistent with the Administrative Procedure Act. Compare section 67-5209, Idaho Code, with IDAPA 16.03.2851 and Health and Welfare Policy Memorandum 87-7. The only significant difference between these hearing processes is that the rules of evidence apply in APA proceedings and do not apply to these administrative proceedings. Section 67-5210, Idaho Code.

Although all hearing officers are trained in hearing procedures, not all are attorneys. To require the hearing officers to apply the rules of evidence would be a heavy burden.

The determination that the Administrative Procedure Act does not apply to these hearings does not jeopardize the legal rights of the child or parent. A decision by a hearing officer will be necessarily limited by the court's existing order in the case. The decision of the hearing officer may be appealed to district court under IDAPA 16.03.2851, but the scope of the appeal is limited to review of the record. It is not a de novo proceeding. The appellate order can not exceed the limits of the existing court order. The APA would allow a review with the same limitations and no additional rights. However, under each act, either the child or the parent has an ability to request a review hearing to modify the court's order. It would always be to the advantage of the child or parent aggrieved by the administrative proceeding to seek a court modification rather than to appeal the more limited administrative proceeding order.

The administrative hearing process establishes only a permanent plan of action to be taken by the department. That case plan can only be put in effect if there is consistent action in a court proceeding.

SUMMARY:

The department is not required by either state or federal law to determine the legal rights, duties or privileges of a party relevant to their permanency planning future status. Such authority is not granted in Idaho Code and the relevant federal statute requires such determination be made by a family, juvenile, or other court of competent jurisdiction, or by an administrative body appointed or approved by the court. Therefore, eighteen month permanency planning dispositional hearings are not within the definition of “contested cases.” As the hearings do not involve “contested cases,” the Idaho Administrative Procedure Act does not apply.

AUTHORITIES CONSIDERED:

Federal Statutes:

P.O. 96-272, 42 USC b70 et seq.

Federal Regulations:

45 C.F.R. 1350.

48 F.R. 100, 23107 (May 23, 1983).

HHS, PI 82-06, 603. 1982.

Idaho Code:

Sections 16-1601 et seq.

Sections 16-1801 et seq.

Sections 66-317 et seq.

Sections 66-401 et seq.

Sections 67-5207 et seq.

Idaho Cases:

Idaho Falls Consolidated Hospitals, Inc. v. Board of County Commissioners of Bonneville County, 104 Idaho 628, 661 P.2d, 1227 (1983).

Hoppe v. Nichols, 100 Idaho 133, 594 P.2d 643 (1979).

DATED this 30th day of December, 1988.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

ROSEANNE HARDIN
Deputy Attorney General
Health and Welfare Division

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1988



Jim Jones
Attorney General
State of Idaho

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 4, 1988

Honorable Laird Noh
State Senator, District 23
Idaho State Senate

STATEHOUSE MAIL

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

Re: Water Delivery to Subdivisions Located Within Irrigation Entities

Dear Senator Noh:

You have asked for an opinion regarding Idaho Code § 31-1805 which sets forth certain requirements for water delivery in subdivisions located within irrigation districts, and Idaho Code § 31-1806 which provides for penalties for failure to comply with § 31-1805. The questions you present are:

- (1) Can county commissioners and planning and zoning commissioners be held liable both as a group and individually for failure to implement Idaho Code § 31-3805 and, hence, subject to the penalties of § 31-3306?
- (2) Can a county recorder become liable under these sections for accepting a plat for recording without compliance with the statute?
- (3) Must the requirements of Idaho Code § 42-108 be satisfied in order to complete a valid transfer of water right to satisfy the requirements of Idaho Code § 31-3805(1)?

Conclusions:

(1) and (2). A review of the language of §§ 31-3805 and 31-3806 as a whole and the Statement of Purpose of the enacting legislation of those statutes reveals that § 31-3805 is directed towards owners or sellers of property to be subdivided, and the sanctions of § 31-3806 are intended to be imposed against such owners and sellers for not taking one of the three options regarding water delivery to subdivisions afforded by the statute. Although county commissioners, planning and zoning commissioners and county recorders are charged with ensuring compliance with § 31-3805 before approving or recording a subdivision plat, the fact that a third option is provided to the subdivider in the event that a noncomplying subdivision plat is approved and recorded leads to the conclusion that the sanctions of § 31-3806 are not directed towards public officials involved in the subdivision approval and recording process.

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A zoning authority's approval of a subdivision plat in absence of compliance with § 31-3805 would, however, provide adequate basis to challenge the validity of that approval.

(3). Although § 31-3805(1) affords the owner of the land to be subdivided the opportunity to comply with the statute by having the water rights appurtenant to that land transferred from the land by the owner of the water rights, it does not provide any short cut methods of effecting such transfer. The owner of the water rights must comply with all legal requirements to make a valid transfer of those rights, including compliance with § 42-108.

Discussion:

Applicability of the Statutes: Idaho Code § 31-3805 sets forth certain requirements for the delivery of water to subdivisions located within an irrigation district, canal company or similar "irrigation entity." The statute provides that one of two actions must be taken concerning water delivery before a proposed subdivision will be approved:

[N]o subdivision plat will be accepted, approved and recorded unless:

(1) The water rights appurtenant to the lands in said subdivision which are within the irrigation entity will be transferred from said lands by the owner thereof; or

(2) The subdivider has provided for underground tile or other like satisfactory underground conduit to permit the delivery of water to those landowners within the subdivision who are also within the irrigation entity, with the following appropriate approvals:

(a) For proposed subdivisions within the incorporated limits of a city, the irrigation system must be approved by the city zoning authority and the city council with the advice of the irrigation entity charged with the delivery of water to said lands.

(b) For proposed subdivisions located outside incorporated cities but within one (1) mile outside the incorporated limits of any city, both city and county zoning authorities and the city council and county commissions must approve such irrigation system in accordance with section 50-1306, Idaho Code. In addition, the irrigation entity charged with the delivery of water to said lands must be advised regarding the irrigation system.

(c) For proposed subdivisions located in counties with a zoning ordinance, the delivery system must be approved by the appropriate county zoning authority, and the county commission with the advice of the irrigation entity charged with the delivery of water to said lands.

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(d) For proposed subdivisions located in counties without a zoning ordinance, such irrigation system must be approved by the irrigation entity charged with the delivery of water to said lands.

A third option is available to the subdivider, however, in the event that a subdivision plat is approved and recorded without compliance with either subsection (1) or (2). Section 31-3805(3) first states that if such an event occurs, the assessments of the irrigation entity will still be valid against landowners who have purchased subdivided lots, despite the fact that water cannot be delivered from the irrigation entity to their property. Subsection (3) then requires purchasers of subdivision lots to be advised that such assessments will occur:

(3) In the event that the provisions of either subsections (1) or (2) of this section have not been complied with, the assessments of the irrigation entity for operation, maintenance, construction, and other valid charges permitted by statute shall in no way be affected. However, any person, firm or corporation or any other person offering such lots for sale, or selling such lot shall, prior to the sale, advise the purchaser in writing as follows:

- (a) that water deliveries have not been provided; and
- (b) that the purchaser of the lot must remain subject to all assessments levied by the irrigation entity; and
- (c) that the individual purchaser shall be responsible to pay such legal assessments; and
- (d) that the assessments are a lien on the land within the irrigation entity; and
- (e) that the purchaser may at a future date petition the appropriate irrigation entity for exclusion from the irrigation district.

(4) A disclosure statement executed by the purchasers and duly acknowledged, containing the representations required in subsection (3) of this section, shall be obtained by the seller at the time of receipt of the earnest money from the purchaser, and affixed to the proposed sales contract and a copy thereof shall be forwarded to the appropriate irrigation entity.

Section 31-3806 provides a penalty which is directed against “any person, firm or corporation who shall omit, neglect, or refuse to do any act required by section 31-3805. . . .”

Standing alone, the term “any person, firm or corporation” does seem broad enough to include zoning authorities, county recorders, and any other public officials who might

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play a part in ensuring that the requirements of § 31-3805 are met before a proposed subdivision is approved or recorded. However, a reading of both statutes together, along with a consideration of the legislative intent as evidenced by the Statement of Purpose of the enacting legislation leads to the conclusion that such public officials are not subject to the penalty provisions of § 31-3806.

One indication that “any person, firm or corporation” was not meant to include zoning officials and county recorders is that the identical terms are used in § 31-3805(3) which allows “any person, firm or corporation or any other person offering such lots for sale” to provide notice to potential buyers of subdivision lots that they will be subject to the irrigation entity’s assessments and will not be delivered water. This method of compliance with § 31-3805 is available only to owners or sellers of subdivision lots. Thus, it can be argued that the penalty provisions of § 31-3806 were only meant to apply to “any person, firm or corporation” having the opportunity to take one of the three options offered by the statute.

This conclusion is bolstered by the legislative intent evidenced in the Statement of Purpose of 1976 House Bill No. 593 which created §§ 31-3805 and 31-3806:

RS 1141 provides three options in subdividing:

1. That irrigation water be transferred from the subdivision to other lands;
2. distribution of water to subdivision lots;
3. or a written statement to buyers that they will not receive water but will receive bills even though water is not delivered.

This Statement of Purpose again indicates that the statute is directed towards subdividers and provides three options to them in order to comply with § 31-3805 and avoid the penalty imposed by § 31-3806.

From the analysis above, it can be concluded that although county commissioners and planning and zoning commissioners are charged with ensuring compliance with §§ 31-3805(1) or 31-3805(2) before approving or recording a subdivision plat, the sanctions of § 31-3806 are not directed towards such public officials, but are rather directed at subdividers who fail to take one of the three options offered to them by § 31-3805.

Transfer of Water Rights.

Although § 31-3805(1) affords the owner of land to be subdivided the opportunity to comply with the statute by having the water rights appurtenant to that land transferred from the land by the owner of the water rights, it does not provide any specialized procedure for such a transfer. The owner of the water rights must therefore comply with

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already existing laws regarding transfers of water rights, such as § 42-108, to ensure that the transfer is legally valid.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

February 8, 1988

The Honorable Dean Haagenon
Idaho State Representative

STATEHOUSE MAIL

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

Dear Representative Haagenon:

Your letter of January 20, 1988, asks our opinion as to how the floating golf green proposed by Hagadone Hospitality on Lake Coeur d'Alene may be impacted by Idaho Code § 67-4304. That statute was enacted in 1927 and authorizes the governor "to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition." Specifically, you ask the following three questions:

- (1) What authority does the governor have under the 1927 statute and can the statute be used to affect the floating green proposal in any way?
- (2) In his comments the governor stated, "They (Hagadone Hospitality) need a water right to use the surface of that lake. . . .He [Hagadone] has yet to receive all the necessary approval." Can a valid argument be made that the water right of the people of the state of Idaho held in trust by the governor be used to control surface encroachments or imply authority over the lake bed?
- (3) Certain individuals have suggested that I have a conflict of interest because I have asked questions about the nature of this water right. Their allegations are

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premised upon the fact that a company in which I have an ownership interest, Contractors Northwest, has a construction contract with Coeur d'Alene Racing Limited in which Hagadone Hospitality is a partner. Does a conflict exist, and if so, what steps should I take in this matter?

In response to your inquiries, I have reviewed a memorandum from John W. Homan to R. Keith Higginson, dated January 4, 1987; the actual applications for, and permits issued by the state reclamation engineer; and newspaper articles from the Idaho Statesman dated June 24 and 25, 1927, concerning this matter. As outlined below, it is my conclusion that the statute in question was enacted to grant to the Governor an appropriative water right for the purpose of maintaining the water level in Lake Coeur d'Alene. The purpose in maintaining the water level was to prevent increases to or decreases from a certain level in the lake, thus disrupting beneficial uses expressly recognized by the Idaho Legislature in Idaho Code § 67-4304. The recognized beneficial uses were "scenic beauty, health, recreation, transportation and commercial purposes." As such, the water right granted to the Governor may only be used to prevent such interference with maintenance of the level of Lake Coeur d'Alene as would impact the recognized beneficial uses. Finally, it is my conclusion that you do not have a conflict of interest in this matter.

I.

My analysis begins with a review of the historical context within which the statute was passed. In the early 1920's, certain interests in the downriver states of Washington and Oregon conceived and began construction of the Columbia Basin project. A portion of the project contemplated utilizing Priest, Pend Oreille and Coeur d'Alene Lakes as large reservoirs for the storage of water. By turning the lakes into reservoirs, dramatic fluctuations in the lake levels would result. For example, the shoreline of Lake Pend Oreille would have fluctuated an additional 11 feet over its natural high and low water marks.

Idaho residents became greatly concerned that these fluctuations would destroy the scenic value of the shoreline. As stated at the time by Mr. E. F. Hitchner of Sandpoint, Idaho, who had travelled to Boise to testify about the proposal:

Our shoreline is one of our greatest scenic assets and when the timber is gone from our mountains we shall have to rely on our scenic attractions. If Montana thought the plan was bad for that part of its state affected, and Mr. Swenson thinks it bad for the other two lakes, we are very sure it is bad for us, and we have come down to protest.

Idaho Statesman, June 24, 1927.

Responding to the challenge, the Idaho Legislature passed the statute in question in record time:

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Idaho's legislature Monday approved inside three-quarters of an hour, a measure designed to lock up North Idaho's waters for Idaho's use. It was house bill No. 48, passed unanimously by the house and with only six dissenting votes in the senate.

Idaho Statesman, June 25, 1927. The governor signed the bill the same day.

Following the legislative action, then Governor Baldrige applied to the reclamation engineer for a water permit. The applications make clear that the purpose of the appropriation was to maintain the water surface elevation of each of the three lakes in question. In the application for Lake Coeur d'Alene it is stated:

[the] quantity of water claimed under this application is 1,000,000 acre-feet annually, the quantity necessary to protect and preserve Coeur d'Alene Lake for recreational purposes and that quantity necessary to provide for maintaining the lake water surface elevation at a point not higher than the natural high water level of the lake and at a point not lower in any season, than the lower water level of said Lake, the appropriation thus covering all of the water in the Lake below the natural low water elevation, and sufficient of the water flowing into said Lake to maintain it at its natural level.

In the subsequent proof of application of water to beneficial use, a deposition filed by the governor acknowledged the appropriative nature of the water right for the purposes contemplated by the statute. In response to the question, "State for what purpose water is used and describe place of use," he answered: "Purpose of use is preservation of said waters in said lake in its present condition for scenic beauty, health and recreation purposes necessary and desirable for all the inhabitants of the state." The supporting depositions of the state game warden and the state land commissioner both indicated that the purpose of the appropriation was to preserve the shoreline of Lake Coeur d'Alene.

In short, the historical record clearly indicates that the statutory duty and fiduciary responsibility of the governor is to prevent any junior appropriation or construction of works that would lead to fluctuations in the lake level of Coeur d'Alene Lake beyond the natural and ordinary low and high water marks and that would consequently interfere with the statutorily recognized beneficial uses.

II.

The next issue to be considered is whether an appropriative water right may be asserted by the holder as a method of seeking regulatory or management responsibility over surface waters of Lake Coeur d'Alene. The answer to this question requires a brief review of water rights law and then an application of that law to this specific water right. We conclude that because of the appropriative nature of the water right issued here, no such authority was intended by the Idaho Legislature.

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Before analyzing this issue, however, it is necessary to clarify a memorandum issued by Mr. John Homan. This one page document has been cited for the proposition that the statute in question confers upon the governor "an additional statutory and fiduciary responsibility as trustee for the citizens of Idaho to see that the trust water in Lake Coeur d'Alene is managed in accordance with Idaho law." Mr. Homan's analysis is as follows:

The water right is nonconsumptive and only contemplates maintaining the lake at a level above the natural low water stage. The purpose of the appropriation was to maintain a level of water in the lake to ensure the preservation of scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable to all the people of Idaho. Under I.C. § 67-4304, the water appropriated to maintain this constant lake level was deemed to be beneficial use of the water.

The Governor holds the water in trust for the benefit of the people of Idaho. The trust relationship imposes upon the Governor a fiduciary responsibility to manage the water according to the original terms of the trust. Thus, the Governor has a duty to manage 1,000,000 a.f. of water in Coeur d'Alene Lake so as to preserve the scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for the people of Idaho.

Finally, I.C. § 67-4304 creates an express trust which appoints the Governor as trustee over the water for the benefit of the people of Idaho. The Governor's appointment as trustee carries with it all the powers necessary to carry out his fiduciary duty to manage the water within the original terms of the trust.

To the extent that Mr. Homan's analysis might be construed to imply that the holder of the water right can seek to manage surface activities that do not affect the level of the lake, it would be in error. The appropriative nature of this water right is explicit in the statute, Idaho Code § 67-4304, which states:

The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend d'Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition. The preservation of said water in said lakes for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

As previously noted, the subsequent actions of the state in issuing the water right carried out the intent of the legislature.

An appropriative water right is not a typical type of real property right. It is not measured by a metes and bounds description as is most real property. An appropriative water right is defined by the following elements describing the right: priority, amount,

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season of use, purpose of use, point of diversion, place of use, source, annual volume of consumptive use, and the name of the claimant. *Olson v. Idaho Department of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188 (1983); Idaho Code § 42-1411(2) (Supp. 1987). An injury to a water right occurs by an impairment of or interference with one or more of the elements of the right. An example would be an upstream junior appropriator who diverts water needed to satisfy a downstream senior appropriator. The senior appropriator may obtain damage relief for past injury to his water right and injunctive relief for future threatened injury. *Nordick v. Sorenson*, 81 Idaho 117, 338 P.2d 766 (1959); *MacKinnon v. Black Pine Mining Co.*, 32 Idaho 228, 179 Pac. 951 (1919).

The assertion that an appropriative water right such as that authorized by Idaho Code § 67-4304 could be used to monopolize the development of future water rights, was expressly rejected by the Idaho Supreme Court in the Malad Canyon case. In that case, the Idaho Department of Parks had appropriated water under Idaho Code § 67-4307, a statute that parallels the language in the Coeur d'Alene appropriation statute. The Supreme Court addressed the fears of water users that the department's trustee status would serve to monopolize future water development:

I.C. § 67-4307, at issue herein, only authorizes the Department of Parks to appropriate, in trust for the public, certain clearly designated waters for nonconsumptive use. We are of the opinion that the legislature in the instant case has not adopted an insidious scheme in an attempt to monopolize the state's unappropriated waters or to condemn already appropriated waters.

State Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

The Malad Canyon case thus confirms our conclusion that the trustee of a minimum-stream or lake-level-maintenance water right has a fiduciary duty only to protect the stream or lake against junior appropriators who would interfere with the minimum streamflow or the lake level. In this case, no water right has been sought, nor could a case be reasonably made that an appropriative water right would be necessary, for the operation of the floating golf green. The Idaho Supreme Court has laid to rest the notion that the trustee has been granted expansive powers to regulate all future development of the resource.

Finally, a careful look at the nature of the assertion of authority in this instance demonstrates the unacceptable results of construing Idaho Code § 67-4304 broadly. If the governor had the authority to regulate non-appropriative uses of the lake, then dock-owners, marinas, log storage facilities, boaters, rafters, in short virtually any use of the lake, would come under his purview. It is quite obvious that this would lead to an unreasonable and duplicative result. The legislature has created the Lake Protection Act (Idaho Code § 58-142 et seq.) to regulate encroachments to surface waters, and the Safe Boating Act (Idaho Code § 67-7001 et seq.) to regulate other surface activities.

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Here, it is our opinion that the governor, as a senior appropriator, would only have a cause of action to prevent a junior appropriator from taking action that would cause fluctuation in the level of Lake Coeur d'Alene beyond the natural and ordinary low and high water marks. The governor would have no authority as trustee under Idaho Code § 67-4304 to use the water right of the people of the state of Idaho to regulate, manage or control surface encroachments that do not impair this right. Finally, since the present project will not influence the level of Lake Coeur d'Alene, the governor has no authority under Idaho Code § 67-4304 to oppose the project.

III.

Your third question was whether you had a conflict of interest in this matter. Idaho Code § 59-201, which arguably is the only statute that could be applicable here, provides:

Officers not to be interested in contracts. — Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

This office has previously issued two opinions, one guideline and several letters construing this section of the Code and article 7, § 10, of the Idaho Constitution which states:

Making profit from public money prohibited. — The making of profit, directly or indirectly, out of state, county, city, town, 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, and shall be punished as provided by law.

I am enclosing copies of these earlier opinions for your review.

In general, a conflict of interest means a situation where a public official exercises discretion either by affirmative act or omission to act in the course of his official duties which may directly or indirectly result in economic gain for himself or a member of his household. It does not include the general public interest a public official has by virtue of his profession, trade or occupation where his interest is the same as all others similarly engaged in the profession, trade or occupation. Further, a conflict does not exist where a public official acts upon a revenue measure, appropriation measure or any measure imposing a tax when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner. The latest Idaho case discussing this issue is *Manookian v. Blaine County*, 112 Idaho 697, 735 P.2d 1008 (1987).

I first note that there is no contract involved nor any economic gain resulting to you from any legislative action you could take in this matter. As indicated in your letter, there is no contract between any governmental entity, which you could influence as a

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legislator, and Coeur d'Alene Racing Limited. The distinguishing factor to focus on is who the contracting parties are. If you as a legislator were to contract with the legislature itself, for example, to print the session laws, the contract would be void, no compensation could be paid and criminal sanctions could apply. That is, however, not the case here. You are not interested in a contract made by you in your official capacity or made by the body of which you are a member. Secondly, your interest here is substantially similar to the interest of other members of the general public. There would be a much closer judgment call to be made if a proposal to repeal the pari-mutuel dog racing legislation was to be considered. I hope that this information is helpful. If I can be of further assistance, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

February 26, 1988

The Honorable Joe R. Williams
Idaho State Auditor
700 West State Street
Boise, Idaho 83720
STATEHOUSE MAIL

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

Re: Who has Authority to Sign Expense Vouchers and Claims for the State Senate

Dear Mr. Williams:

You have requested advice on whether the lieutenant governor, as president of the senate, or the president pro tempore has the authority to authorize expenditures pursuant to Idaho Code § 67-451(3). This section authorizes "the presiding officers of each house of the legislature" to make expenditures out of the legislative account.

The language of the statute raises the questions of (1) who is a "presiding officer" of the senate and (2) whether it is possible to have more than one presiding officer. Once the identity of the person or persons authorized in Idaho Code § 67-451(3) is resolved,

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the next issue is whether the statutory language is conclusive and constitutional. In other words, how does Idaho Code § 67-451(3), which authorizes the presiding officers of each house to expend funds, interact with both art. 4, § 9, of the Idaho Constitution, which permits the senate to determine its own officers and rules of proceeding, and art. 4, § 13, which names the lieutenant governor as the president of the senate?

CONCLUSION:

Article 4, § 3, of the Idaho Constitution designates the lieutenant governor as president of the senate which includes the duty to act as presiding officer of the senate. Therefore, for purposes of interpreting Idaho Code § 67-451(3), the lieutenant governor is the presiding officer of the senate. Both Idaho Code § 67-451(3) and the ordinary and natural meaning of “presiding officer” contemplate that only one person be authorized to sign vouchers and claims for the senate. Consequently, the lieutenant governor, as the presiding officer of the senate, must sign expense vouchers and claims pursuant to Idaho Code § 67-451(3).

Article 3, § 9, of the Idaho Constitution is a general provision that permits the senate to elect its officers. However, the senate may not choose its presiding officer since a more specific provision, art. 4, § 14, mandates that the lieutenant governor serve as president of the senate. The senate’s rules recognize the constitutional requirement providing that the lieutenant governor is the presiding officer of the senate.

Article 3, § 9, also gives the senate general authority to pass its own rules of proceeding for internal governance and order. This general section does not permit the senate to unilaterally override statutory or constitutional requirements regarding expenditure of funds. An internal senate rule cannot alter the statutory authority granted to the lieutenant governor in Idaho Code § 67-451(3) to sign expense vouchers and claims. The current senate rules acknowledge this by providing that statutory provisions prevail over the rules if those rules are in conflict with statutes.

Article 2, § 1, prohibits executive branch officers from performing legislative powers except as permitted by the constitution. The constitution makes the lieutenant governor the presiding officer of the senate and provides that he may vote in the event of a tie. As president of the senate, he may perform such administrative duties as are delegated to him by statute or rule of the senate.

In performing his duties under Idaho Code § 67-451(3), the lieutenant governor performs the ministerial function of signing vouchers and claims which are in proper form and authorized by the senate. The senate itself determines what senate expenditures are authorized.

ANALYSIS:

A. WHO IS THE “PRESIDING OFFICER” OF THE SENATE PURSUANT TO IDAHO CODE A 67-451(3)?

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Idaho Code § 67-451(3) provides in pertinent part:

(3) The *presiding officers of each house of the legislature are hereby authorized to make expenditures* out of the legislative account for any necessary expenses of the legislature and the legislative account is hereby perpetually appropriated for any necessary expenses of the legislature. (Emphasis added.)

“Presiding officer” is not defined in either the Idaho Constitution or the Idaho statutes. The Idaho Constitution or the Idaho statutes. The Idaho Constitution, however, states that “[t]he lieutenant governor shall be president of the senate. . . .” Article 4, § 13. It is clear that the founding fathers, in naming the lieutenant governor president of the senate, expected him to act as its presiding officer. This is evident from both the constitutional debates as well as the ordinary meaning of “president.” According to the debates, the lieutenant governor was to be paid only “when he is in actual service as *presiding officer* of the senate.” *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, Vol. 1, at 412 (emphasis added). Furthermore, the pay was the same as that for the speaker of the house, thus reinforcing the notion that the lieutenant governor, as president of the senate, is its presiding officer, just as the speaker is the presiding officer of the house.

Although the Idaho courts have never defined “president,” the Missouri Supreme Court has in *State ex inf. Danforth v. Cason*, 507 S.W.2d 405 (Mo. 1973). In *Cason*, the lieutenant governor, who under Missouri Constitution is the president of the senate, and the president pro tempore of the senate disagreed as to who should be the “presiding officer.” The Missouri senate passed an internal rule which stated “the president shall preside over the senate at the pleasure of the president pro tem who may assume the chair at will, or the president pro tem may designate some other senator to preside.” The president pro tem argued that the rule permitted him to preside over the senate to the exclusion of the lieutenant governor. The lieutenant governor replied that the Missouri Constitution, which specifically named the lieutenant governor as the senate president, controlled over the senate rule.

In interpreting the constitutional provision, the Missouri court relied on “the natural and ordinary meaning of words.” *Id.* at 408. After a lengthy discussion on the meaning of “president” and extensive quotations from various dictionaries, the Missouri court concluded that “the ordinary, usual and generally understood meaning of the term ‘president of the senate,’ when used in constitutional provisions assigning that role to the lieutenant governor, has been and is the presiding officer of that body.” *Id.* at 412. This analysis would also apply to an interpretation of the same words in the Idaho Constitution. *See*, Attorney General Opinion No. 75-88 (“Presiding Officer” of senate is the lieutenant governor.) Thus the lieutenant governor as president of the Idaho senate is at least a presiding officer of the senate. The question then becomes whether he is *the* presiding officer. In other words, the issue is whether Idaho Code § 67-451(3) permits two presiding officers of the senate, each of whom would be authorized to sign vouchers pursuant to Idaho Code § 67-451(3).

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Although it is possible to have many officers of the senate, logically only one person at a time can actually *preside*. This is inherent in the definition of “president pro tempore.” “Pro tempore” is Latin for “for the time being.” A president pro tem, therefore, is one who presides “temporarily or during the absence of a regularly elected official.” *Webster’s Third New International Dictionary* (1971). A 1984 Attorney General’s opinion also concluded that the constitutional language precluded more than one presiding officer at any one time. Attorney General Opinion No. 75-88, p.4. Because of the logical meaning of the term “presiding officer,” there is no semantic ambiguity in Idaho Code § 67-451 (3). Therefore, the person authorized to sign vouchers pursuant to the statute is the lieutenant governor.

B. DOES IDAHO CONSTITUTION ART. 3, § 9, WHICH GIVES THE SENATE THE RIGHT TO CHOOSE ITS OWN OFFICERS, OVERRIDE THE IDAHO CONSTITUTION ART. 4, § 13, WHICH MAKES THE LIEUTENANT GOVERNOR THE PRESIDING OFFICER OF THE SENATE?

Idaho Const. art. 3, § 9, provides in pertinent part:

Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments; . . .

Thus, once the identity of the “presiding officer” of the senate is determined, the question becomes whether art. 3, § 9, of the Idaho Constitution allows the senate to choose its presiding officer from among its members or whether the senate must accept the lieutenant governor as its president. The answer lies in how the senate’s authority to “choose its own officers” (art. 3, § 9) interacts with the requirement that the lieutenant governor be president of the senate (art. 4, § 13).

The senate cannot constitutionally remove the lieutenant governor from his position as “presiding officer” by resorting to art. 3, § 9, and choosing its own president. *Cason, supra*, is directly on point. In resolving the conflict between the lieutenant governor, who was relying on constitutional language similar to art. 4, § 13, and the president pro tempore, who was relying on a senate rule adopted pursuant to a constitutional provision similar to art. 3, § 9, the Missouri Court ruled in favor of the lieutenant governor. The court stated:

While [the Missouri Constitution] does confer on the senate the right to establish its own procedural rules, the section expressly limits that right by providing that such authority is subject to exceptions provided in the Constitution itself. One of those exceptions is established by Art. IV, § 10, which makes the lieutenant governor president and, as we interpret the language, presiding officer of that body. The effect of such provisions is to provide a constitutional exception to the right of the senate to specify by rule who shall be its presiding officer. The senate may elect its president pro

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tempore or otherwise provide for persons to preside in the absence of the president, but it may not by rule dilute the constitutional authority conferred on the lieutenant governor by Art. IV, § 10.

Cason, supra, at 413.

The court therefore held that any internal senate rule that conflicted with the constitutional provisions requiring the lieutenant governor to serve as president was unconstitutional. *Id.* at 412. The court also stated that the Missouri equivalent of art. 4, § 13, is a specific grant of authority that must prevail over the general grant of authority articulated in the Missouri equivalent of art. 3, § 9. *Id.* at 413. The Missouri court, however, held that there was no conflict between the two provisions. “When read together, they mean that the lieutenant governor, in his capacity as president of the senate, is the presiding officer of that body and has a constitutional right to so serve, but that in presiding he must conform to procedural rules of the senate authorized and adopted pursuant to (the internal rule-making provision of the Missouri Constitution) to govern the conduct of the senate’s business.” *Id.* at 413-414.

Therefore, the constitutional clause allowing the senate to choose its own officers must be read in conjunction with art. 4, § 13, and the senate may not choose its president.

C. DOES ART. 3, § 9, WHICH GIVES THE SENATE THE RIGHT TO DETERMINE ITS OWN RULES OF PROCEEDING, INCLUDE THE RIGHT TO PRESCRIBE PROCEDURES FOR PROCESSING EXPENSE VOUCHERS IN A MANNER CONTRARY TO IDAHO CODE § 67-451(3)?

Article 3, § 9, also grants the senate authority to adopt its own rules of proceeding. Those rules are necessary for the orderly proceedings of the senate, but are not at all substantively relevant for its business. Gooch, *Legal Nature of Legislative Rules of Procedure*, 12 Va.L.Rev. 527, 528-529 (1926).

However, the power of those rules is not absolute. “It is, of course, impliedly limited by the general nature of American government and more especially by the principle of constitutional limitation. . . . [The legislature] may not by its rule ignore constitutional restraints or violate fundamental rights.” *Id.* at 531. This principle has been expanded upon in other cases. Specifically, the United States Supreme Court has stated “the constitution empowers each house to determine its rules of proceeding. It may not by its rules ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.” *United States v. Ballin*, 144 U.S. 1, 5 (1891).

The role of the rules of procedure in relation to the constitution and statutes is more clearly defined in *Heiskell v. City of Baltimore*, 4 A. 116, 118 (1897), wherein the court stated:

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“Rules of procedure” are rules made by any legislative body as to the mode and manner of conducting the business of the body. They are intended for the orderly and proper disposition of the matters before it. Thus, what committees, and upon what subjects they shall be appointed; what shall be the daily order in which the business shall be taken up; in what order certain motions shall be received and acted upon; and many other kindred matters, — are proper subjects of the rules of procedure. These rules operate nowhere except in the legislative hall that adopts them; and in this country, where what is called in England standing orders are almost unknown, expire at the end of the session. But these rules of procedure never contravene the statute or common law of the land. *When the constitution of the United States gave to each house of congress, and the constitution of the state of Maryland the right to each house of the general assembly, to determine its rules of proceeding, it was never held for a moment that such a right included the power to change any existing statute or common law.* (Emphasis added.)

The Idaho Supreme Court discussed the “rules of proceeding” provisions of Idaho Const. art. 3, § 9, in *Keenan v. Price*, 68 Idaho 423, 437, 195 P.2d 62 (1948). The court noted that:

The power of the legislative houses to make their own rules is for orderly procedure and the expedition and disposition of their business.

This construction of the “rules of proceeding” language is consistent with the construction given to such language in the cases discussed above.

An earlier case, *Cohn v. Kingsley*, 5 Idaho 416, 49 Pac. 985 (1897) also indicated that art. 3, § 9, of the constitution must be read in conjunction with the other provisions of the constitution. *Id.* at 436. Article 3, § 9, does give the senate the authority to make its own internal rules of proceeding. But that authority cannot be extended to nullify a statute when the statute is appropriately and constitutionally enacted. To the extent that a rule dealing with processing expense vouchers conflicts with a statutory provision, that rule must fall and the statute must prevail.

D. THE SENATE’S OWN RULES SUPPORT THE VIEW THAT THERE IS ONLY ONE PRESIDING OFFICER WHO IS THE PRESIDENT OF THE SENATE AND THAT STATUTORY PROVISIONS TAKE PRECEDENCE OVER RULES TO THE EXTENT OF ANY CONFLICT.

The senate’s own rules contemplate that the president, and not the president pro tem, is the one who actually presides over the senate floor. Rule 1 of the senate’s rules is labelled “Presiding Officer.” The rule clearly contemplates only one “presiding officer” at a time. According to the rule, the president pro tempore performs the functions and duties of the president “in his (the president’s) absence or inability to serve.”

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In Rule 1(c), the president is specifically directed to conduct the business of the senate: “The President shall take the Chair every day promptly at the hour to which the senate stands adjourned, shall call the senate to order, and a quorum being present shall proceed to the business of the senate.” Rule 5 states that: “The President of the senate has general control and direction of the senate Floor, while *presiding*, and shall preserve order and decorum therein” (Emphasis added.) Furthermore, Rule 47(B) specifically states that the laws or constitutional provisions prevail over the rules of proceeding.

Therefore, by the senate’s own rules, the president of the senate is the presiding officer, and by statute, the presiding officer — in the case of the senate, the lieutenant governor — is the only one with authority to sign vouchers required by Idaho Code § 67-451(3).

E. CONSTITUTIONAL ROLE OF LIEUTENANT GOVERNOR AS PRESIDENT OF THE SENATE.

Although the lieutenant governor is the president of the senate, his legislative duties are constitutionally circumscribed. Because he is a member of the executive branch (Idaho Const. art. 4, § 1) and not the legislative branch, he may not exercise legislative powers except as expressly permitted by the Idaho Constitution. *See*, Idaho Const. art. 2, § 1; *State ex inf. Danforth v. Cason, supra* at 419. To do otherwise would violate the Separation of Powers clause which states:

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.

There is no separation of powers violation when the lieutenant governor presides over the senate or performs administrative functions assigned to him as president of the senate because those functions are provided for by Idaho Const. art. 4, § 13. However, as presiding officer of the senate, the lieutenant governor may not assign bills to committees or establish rules regarding points of order because those are legislative functions and the senate rules would govern such functions. *See, Danforth v. Cason, supra* at 417-19. In that case, the Missouri Supreme Court held that senate rules giving the president pro tem the authority to assign bills to committee and to act as parliamentarian were constitutional. Because those powers were not specifically given to the lieutenant governor in the constitution, the lieutenant governor must defer to the senate rules.

The courts will defer to the rules of the senate as long as those rules do not infringe on either the statutes or the constitution. For example, in *Beitelspacher v. Risch*, 105 Idaho 605, 671 P.2d 1068 (1983), the Idaho Supreme Court specifically refused to interpret

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rules governing the parliamentary procedure in the legislature. According to the supreme court:

The Senate, as part of the legislature, is an independent branch of government. Our state Constitution, art. 2, § 1, divides our government into three distinct departments and forbids members of one department, for example the judiciary, from exercising powers properly belonging to one of the other departments, such as the legislature. Art. 3, § 9, of our Constitution gives each house of the legislature the power to determine its own rules of proceeding. Thus, this power is specifically reserved to the legislative branch by the Constitution, and we cannot interfere with that power. The interpretation of internal procedural rules of the Senate is for the Senate.

105 Idaho at 606.

In other words, the judiciary, as well as the executive branch, must defer to the legislature in the interpretation of its own internal rules. *See, Malone v. Meekins*, 650 P.2d 351 (Alaska 1981) (Alaska judiciary refused to rule on the merits in a claim by an ousted speaker of the house that his removal and the election of his successor violated the house internal rules); *see also, Keenan v. Price, supra* at 437 (failure to comply with its internal rules does not invalidate legislative acts), *but see, Cohn v. Kingsley, supra* (legislature must affirmatively comply with constitutional mandates in enacting valid laws).

Just as the judiciary must defer to the legislature when it is acting in its legislative capacity, so too must the lieutenant governor as a member of the executive branch. He must defer to the rules of the senate and may only assume legislative functions that are clearly delineated in the Idaho Constitution or administrative functions assigned to him as president of the senate.

F. STATUTORY ROLE OF PRESIDING OFFICERS IN APPROVING VOUCHERS AND CLAIMS.

Idaho Code § 67-451(3) provides that the signature of a presiding officer on a voucher or claim is “sufficient authority for the state auditor to pay the same.” This provision does not allow the executive branch of government (state auditor) to perform as extensive a review of expenditures as would be allowable when reviewing executive branch expenditures. The provision acknowledges the fact that the legislature is an independent branch of government with a authority to determine how it will expend its funds. Idaho Code § 67-451(3) designates the presiding officers of the house and senate as the persons to carry out the will of the legislative branch in processing vouchers and claims.

We view this role of the presiding officers in approving vouchers and claims to be a ministerial rather than a discretionary function. The presiding officers should review

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vouchers and claims to see if they are authorized, in proper form, and properly chargeable against the appropriation. However, discretionary authority to determine what the appropriation should be used for lies with the house and senate respectively. It is up to each house to determine what expenses are authorized and the procedure used to authorize the expenses. Thus, the statute contemplates that the presiding officers' roles in approving vouchers and claims are to give effect to the will of the house and senate respectively.

Sincerely,

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

March 31, 1988

Charles A. Smyser
Connolly and Smyser
134 S. 5th
Boise, ID 83702

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

Re: Beer Licenses

Dear Mr. Smyser:

This letter is in response to your inquiry dated March 4, 1988. The issue is whether a municipality may require prospective tavern keepers to obtain the consent of adjacent residents before a liquor license is issued. Although the city has the authority to limit both the number and location of licenses, requiring the written consent of resident owners as a condition precedent to obtaining a license conflicts with both federal and state law.

Regulating the sale of alcoholic beverages is a valid exercise of the police power under art. 12, § 2, of the Idaho Constitution. *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 572 P.2d 865 (1977). Accordingly, the proposed limitation of the maximum number of outstanding licenses that may be issued is a valid exercise of the city's police power. In

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Garland v. Talbott, 72 Idaho 125, 237 P.2d 1067 (1951), the Idaho Supreme Court specifically recognized that “[a] limitation of the number of licenses which will be issued for the sale of intoxicants within a municipality or within a given area is not of itself prohibitory, and is recognized as a legitimate regulation tending to promote public health, safety and welfare within the police power.” *Id.* at 130.

The issue, therefore, is not whether the limitation of the number of licenses is constitutional, but whether the condition precedent of obtaining the adjacent residents’ consent is a valid exercise of the police power. Because the proposed ordinance limits the *location* (inherently a zoning process), and not the *individuals* (inherently a licensing process), the ordinance must conform with the Local Planning Act of 1975, which requires certain procedures be followed in order to protect the rights of individuals subject to the zoning process. Idaho Code §§ 67-6501 - 6536. The Local Planning Act specifically authorizes only the city council or a specifically defined commission to decide matters of zoning. Idaho Code § 67-6504. The Idaho Supreme Court held that this authorization of decision-making powers is exclusive. In other words, no other procedure is permitted. *Gumprecht v. City of Coeur d’Alene*, 104 Idaho 615, 651 P.2d 1214 (1983). The issue in *Gumprecht* was whether local zoning ordinances could be amended or enacted through an initiative election. *Id.* at 615. According to the Idaho Supreme Court, because the statutory law mandated that only the city or its established commission could decide zoning matters, any other procedure granting that decision-making authority to others, such as the initiative process in *Gumprecht*, would violate the law. *Gumprecht* contemplated a district wide initiative, whereas the proposed ordinance allows a much smaller segment of the population - 75% of owners or occupants within five hundred feet of the premises - to make that decision. Accordingly, just as the *Gumprecht* procedure violated state law, so too would the consent requirement in the proposed ordinance.

Gumprecht was decided on state statutory grounds, but the proposed ordinance would also violate the Due Process Clause of the U.S. Constitution. The United States Supreme Court case on point is *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928). In *Roberge, supra*, the issue was whether a land owner’s due process rights were violated by a zoning ordinance which required consent of the owners of two-thirds of the property within four hundred feet of the proposed building. *Id.* at 120. The United States Supreme Court held that such a “delegation of power . . . is repugnant to the due process clause of the fourteenth amendment.” *Id.* at 122. The Court noted that the ordinance did not provide for any review procedure: once the homeowners refused to consent, the land owner had no recourse. Because the homeowners were not bound by any official duty, they were free to withhold their consent for any capricious or selfish reason. The possibility for such capricious action is clearly repugnant to the due process clause of the fourteenth amendment.

The proposed legislation fits squarely into the *Roberge* facts. In both cases the ordinances in question require a percentage of the residents to give written consent. Just

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as that requirement of written consent violated the due process clause in *Roberge*, so does the requirement in the proposed legislation for written consent also violate the due process clause. The *Roberge* case, although decided in 1928, was upheld in 1976 by *City of East Lake v. Forrest City Enterprises, Inc.*, 426 U.S. 668, 677-78, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). In *East Lake* the United States Supreme Court affirmed *Roberge* stating that the delegation of the decision-making authority to a narrow segment of the community violates the due process clause.

The requirement of written consent would also violate general Idaho law. According to the Idaho Supreme Court, "it is the general rule that where authority to license and regulate a business is granted by the legislature to a municipality, the regulations adopted must not be unreasonable, unjust, or unduly oppressive." *Barth v. De Coursey*, 69 Idaho 469, 207 P.2d 1165 (1949). The supreme court has also stated that ordinances must have "a reasonable connection to a goal legitimately related to the police power." *Cooper v. Board of Ada County Commissioners*, 96 Idaho 656, 658, 534 P.2d 1096 (1975). As long as the ordinance bears "a rational relationship to permissible state objectives," the ordinance is valid. *Id.* at 659. When a narrow segment of the population decides whether a liquor license should issue, the decision is inherently fraught with arbitrary and capricious bias. A requirement of consent does not promote any general public welfare or health. Rather, the consent requirement vitiates any impartial, reasoned opinion a neutral city council may have. Such a delegation of decision-making power to a narrow segment of the population clearly would violate the due process clause, as well as being inconsistent with Idaho law.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 5, 1988

Lawrence J. Carson II
Executive Director
Public Employee Retirement System
STATEHOUSE MAIL

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

Re: Use of Directed Commissions and "Soft Dollars" to Pay Investment Expenses

Dear Mr. Carson:

This is in response to your request for advice regarding use of directed commissions and "soft dollars" to pay investment expenses of PERSI. You have asked for our review of a letter opinion of the Oregon Attorney General's Office on the subject. You have also asked us to address the use of investment expense funds to pay for travel, hotel and meal expenses incurred in investment activities such as investment research seminars.

SUMMARY

General trust principles permit trustees to utilize trust assets to pay for reasonable and necessary investment expenses for the effective investment of trust assets. Such expenses would include travel and related expenses which are reasonable and necessary for the effective investment of assets. However, the allocation of expenses between administrative and investment accounts is governed by Idaho Code § 59-1331.

That section creates an administrative account to pay administrative expenses of PERSI. The balance of funds are paid to the funding agent(s) "for investment and payment of investment expenses under its contract with the board." Thus, the statute contemplates that investment expenses will be paid from investment funds and administrative expenses will be paid from the administrative account.

The allocation of expenses between investment and administrative expenses should be considered carefully on a case-by-case basis. If, for example, an expense which the legislature considered to be within the administrative appropriation were paid from the investment account, the effect would be the payment of administrative expenditures beyond what was intended by the legislature. Accordingly, care must be taken in allocation of expenses consistent with legislative intent.

The Oregon Attorney General's Letter Opinion

Pursuant to your request, I have reviewed the January 8, 1988 letter opinion of the Oregon Attorney General's Office dealing with use of "soft dollars" to pay for

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investment expenses in general and travel expenses in particular. The opinion concludes that as a matter of general trust law, trustees may charge the trust for reasonable and necessary expenses incurred in the discharge of trust duties. These would include payment of travel expenses to attend investment seminars if it can be shown that the expenses are reasonable and necessary to the management of the investments of the trust.

The opinion also discusses the provisions of section 28(e) of the Securities and Exchange Act of 1934. That section was enacted to provide a “safe harbor” to those directing the brokerage who have investment discretion with respect to the transaction, and where the broker provides brokerage and research. It states in pertinent part:

[a] person who exercises investment discretion with respect to an account shall not be deemed to have acted unlawfully or to have breached a fiduciary duty under state or federal law solely by reason of his having caused an account to pay more than the lowest available commission if that person determines in good faith that the amount of the commission is reasonable in relation to the value of the brokerage and research services provided with respect to either the particular transaction or all the accounts as to which the person exercises investment discretion.

Regulations interpreting that section do not provide a “safe harbor” for payment of travel expenses. The regulations provide in pertinent part at 17 CFR 241.23170:

Finally, where a money manager is invited to attend a research seminar or similar program, the cost of that seminar may be paid for with commission dollars. Non-research aspects of the trip, however, such as travel costs, hotel, meal and entertainment expenses, are not within the safe harbor.

...

Section 28(e), however, cannot by its terms be violated. Thus, the fact that sponsor directed brokerage transactions are outside its protections does not necessarily mean that such transactions are illegal.

Most pension plans are governed principally by the provisions of ERISA. However, state retirement plans such as PERSI or the Oregon plan are not subject to ERISA. The permissible uses of investment funds by state plans are governed by state law. The Oregon letter opinion thus considered general trust law principles. It concluded that general trust law principles permit trustees to pay for reasonable and necessary investment expenses for the effective investment of trust assets. If travel is reasonable and necessary for effective investment under the particular circumstances, the Oregon opinion concludes that such travel expenses can be paid for with trust assets.

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The Oregon letter opinion recommended that the "safe harbor" provisions be considered for general guidance. It recommended that expenses which go beyond the "safe harbor" provisions be considered on a case-by-case basis to determine if they are reasonable and necessary for the effective investment of trust assets. I concur in this advice. However, as discussed below, investment expenses in Idaho must also be paid in a manner consistent with Idaho Code § 59-1331.

The Idaho Statutes

Idaho Code § 59-1331 provides in pertinent part:

All moneys received from employers by the board on their account and on account of members shall be initially deposited in the clearing account. On or before the fifteenth of each month not more than one-twelfth (1/12) of the amount appropriated by the legislature to the board for that fiscal year shall be transferred to the administration account. Immediately after each transfer from the clearing account to the administration account, the remaining balance in the clearing account shall be forwarded to the funding agent for investment and payment of investment expenses under its contract with the board.

...

All moneys payable to the funding agent are hereby perpetually appropriated to the board, and shall not be included in its departmental budget. All moneys transferred to the administration account shall be available to the board for the payment of administrative expenses only to the extent so appropriated by the legislature.

The section provides that funds appropriated by the legislature to the administration account are available for payment of administrative expenses only to the extent so appropriated. It also provides that funds forwarded to the funding agent are available for "investment and payment of investment expenses under its contract with the board."

Pursuant to the statute, it is not pertinent whether funds are characterized as "soft dollars," rebates of directed commissions, or other investment funds held by the funding agent. None of these categories of investment funds or commission rights deriving therefrom are part of the administration account. Rather, they are funds or rights held by the funding agent for its investments and payment of investment expenses pursuant to its contract with the board. Accordingly, for purposes of the Idaho statute, both investment funds and commission rights are held by the funding agent and may be used to pay "investment expenses under its contract with the board."

The retirement statutes do not provide definitions of administrative expense or investment expense. Clearly, any item of projected expense included within the detailed administrative budget submitted to the legislature should not be charged as an

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investment expense. To do so would have the effect of increasing the amount available for payment of “administrative expenses” as contemplated by the legislature. On the other hand, items which are clearly investment expense such as manager evaluation services, which have always been charged as investment expense, should continue to be charged as investment expense. Between these extremes, there exists a substantial grey area.

For example, a trip to Mellon Bank to improve custodial functions would appear to be a reasonable and necessary investment expense properly chargeable as such. Likewise, a trip for an investment seminar would appear to be a proper investment expense, provided proposed expenses of this type had not been included in the detailed administrative budget submitted to the legislature. On the other hand, a trip to a convention of pension administrators would appear to be more properly chargeable as administrative expense.

I would recommend adoption of guidelines for payment of investment expenses to provide operational uniformity in the charging of expenses. Otherwise, PERSI could be subjected to criticism that it is playing games with its administrative budget. It would seem that it is not as important precisely where the lines are drawn as that there be consistency in the process. With defined administrative versus investment expenses, the legislature can appropriate administrative funds in a manner which it considers proper. If investment versus administrative expenses are ill-defined, the legislature would have inadequate budget control and PERSI could be subject to substantial criticism.

Sincerely,

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

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 20, 1988

Board of County Commissioners
and Prosecuting Attorney
Caribou County
County Courthouse
Soda Springs, ID 83276

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

**Re: Bankruptcy Upon the Claim of a County for Property Taxes Incurred by the
Bankrupt Owner**

Gentlemen:

You have asked for an opinion regarding the effect of two orders entered in a bankruptcy proceeding upon the claim of the county for property taxes incurred by the bankrupt owner. Because of the complexity of the particular court action and the lack of access to the various litigation developments in the proceeding and the file itself we can only provide you with legal guidelines as to the possible effect of the bankruptcy court orders.

QUESTIONS:

1. What effect does a pending bankruptcy proceeding have on a county's power to make a delinquency entry against property in bankruptcy for nonpayment of property taxes?
2. What is the effect on property tax liens of an authorized sale of the property by a United States Bankruptcy Court free of the liens?
3. What is the effect of an order of a United States Bankruptcy Court that fails to transfer a tax lien on property in bankruptcy to the proceeds from the property sold free of the lien?

CONCLUSIONS:

1. While a bankruptcy proceeding is pending, a county is prohibited from making a delinquency entry against property in bankruptcy until the bankruptcy "stay" is lifted and any delinquency entry made contrary to the stay is void.
2. A county loses its tax liens on property sold free of the liens in a United States Bankruptcy proceeding.

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3. A county's tax liens do not transfer to the proceeds from the sale of property sold in a United States Bankruptcy proceeding free of the liens.

ANALYSIS:

A large industrial property owner in a county filed Chapter 11, reorganization bankruptcy, in October, 1985. At the end of the year it paid the ad valorem property taxes attributable to the portion of the year prior to the bankruptcy filing, but not afterwards. Nor did it pay its 1986 property taxes. Delinquency entries were made against the real property as required by Idaho Code §§ 63-1109 and 63-1114. Previously, Idaho property tax liens would have arisen January 1st of the year in which the tax levies were made, even though the levies occurred later in the year. Idaho Code §§ 63-102 and 63-104. (This opinion assumes all personal property which was taxed was in the county on January 1, 1985.) In Idaho, ad valorem real property tax liens are superior to all other liens, even those liens that predate it. *Trust & Savings Bank v. Werner*, 36 Idaho 601, 606; 215 P. 458 (1923), cert. den. 264 U.S. 594 (1924); *Bosworth v. Anderson*, 47 Idaho 697, 707; 280 P. 227 (1929). Idaho courts likely would treat personal property liens the same way. Cf. *Scottish Amer. M. Company, Ltd. v. Minidoka County*, 47 Idaho 33, 39; 272 P. 498 (1928); *Metropolitan Life Ins. Co. v. Twin Falls Co.*, 56 Idaho 93, 98 (1935). See, *Op. Idaho Att'y Gen.*, 85-1 (1985).

In mid-1987 the owners sold its property with the authorization of a U.S. Bankruptcy Court "free and clear" of all liens attached to the property. The order authorizing this sale had followed a court hearing presumably preceded by notice of the proposed sale to the county, as well as to all of the owner's creditors. The county did not object to the proposal or participate in the court hearing.

In ordering the sale, the bankruptcy court order provided initially that all liens on the property were transferred to the proceeds of the sale, but more specific provisions stated that the liens would only transfer to the proceeds as provided in the "approved agreement" of sale as modified by terms worked out in the court hearing and referred to in the order as Exhibit B. Presumably, the county tax liens were excluded from attaching to the proceeds of the sale. (We did not have access to the "approved agreement" or Exhibit B.) A subsequent amended court order identified those liens that transferred to the proceeds. The county's tax liens are not mentioned in the amended order. No appeal was taken from either order.

The questions posed in your opinion request deal with the effect these bankruptcy proceedings had on the county's tax claims and lien rights.

A. DELINQUENCY ENTRIES

When a landowner fails to pay ad valorem property taxes, the county tax collector is required to make an "entry of delinquency" of the taxes on the real property assessment roll, which entry has "the force and effect of a sale to the Tax Collector" of the property

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in trust for the county. Idaho Code § 63-1109. “The county is deemed to be the purchaser of the property described in such delinquency entry” Idaho Code § 63-1114. Unless the landowner “redeems” his property by paying the outstanding taxes, interest and penalties within three years from the date of the entry, the property will be deeded over to the county. Idaho Code § 63-1126A.

Bankruptcy law prohibits county officials from making delinquency entries and issuing tax deeds while property of a landowner is in bankruptcy proceedings. The filing of a bankruptcy triggers the “automatic stay” which prohibits, among other acts:

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a)(3). As the legislative history makes clear, the “purpose of this provision is to prevent dismemberment of the estate.” H.R. Report No. 595, 95th Cong., 1st Sess. 341 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 56 (1978). Virtually all the property owned by a corporation in bankruptcy is “property of the estate.” 11 U.S.C. § 541. As a rule, “acts taken in violation of the automatic stay are ... deemed void and without effect....” *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). See, Colliers on Bankruptcy 362.04(3)(15th Ed. 1979). The stay remains in effect until the stay is lifted by court order against the property or when the property is no longer part of the bankruptcy estate, such as by confirmation of a plan of reorganization. 11 U.S.C. §§ 362(c)(1) and (d); 1141(c).

This analysis assumes that ad valorem property tax liens can even arise against property in bankruptcy. The automatic stay also prohibits “any act to create ... any lien against property of the estate.” 11 U.S.C. § 362(a)(4). One court has held this provision prevents ad valorem tax liens from arising under a property tax scheme similar to Idaho’s. *In re Carlisle Court, Inc.*, 36 B.R. 209, 214 (Bkrtcy. D.C. 1983).

However, a United States Court of Appeals has recognized under an exception to the stay in §§ 362(b)(3) and 546(b) of the bankruptcy code the superiority of property tax claims of Maryland and Baltimore that arose after the bankruptcy filing. *Md. Nat. Bank v. Mayor & City Council of Baltimore*, 723 F.2d 1138, 1143 (4th Cir. 1983). The court pointed out that under Maryland law, which is like Idaho’s, no bona fide purchaser could ever take the property ahead of ad valorem real property tax liens:

One regularly buys real estate knowing that purchase entails an obligation to meet future real estate taxes when they become due and payable and that perfection of the rights to collect automatically occurs on the first day of July in each and every year.

723 F.2d at 1142-1143, fn. 10. The court characterized the arising of the tax lien as “perfection under § 546(b)” of the bankruptcy code. 723 F.2d at 1144.

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Unlike its treatment of real property tax liens, though, the Maryland court held that liens for personal property taxes involving “moveable personality” did not arise in bankruptcy because “there is no assurance that the taxing authorities will indeed have the power to tax the given item of personal property in any given year.” 723 F.2d at 1144, fn. 14. The different treatment for personal property has been followed by other courts. *See, In re Electric City, Inc.*, 43 B.R. 336 343 (Bkrcty. W.D. Wash. 1984) (“In the case of personal property, ... taxation and the lien thereon are dependent on its existence and identification.” — unlike real estate); *In re Cumming Market, Inc.*, 53 B.R. 224 (Bkrcty. Vt. 1985) (when lien was created it did not relate back to a time before bankruptcy); *In re Continental Corp.*, 1 B.R. 680, 688 (Bkrcty. N.D. Ill. 1979) (Michigan personal property tax liens could not “attach until ... long after the date of bankruptcy”).

This is an area that remains unsettled, but it is assumed for the purposes of this opinion that the county acquired liens against the property after the filing of the bankruptcy.

B. LOSS OF PROPERTY TAX LIEN

United States bankruptcy laws specifically authorize the sale “other than in the ordinary course of business” of property in bankruptcy free and clear of any liens upon the property, property tax liens included. 11 U.S.C. § 363(b) and (f). This authority has long been held to be constitutional. *Van Huffel v. Harkelrode*, 284 U.S. 225, 228-229, 52 S.Ct. 115, 76 L.Ed. 256 (1931); *Gardner v. New Jersey*, 329 U.S. 565, 578, 67 S.Ct. 467, 91 L.Ed. 504 (1947). Current bankruptcy law grants the power to make such extraordinary sales of bankruptcy property to the trustee, but in the reorganization form of bankruptcy, Chapter 11, the trustee’s powers are typically performed by the owner of the property, the “debtor in possession.” 11 U.S.C. §§ 363(b); 1107(a). Although the bankruptcy code does not require it, in practice and recently by rule, an extraordinary sale of bankruptcy property is subjected to court approval. Bankruptcy Rule 6004(c).

Further, notice of the proposed sale and an opportunity to object must be given to all of those with an interest in the property. 11 U.S.C. § 363(b)(1). Such creditors can, on request, prevent a sale unless they are granted “adequate protection” of their interest in the property. 11 U.S.C. § 363(e). *See, United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983) (“Tax collectors also enjoy the generally applicable right under § 363(e) to adequate protection for property subject to their liens”).

Typically, “adequate protection” will be satisfied if the claim on the property “attaches to the proceeds of the sale.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 345 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 56 (1978). “Adequate protection” can also mean granting the lien holder a replacement lien on other property of the bankrupt landowner, including property not otherwise subject to ad valorem property taxes. 11 U.S.C. § 361(2).

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If timely and adequate notice of the intended property sale is not given to a lienholder, that lienholder can void the sale or assert a lien against the proceeds from the sale. *Ray v. Norseworthy*, 90 U.S. (23 Wall.) 128, 135, 136-137, 23 L.Ed. 116 (1875) ("Secured creditors ... must have due opportunity to defend their interests and consequently must be properly notified"); *Factors, Etc., Ins. Co. v. Murphy*, 111 U.S. 738, 742-743, 4 S.Ct. 679, 28 L.Ed. 582 (1884); *M.R.R. Traders, Inc. v. Cave Atlantique, Inc.*, 788 F.2d 816, 818 (1st Cir. 1986); *In re Fernwood Markets*, 73 B.R. 616, 620-621 (Bkrtcy. E.D. Pa. 1987). See also, *New York v. New York, N.H. & H.R.R. Co.*, 344 U.S. 293, 296, 73 S.Ct. 299, 97 L.Ed. 333 (1953) (holding that a city not given notice of the claims deadline did not lose its property tax liens against railroad property, despite a court decree transferring property "to the newly organized company free from the city's liens"). In this case, a review of the court proceedings on file has to be made to determine if the county was given timely notice of the proposed sale.

Additionally, a proposed sale of property in bankruptcy out of the "ordinary course of business" free of liens on the property must meet one of five conditions: (1) nonbankruptcy law permits a sale free of a lien; (2) the lienholder consents; (3) the sale price of the property is greater than the value of the liens; (4) the lien claimed is in a bona fide dispute; or (5) the lienholder could be compelled to accept a money satisfaction of its claim in a court proceeding. 11 U.S.C. § 363(f).

For an Idaho county trying to protect its liens and timely objecting to a proposed sale, only condition (3) is likely to provide an avenue allowing the sale to take place over its objection because under bankruptcy law, unlike Idaho law, ad valorem tax liens can become valueless. A bankruptcy court has the authority to grant a lien senior to all liens already attached to the property in bankruptcy to a lender who advances new financing for a business. 11 U.S.C. § 364(l) (after notice and an opportunity to be heard). Hence, where such a senior lien had been granted, one court held that junior liens on the property had no "value" and the objection of their lienholders was immaterial because the value of the property was only enough to satisfy senior liens against it and the senior lienholders agreed to the sale. *In re Beker Industries, Corp.*, 63 B.R. 474-476 (Bkrtcy. S.D.N.Y. 1986).

Finally, in reorganization bankruptcy, Chapter 11, courts are requiring "a sound business purpose" before permitting an extraordinary sale of property. *Stephens Industries, Inc. v. McClung*, 798 F.2d 386, 390 (6th Cir. 1986); *In re Industrial Valley Refrig. & Air Cond. Supplies*, 77 B.R. 15, 17 (Bkrtcy. E.D. Pa. 1987).

Still, even though the conditions for allowing a sale are not met, if the requisite notice to lienholders is given, bankruptcy law treats an extraordinary sale of property to a "good faith" purchaser as final and free of liens previously attached to the property. 11 U.S.C. § 363(m). See, *In re Magwood*, 785 F.2d 1077, 1080 (D.C. Cir. 1986); *In re K.C. Mach. & Tool Co.*, 816 F.2d 238, 242 (6th Cir. 1987); *In re Exennium*, 715 F.2d 1401 (9th Cir. 1983); *In re Bel Air Associates, Ltd.*, 706 F.2d 301, 304-305 (10th Cir. 1983). Hence, in *In re Mach. & Tool Co.*, *supra*, the City of Detroit lost its property tax liens on the sold property:

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Whether the abandonment order was valid or not, the property has been sold to a good faith purchaser. The City of Detroit did not move to stay the sale pending appeal. That being so, the City's argument that the liens continued to attach to the property is mooted and the liens now attach solely to the proceeds of the sale.

816 F.2d at 242. Only in extraordinary circumstances will a confirmed property sale in bankruptcy be set aside. *Matter of Chung King, Inc.*, 753 F.2d 547, 549-550 ("fraud, mistake or a like infirmity" — "mistake" equated with lack of notice); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149-150 (3rd Cir. 1986) (sale "not moot" in case where purchaser was not acting in good faith — purchaser had offered lucrative employment to seller's principal officer).

C. ORDER TRANSFERRING LIENS

The initial court order authorizing the sale of property stated that all liens on the property were "transferring, affixing and attaching to the net proceeds of the transfer in the order of their priority as determined by the court, ..." (Order, p.4.) That paragraph is referred to by the amending order as the "seventh decretal paragraph," and was substantially amended to provide that only certain liens on the property transferred to the proceeds. (Amending Order, pp.2-3.) Both orders referred to the "approved agreement" which allocated proceeds from the sale beyond those proceeds awarded to the senior lienholder (identified as CBBL). (Order, p.4.) Another paragraph, identified by the amended order as the "Ninth decretal paragraph" in the original order, seemingly determines the allocation and payment of the remaining proceeds to lienholders "in accordance with the approved agreement" subject to the order of the court. (Amending Order, p.4.) A review of the "approved agreement" is essential to determine how the county's tax liens were treated.

Moreover, a determination must be made of whether the motion and notice initiating the hearing to allow the sale of the assets and transfer of the liens to the proceeds, dated June 16, 1987, was served upon the county. If the motion and notice adequately informed the county that its property tax liens were not protected by the proposed sale, then the order and the amending order are res judicata — final — as to the county at this stage. See, *In re Penn-Dixie Industries, Inc.*, 32 B.R. 173, 177 (Bkrtcy. S.D.N.Y. 1983), where counties lost their tax liens on property of a reorganized debtor by not objecting to the reorganization plan or the order confirming it which terminated their liens, and relegated the counties' claims to a six year payout period.

If the notice to the county of the proposed order was inadequate, the county may have recourse under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the basis of "mistake, inadvertence, surprise or excusable neglect," and Bankruptcy Rule 9024 which incorporates the federal rule. *Matter of Whitney-Forbes, Inc.*, 770 F.2d 692, 696 (7th Cir. 1985). The grounds for setting aside the orders must be asserted within one year of their entry, Rule 60, F.R.C.P.

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Finally, even if the county has lost its ad valorem property tax liens, it is not without a remedy. The property tax claims for 1986 and part of 1987 are all post-petition bankruptcy claims — and are entitled to administrative expense treatment out of the unsecured assets of the bankrupt debtor. 11 U.S.C. §§ 507(a)(1); 503(b)(1)(B)(i). *See, Matter of Hirsch-Franklin, Enterprises, Inc.*, 63 B.R. 864, 859-871 (Bkrtcy. M.D. Ga. 1986) (property taxes); *In re Carlisle Court, Inc.*, *supra*. *See also, United States v. Friendship College, Inc.*, 737 F.2d 430 (8th Cir. 1984) (employment taxes). In addition to a claim for taxes, the counties can claim as an administrative expense any penalties related to those taxes — but not interest. 11 U.S.C. § 503(b)(1)(C). *In re Mark Anthony Const., Inc.*, 78 B.R. 260 (9th Cir. BAP. 1987). Further, before a debtor can obtain confirmation of a plan or reorganization in Chapter 11, the plan must provide for payment of all administrative expense claims, upon the “effective date of the plan.” 11 U.S.C. § 1129(a)(9)(A). The plan will also have to provide for payment of the county’s pre-bankruptcy 1985 tax claim. 11 U.S.C. §§ 1129(a)(9)(B); 507(a)(7)(B). The county will have to monitor any proposed plan before it is confirmed and the county may have to move to have its post-petition tax claim allowed as required by 11 U.S.C. § 503(b).

CONCLUSION:

The delinquency entries made against the property in bankruptcy are without effect and the county cannot issue itself a tax deed for the nonpayment of the bankrupt landowner’s property taxes. Further, it is likely, if the county was given adequate notice of the intended sale of the property subject to its tax liens, that the sale freed the sold property of the county’s liens. The current owner of that property is not saddled with tax liens that may have been incurred while its seller owned the property. If the county was given adequate notice of the bankrupt landowner’s intention to transfer only certain liens, not including the county’s, to the proceeds of the property sale then the county’s ad valorem property tax liens did not transfer to those proceeds. However, if the county did not receive adequate notice of the effect of the sale on its liens, or if the notice misled the county by stating that the liens on the property would transfer to the proceeds, then the county may have recourse to attack and have modified the allocation of liens on the proceeds. Finally, even though the county may have lost its liens, or may never have acquired liens on the property following the bankruptcy, it still has a claim as for administrative expenses for the property taxes incurred by the landowner while operating under bankruptcy. Payment of those post-bankruptcy taxes must be provided for in any plan of reorganization.

Respectfully,

JOHN W. RUEBELMANN
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 1, 1988

Nancy Michael, Registrar
Public Works Contractors State License Board
500 South Tenth Street

Statehouse Mail

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

Re: Public Works Contractors' Licensing Requirements

Dear Ms. Michael:

This letter is in response to your inquiry concerning whether Idaho's public works contractors licensing requirements apply to Indian-owned firms that seek to work on highway construction projects administered by the Idaho Transportation Department (ITD). According to the letter from ITD that accompanied your inquiry, some Indian-owned firms have questioned whether they need to comply with state licensing requirements before they can qualify to contract for highway public works projects located partially or wholly within the exterior boundaries of Indian reservations.

The ITD letter indicated that funding for a particular highway project may be provided by state funds, federal funds, or federal funds with state-match funds. The letter also indicated that the Indian owners of the firms interested in participating in ITD administered public works projects may be members of and reside on the particular reservation where a project is being constructed, may reside elsewhere in the state or may reside out of state. The facts provided to us do not indicate that either the federal government or any tribal government has placed any special conditions or restrictions on ITD's administration of public works projects carried on within the exterior boundaries of an Indian reservation.

As you know, Idaho Code § 54-1902 makes it unlawful for any person to enter into a contract with the state, or political subdivisions of the state, for the construction of any public works without first obtaining the appropriate public works contractors license unless such person is specifically exempted from complying with the provisions of the Public Works Contractors Act ("the Act"). The licensing requirements apply to subcontractors as well as primary contractors. The Act defines "person" as "any individual, firm, copartnership, corporation, association or other organization, or any combination thereof acting as a unit." See Idaho Code § 54-1901. In defining what is meant by the term "person" the Act does not make any distinction based upon ethnic status. Accordingly, an Indian-owned firm comes within the Act's definition of "person."

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The only persons exempted from the Act's licensing requirements are authorized representatives of specified governmental entities, court officials, public utilities, and licensed architects, civil engineers and land surveyors when acting solely in their professional capacity. *See* Idaho Code § 54-1903. Thus, the plain language of the statute requires an Indian-owned firm to comply with the Act's licensing requirements. This is the case regardless of whether the firm is owned by a member of the Indian tribe within whose reservation a project is being constructed. Similarly, absent special conditions or restrictions imposed by the federal government on the use of federal funds, consideration of the source of funding for a particular project does not change the conclusion that the Act's licensing requirement applies to Indian-owned firms.

In addition to the specific exemptions excepting certain persons from complying with the Act, there are also several types of public works projects that are not subject to the Act. *See generally* Idaho Code § 54-1903. Any person contracting for such projects would not have to comply with the licensing requirements. One such exemption relevant to your inquiry applies to "any construction, alteration, improvement or repair carried on within the limits and boundaries of any site or reservation, the title to which rests in the federal government." *See* Idaho Code § 54-1903(f).

The statutory language describing the scope of the exemption set forth in Idaho Code § 54-1903(f) appears to be ambiguous as to whether the exemption applies to all public works projects carried out within the exterior boundaries of a federal reservation or site regardless of who holds title to the land on which a project is located, or only those projects within such reservations or sites that are located on lands where the federal government holds title. Where such statutory ambiguities exist, there are rules of statutory construction which a court will apply to resolve the ambiguity.

Generally, in interpreting exceptions to the operation or application of a law, courts will strictly or narrowly construe a statutory exception. *See* 73 Am. Jur. 2d Statutes § 313 (1974). This is particularly true where the statute to which the exception or exemption applies is one that promotes the public welfare. Another rule of construction relevant to resolving the ambiguity created by Idaho Code § 54-1903(f) is that a legislature is presumed to have included every part of a statutory provision for a reason. *See* 73 Am. Jur. 2d Statutes § 250 (1974). Accordingly, significance and effect should be given to every phrase, if possible. Consistent with this rule, courts ordinarily will not construe one part of a statute in a manner which renders another part of no effect.

Taken together, these rules of statutory construction support the conclusion that the exception in Idaho Code § 54-1903(f) should apply only to those public works projects that are carried out within the exterior boundaries of sites or reservations and are located on lands to which the federal government holds title. To conclude otherwise would give no effect to the last phrase included in the statutory exemption and would result in an unnecessarily broad exception to the requirements of the Act. Moreover, the phrase "the title to which rests in the federal government" can only be read to modify or qualify what is meant by "site or reservation." *See id.* at § 229. While we believe that the likely

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judicial construction of this statutory provision would limit the exemption to only those lands to which the federal government holds title, we recognize that a statutory ambiguity exists and that it would be helpful if the Idaho legislature would clarify the intended scope of this exemption.

In summary, Indian-owned firms are subject to the public works licensing requirements imposed by the Idaho Public Works Contractors Act the same as any other person. Based upon the exemption set forth in Idaho Code § 54-1903(f), a public works contractors license is not required for public works projects performed on lands within an Indian reservation that are held in trust by the United States for an Indian tribe or a member of an Indian tribe, or where title to the land is otherwise held by the federal government. We do not believe a court would construe this statutory exemption to apply to public works projects carried out on lands within a federal reservation or site where title is not held by the federal government. The exemption applies to both Indian- and non-Indian-owned firms. This guideline does not consider issues of preemption that may arise by virtue of special conditions or limitations imposed by the federal government or any tribal government on highway public works activities that are carried out within the exterior boundaries of a particular reservation.

Should you have any questions concerning our response to your inquiry, please let me know.

Sincerely,

MERRILEE CALDWELL
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 18, 1988

The Honorable Jerry Thorne
Idaho State Senator
P.O. Box 447
Nampa, ID 83653

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

Dear Senator Thorne:

This letter is written in response to your request for an opinion regarding the jurisdiction of the magistrate division of the district court under the Youth Rehabilitation Act.

You first ask whether the court can order disposition other than by ordering custody to the department of health and welfare. A court becomes involved in a juvenile case when a pleading, known as a petition, seeks to have a child brought within the purview of the Youth Rehabilitation Act. Subsequent to the filing of a petition under the Youth Rehabilitation Act and where the juvenile admits to the allegations contained in the petition, the court may make an informal adjustment or a formal disposition of the petition.

Informal adjustment is outlined in Idaho Code § 16-1807A(2). The options available to the court include, but are not limited to:

- (a) Reprimand of the juvenile;
- (b) Informal supervision with the probation department;
- (c) Community service work;
- (d) Restitution to the victim;
- (e) Participation in a community-based diversion program.

The court also has the option of proceeding by way of formal disposition, in which case the court conducts a disposition hearing and orders an investigative report as prescribed by Idaho Code § 16-1814:

16-1814. DISPOSITIONAL HEARING. — (1) Upon the entry of an order finding the child is within the purview of the act, the court shall then hold a disposition hearing in the manner prescribed by the Idaho juvenile rules to determine the treatment, rehabilitation or detention sentence that will best serve the needs of the child and the public interest.

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Prior to the entry of an order disposing of the case, other than an order of discharge or dismissal, the court shall request and shall receive a report containing the results of an inquiry into the home environment, past history, rehabilitation or prevention of out of home placement services provided, social, physical and mental condition of the child. The court shall not consider or review the report prior to the entry of an order of adjudication. After receiving the investigative report, the court then has numerous options at its disposal under Idaho Code § 16-1814:

1. Place the child on formal probation for a period not to exceed one (1) year from the date of the order;
2. Commit the child to a period of detention, pursuant to this act, for a period of time not to exceed thirty (30) days for each unlawful or criminal act the child is found to have committed, or where the child has been adjudicated as an habitual status offender. No child who is found to come within the purview of the act for the commission of a status offense shall be sentenced to detention in a jail facility unless such an adjudication has been made that the child is an habitual status offender;
3. Commit the child to detention and suspend the sentence on specific probationary conditions;
4. Commit the child to the legal custody of the department of health and welfare for an indeterminate period of time not to exceed his or her nineteenth birthday, unless extended jurisdiction is necessary to complete the rehabilitation goals of the department, for appropriate disposition. When such commitment order is entered, the child shall be transported to the *facility designated by the department* by the sheriff of the county where the child resides or is committed, or by appointed agent. Any order of commitment to the department shall be subject to review at least once every six (6) months. When committing a child to the department the court shall at once forward to the department a certified copy of the order of commitment;
5. Order the proceeding expanded or altered to include consideration of the cause pursuant to chapter 16, title 16, Idaho Code.
6. Order the case and all documents and records connected therein transferred to the magistrate division of the district court for the county where the child and/or parents reside if different than the county where the child was charged and found to have committed the unlawful or criminal act, for the entry of a dispositional order;
7. Order medical care or psychological examination and treatment for the child;
8. Order such other terms, conditions, care or treatment as appears to the court will best serve the interests of the child and the community.

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(2) Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order the child or his parents or both to pay restitution to any victim who suffers an economic loss as a result of the child's conduct in accordance with the standards and requirements of sections 19-5304 and 19-5305, Idaho Code. (Emphasis added.)

The court thus has several options in ordering disposition of an adjudicated youth, many of which do not involve custody by the department of health and welfare. However, youths who have had prior adjudications or who have committed multiple offenses may require residential treatment. This will normally necessitate commitment to the department of health and welfare, as there are few adequate community-based programs for juveniles in Idaho.

Your second question is whether the court can order the Idaho Department of Health and Welfare to provide a particular care and treatment program that the court determines to be in the best interests of the child. Idaho Code § 16-1801 explains the intent behind the Youth Rehabilitation Act: "the policy of the state of Idaho is hereby declared to be . . . to consider the needs and best interests of the child." Idaho Code § 16-1814 implements this policy by allowing *the court* to proceed to the disposition of the case by any of the prescribed methods listed in the statute.

One such prescribed method is to commit the child to the legal custody of the department of health and welfare. Once the child is committed to the custody of the department, it is *the department* that has the responsibility to designate the facility where a youth is to be placed. The judge may make recommendations to the department as to appropriate placement, treatment and care. However, these recommendations are not binding on the department. Rules promulgated by the department of health and welfare appear to be consistent with the above interpretation. Assigned social workers attempt to follow court recommendations when possible.

Once committed to the custody of the department of health and welfare:

[T]he department shall keep under continued study a child in its control and shall retain him under supervision and control so long as, in its judgment, such control is necessary for the protection of the public. . . The department shall discharge a person as soon as, in its opinion, there is reasonable probability that he can be given full liberty without danger to the public.

Idaho Code § 16-1826. Thus, discharge of a child from custody by the department of health and welfare requires notification in writing to the court as well as to the parent. No court approval is required for discharge. If a new offense is committed by the youth subsequent to a disposition under the Youth Rehabilitation Act, the judge may again act in accordance with § 16-1814.

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In summary, once a judge determines that residential treatment is necessary, the only practical placement at this time is usually the department of health and welfare. Once custody of the child is given to the department, the judge may recommend, but not order, the department to follow placement, treatment or supervisory programs.

I hope you will find this information helpful.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

August 23, 1988

Major General Darrell V. Manning
Adjutant General
Idaho National Guard
P.O. Box 45
Boise, Idaho 83707

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

Re: Tort Liability Coverage for MWR Employees and Voluntary Service Persons

Dear General Manning:

I have been requested to respond to your August 1, 1988, letter in which you request a review of the question whether certain personnel and volunteers employed by the Idaho National Guard in morale, welfare and recreation (MWR) activities would be considered to be state "employees" as provided by Idaho Code § 6-902(4).

As stated in your letter these employees and uncompensated volunteers while working for MWR activities having a federal instrumentality status are considered federal employees for work related injuries and tort claims only. (5 U.S.C. 2105(c), 10 U.S.C. 9779(b) and 10 U.S.C. 1588.) The question of whether the Idaho Tort Claims Act would provide coverage for these employees and volunteers arises when such personnel are not under federal instrumentality status.

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This question and situation is analogous to the one raised in 1975 regarding whether state employees and citizen volunteers for 4-H projects would come under the Idaho State Comprehensive Liability Policy. The conclusion in Attorney General Opinion 57-75 was that such volunteers would be covered under the state's then insurance policy. The same analysis utilized in the 1975 opinion would apply today. The key for a finding of coverage is whether the activities performed by the volunteers are a public service for the state. The attorney general found that the 4-H clubs and farm bureaus, which were established under federal legislation (Smith Lever Act), served a public purpose.

It is clear that the volunteers under the supervision of the military division perform their services on behalf of the State of Idaho. They serve a public purpose to enhance the morale of those in service to the state and country. As employees and volunteers of the military division they would be within the protected classification and the definition contained in Idaho Code § 6-902(4), which states:

An employee means an officer, employee, . . . and . . . persons acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether with or without compensation, . . .

I am of the opinion that employees and volunteers of the military division, when acting under the direct supervision of the military personnel, would come within the protections provided by the Idaho Tort Claims Act.

Additionally, it appears that the state insurance fund will provide workers compensation insurance coverage for authorized volunteers in public employment. The manager of the state insurance fund announced on August 15, 1988, that the fund would cover certain volunteers if the department head or public employer provided substitute payroll information.

Very truly yours,

Michael R. Jones
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 7, 1988

The Honorable Lydia Justice Edwards
Idaho State Treasurer
Statehouse

Statehouse Mail

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

Re: Processing Deposits of Co-mingled Public School Funds and Treasury Funds

Dear Ms. Edwards:

This is in response to your question regarding procedures for handling deposits which must be credited in part to the public school fund and in part to the state treasury. The department of lands receives many payments which must be credited in part to the public school fund and in part to the state treasury. The deposits are made to the treasurer's suspense account. However, you do not know until the following day what portion belongs to the public school fund and what portion belongs to the state treasury. Therefore, it is your practice to initially deposit funds to your suspense account. You transfer the public school fund share to the public school fund as soon as you know what portion should be transferred. You have asked if the procedure is legal in light of Idaho Const. art. 9, § 3, which provides in pertinent part:

No part of this [public school] fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. [Emphasis added.]

In *Moon v. State Board of Land Commissioners*, 111 Idaho 389, 724 P.2d 125 (1986), the Idaho Supreme Court explained that the state manages two separate trusts for the benefit of the public schools:

The State of Idaho manages two separate trusts for the benefit of public schools. The Public School Fund is the res of the first trust, which is invested by the Investment Board. I.C. § 57-715 et seq. The State's constitutional responsibilities regarding this trust and the protection of the money corpus are found in ID. CONST. art. 9, § 3. The second trust consists of school endowment lands managed by the Land Board. The endowment lands themselves form the res of this trust and the State's constitutional duties regarding this trust and protection of the land corpus is found in ID. CONST. art. 9, § 8.

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111 Idaho at 391.

As the court points out, the fund referred to in Idaho Const. art. 9, § 3, is the fund invested by the investment board. Idaho Const. art. 9, § 3, provides that that fund cannot be transferred to any other fund. However, Idaho Const. art. 9, § 3, does not address the handling of funds not yet received by the investment board. Thus, those provisions are not applicable to the funds you receive from the department of lands which are not yet deposited to the public school fund.

Idaho Const. art. 9, § 8, contains the only constitutional provision relating to the transfer of endowment land proceeds to endowment funds such as the public school fund. It provides in pertinent part:

. . .the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants. . . [Emphasis added.]

Thus, the constitution requires endowment land proceeds to be faithfully applied. However, it does not specify the procedure to be used in doing so. The procedure you follow does result in the faithful application of the proceeds as required by the constitution. Your use of the suspense account until you know where the funds should be transferred is in accordance with Idaho Code § 67-1209. That section provides:

Any state officer, department, board or institution having or receiving money in trust or for safe-keeping pending its final disposition or distribution shall deposit the same in the state treasury in a special suspense account from which it may be withdrawn or distributed under rules and regulations promulgated by the state auditor.

In summary, the procedure you use to handle deposits which must be credited in part to the public school fund and in part to the state treasury meets constitutional and statutory requirements noted above. The deposits are initially made to the treasurer's suspense account as required by Idaho Code § 67-1209. As soon as you know what portion, if any, of the suspense account belongs to the public school fund, you transfer that portion to the public school fund. The procedure results in "the faithful application of the proceeds" from endowment lands to the public school fund.

Sincerely,

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

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

November 2, 1988

Thelma R. Kolodziej
Clerk of the District Court
Gem County
415 E. Main Street
Emmett, ID 83617

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

Re: Drug Enforcement Donation Account

Dear Ms. Kolodziej:

Your recent letter requests our advice as to how a county should handle and maintain drug enforcement forfeiture monies "donated" to the Gem County Sheriff as a result of a court ordered forfeiture. The outside auditors for Gem County have assisted the sheriff in establishing a checking account for the money under the control of the sheriff and separate from normal county budget and finance procedure. Specifically, you ask:

Does the Sheriff keep these monies in a separate regular checking account for his office, or should this go into the Auditor's office and be designated as "Drug Enforcement Donation Trust Account" under Idaho Code § 37-2744, to be used at the discretion of the Sheriff?

Based upon our analysis of Idaho Code title 31, chapters 15, 16, 21, 22 and 23, title 18, chapter 57, and § 37-2744, a county sheriff cannot keep drug forfeiture funds in a separate regular checking account but must treat and account for such money as public money as any other county officer would be obligated to do.

Idaho Code § 37-2744 provides for the forfeiture of property used in aid of a violation of the Uniform Controlled Substances Act. The director of the Idaho Department of Law Enforcement can recommend and the court can order such "property forfeited in whole or in part, to a city or county the law enforcement agency of which participated in the events leading to the seizure of the property. Upon such order, the city or county shall use the property for drug enforcement purposes consistent with this act." Idaho Code § 37-2744(e)(4). This statute clearly states that any money or other property forfeited belongs to the city or county for use in their drug enforcement efforts.

Unless otherwise provided by law, all money received by or paid to a county officer must be turned over to the custody of the county treasurer until disbursed according to law. Idaho Code §§ 31-2101 and 31-2119. The county auditor is obligated to keep current accounts of all such public money. Idaho Code § 31-2304.

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Drug forfeiture money received as a result of the procedure set forth in § 37-2744 clearly meets the definition of money which must be turned over to the county treasurer. Nothing in this section or in title 31, chapter 22, covering the duties of the county sheriff, allows the establishment of an account outside the usual procedures required in county budget and finance law.

Public money is defined as *all* money belonging to the state or any city, county or district and *all* money received by any officer of the state or of any city, county or district. Idaho Code § 18-5703. This definition includes all money coming into the hands of any officer in his official capacity or because of his position. *State v. Bell*, 84 Idaho 153, 370 P.2d 508 (1962). Failure of a county officer to properly account for and promptly pay over public money when required constitutes misuse of public money and could result in criminal action against the officer. Idaho Code §§ 18-5701, 18-5702 and 18-5704.

Thus, when a county sheriff receives drug forfeiture money from the courts or through a grant from the drug donation enforcement account established by § 57-816, he must turn the funds over to the county treasurer for custody. Idaho Code § 31-2119. The county auditor, as you suggest, is then obligated to establish a dedicated account to be used at the discretion of the county but within the limitations imposed by Idaho Code § 37-2744. At no time should the sheriff maintain a separate account for these funds. Also, it is important that these funds be taken into consideration and addressed in the regular county budget and finance process. Title 31, chapters 15 and 16.

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

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

November 2, 1988

Honorable Jerry Callen
State Representative, District 25
427-A W. 500 So.
Jerome, ID 83338

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

Re: Legislator/Public School District Employee Conflict of Interest

Dear Representative Callen:

In light of a recent New Mexico Attorney General Opinion, Opinion No. 88-20 (March 7, 1988), which concluded that a public school teacher or administrator may not serve in the New Mexico state legislature, you have requested the opinion of this office on similar issues under Idaho law. Specifically, you ask the following questions:

- (1) Does Idaho's constitutional and/or code prohibition on individuals serving in the legislature while on payroll as an employee of the state extend to employees of Idaho's public school system?
- (2) If so, can a public school system employee elected to the Idaho legislature continue to contract or receive compensation from a local entity of the public school system?

While the New Mexico Attorney General's Opinion is instructive, it does not appear from a review of Idaho law that a legislator/public school district employee in Idaho is precluded from serving in the state legislature or from entering into an employment contract with a local public school district.

I.

In regard to your first question, one statutory provision does exist which might operate to prevent certain state employees from also serving in the legislature; however, the statute does not extend to public school district employees. Idaho Code § 59-511 provides, in part:

Each executive and administrative officer shall devote his entire time to the duties of his office and shall hold no other office or position of profit: . . .

The question is whether a public school district employee is considered an "executive or administrative officer" subject to the restrictions of § 59-511.

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Although the exact meaning of “executive or administrative officer” has not been interpreted by the Idaho Supreme Court, a 1975 Idaho Attorney General Opinion concluded that “executive officers” are those officers specifically listed in art. 4, § 1, of the Idaho Constitution as constituting the executive department. “Administrative officers” are another subdivision of officers within the executive department which, unlike the executive officers, have “no powers to judge the matters to be done, and usually must obey some superior.” *See*, 1975 Att’y Gen. Op. No. 41-75, at 145.

While not mentioned in the 1975 opinion, Idaho Code § 67-2402 directly supports the opinion’s conclusion that executive and administrative offices are limited to offices within the executive branch of state government. Moreover, that section directly answers the question whether public school districts are included within the executive branch:

(1) Pursuant to section 20, article IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:

- Department of administration
- Department of agriculture
- Department of commerce
- Department of correction
- Department of employment
- Department of finance
- Department of fish and game
- Department of health and welfare
- Department of insurance
- Idaho transportation department
- Industrial commission
- Department of labor and industrial services
- Department of lands
- Department of law enforcement
- Department of parks and recreation
- Department of revenue and taxation
- Department of self-governing agencies
- Department of water resources
- State board of education

The public school districts of Idaho, having condemnation authority, shall be considered civil departments of state government for the purpose of and limited to the purchase of state endowment land at appraised prices.

(2) The governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction each heads a constitutional office. (emphasis added.)

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This statute expressly enumerates the departments and offices which constitute the executive branch of Idaho state government, but specifically excludes public school districts except for the limited purpose of “purchasing state endowment land at appraised prices.” It is thus our opinion that public school district employees should not be considered “executive or administrative officers” subject to the restrictions of Idaho Code § 59-511.

Idaho Code § 67-2402’s specific exclusion of public school districts from the executive branch of Idaho state government also answers the question whether the separation of powers requirement of Idaho Constitution art. 2, § 1, is violated when a public school district employee serves as a member of the state legislature. Because the statute expressly treats public school districts separately from the state board of education and superintendent of public instruction, it is unnecessary to engage in a lengthy analysis to determine whether public school districts are merely arms of these executive branch entities. The legislature has expressly excluded public school districts from association with the executive branch of state government, except for the limited purpose of purchasing state endowment lands. Thus, separation of powers is not implicated when a public school district employee serves in the state legislature.

Assuming that a public school district employee meets the general age and residence requirements to qualify for legislative office set forth in Idaho Const. art. 3, § 6, the only other possible barrier which could prevent that employee from serving as a member of the legislature would be a determination by either house of the legislature that public school district employees are not qualified to become members of that house. Art. 3, § 9, of the Idaho Constitution provides, in pertinent part:

Each house when assembled shall choose its own officers; *judge of the election, qualifications and returns of its own members*, determine its own rules of proceeding, and sit upon its own adjournments. . . (emphasis added).

The Supreme Court of Idaho has recognized the legislature’s sole authority under art. 3, § 9, to judge the election and qualification of its own members, and has held that a judicial determination concerning those issues would not be binding on the legislature. *Burge v. Tibor*, 88 Idaho 149, 397 P.2d 237 (1964). Thus, the question of whether a public school district employee is qualified to serve as a member of the state legislature is a matter under Idaho’s constitutional scheme for legislative rather than judicial determination.

A review of previous actions of the Idaho legislature does not indicate that it would disqualify one of its members because that member is a public school district employee. First, the Idaho legislature has historically allowed public school teachers and administrators to serve as legislative members. The 49th legislature of which you are a member is no exception. Senators Denton Darrington and Bert Marley and Representatives Louis Horvath, Jr., Richard Adams, Gayle Wilde, Pete Black and L. Ed Brown are all public school teachers or administrators, and their qualifications to serve as members of the legislature were not questioned during the 49th legislative session.

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Second, the Idaho legislature has adopted rules to deal with the inevitable conflict of interest problems that are bound to arise from a citizen legislature. Both houses of the legislature have used § 522 of *Mason's Manual of Legislative Procedure*, which provides in part:

It is a general rule that no one can vote on a question in which he has a direct personal or pecuniary interest. The right of a member to represent his constituency, however, is of such major importance that a member should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal. This rule is obviously not self-enforcing and unless the vote is challenged the member may vote as he chooses. . . .

Thus, the Idaho legislature has generally handled conflicts by recognizing the importance of a member's right to represent his constituency and by requiring the member to abstain from voting on a particular matter only in "clear cases" of direct and personal conflict. It further appears that the legislature's chosen method of dealing with such clear cases of conflict is to have the member abstain from voting on that particular matter rather than disqualifying the member from serving the office to which he was elected.

II.

Your second question brings into question the applicability of two statutory provisions that govern and limit the permissible activities of legislators. Idaho Code §§ 59-102 and 59-201 provide as follows:

59-102. Legislators disqualified from holding certain offices. — It shall be unlawful for any member of the legislature, during the term for which he was elected, to accept or receive, or for the governor, or other officials or board, to appoint such member of the legislature to, any office of trust, profit, honor or emolument, created by any law passed by the legislature of which he is a member. Any appointment made in violation of this section shall be null and void and without force and effect, and any attempt to exercise the powers of such office by such appointee shall be a usurpation, and the appointee shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than \$500 nor more than \$5000.

59-201. Officers not to be interested in contracts. — Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

To determine whether either of these statutes prohibits a state legislator/public school district employee from continuing to contract with or receive compensation from a local

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public school district, it is necessary to examine the state legislature's role over the financing of public school districts and the contracting of school district employees.

The New Mexico Attorney General Opinion which you have brought to our attention relies heavily on the fact that, pursuant to a 1988 constitutional amendment in that state, the state department of education was given control over most, if not all, financial aspects of public schools. The opinion also relies upon the fact that New Mexico's state legislature has substantial control over the total amount of money available to local school boards to budget for teachers' salaries, and that it had "specifically appropriated funds to increase teachers' salaries." NMAG Op. at 4. The opinion concludes that "this state has so centralized public education that there is very little actual local political control over important decisions about public education." *Id.* at 8.

A review of Idaho's public school financing system reveals that the Idaho legislature does not exercise such exclusive and centralized control over the total amount of money available to local school districts, nor does the legislature play a direct role in hiring school district employees or determining the salaries or other terms of school district employee contracts. Unlike New Mexico, Idaho has left the ultimate determination of these matters up to each school district's locally elected board of trustees.

A. *Funding of the Public School System.* An excellent discussion of Idaho's public elementary and secondary school financing system is found in *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975). In that case, the Idaho Supreme Court upheld the constitutionality of the state's public school financing system despite the fact that the system relies heavily upon local school district property taxes which vary widely from district to district, thus creating differences in the amounts raised and spent among the several districts. The court described the funding of the public school system in detail:

The system is composed of 115 school districts. The funds supporting these public elementary and secondary schools in Idaho are derived from five sources, those being state funds, county property tax, local school district property tax, federal funds, and funds received from miscellaneous sources, such as activity fees and school lunch programs.

96 Idaho at 796. The case goes on to note that, although state funds are uniformly distributed to local school districts based upon the average daily attendance (ADA) of pupils in those districts, local school district trustees have authority to levy additional property taxes in order to raise funds deemed necessary for that district:

The final effect of the Foundation Program is a 22 mill level of taxation that is equalized among the districts. When the mill levy of the districts is combined with the state funds, each district has available essentially the same base amount of funds per ADA. To raise the additional funds deemed necessary, the locally elected trustees of the individual school districts levy taxes against the

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taxable property within the district. Because of the variation in the assessed valuation per pupil in the Idaho school districts, the amount which the individual districts can raise with each mill levied varies greatly.

Id. at 798.

The aspect of local control over the total amount of funding available to each school district upheld in *Thompson v. Engelking* has remained unchanged. To date, the Idaho legislature has seen fit to limit its role in public school financing to approval of general appropriations which are distributed to school districts pursuant to the Foundation Program formula. Specific financial decisions are rather made by each district's board of trustees. Idaho Code § 33-801 grants local school boards the exclusive power and duty to prepare and, after holding a local public hearing, adopt a budget for the school district. Idaho Code § 33-802 similarly grants school boards authority to determine and to levy the amount of property tax necessary to meet the needs of the district for the ensuing fiscal year.

B. *Contracting Authority of the Local School Board.* Commensurate with the local school board's budgeting and taxing authority, Idaho Code §§ 33-513 and 33-511 grant the school boards the exclusive power and duty to employ professional personnel along with other employees necessary to maintain and operate the public schools within the district. The local school boards thus possess sole authority to enter into contracts with teachers, administrators and other school district employees. *See, Hermann v. Indep. School Dist. No. 1*, 24 Idaho 554, 135 P. 1159 (1913). As such, it does not appear that the state legislature exercises sufficient control over the fiscal and employment affairs of local public school districts to conclude that a member of the legislature will run afoul of Idaho Code §§ 59-102 or 59-201 by accepting an employment contract with a school district.

C. *Idaho Code § 59-102.* An Idaho Supreme Court case construing the applicability of § 59-102 indicates that the legislature's role in creating school districts and authorizing district school boards to hire public school district employees is not sufficiently direct to conclude that the legislature itself created the employee positions.

In *State v. Gooding*, 22 Idaho 128, 124 P. 791 (1912), the court considered whether the governor's appointment of a state legislator to the office of highway commissioner in a newly created highway district violated a then existing statutory provision similar to Idaho Code § 59-102. That statute made it unlawful for a legislator to accept or be appointed to "any office of trust, profit, honor or emolument created by any laws passed by the legislature of which he is a member." The court first noted that, because the statute required removal from office, it was quasi-criminal in character and was to be strictly construed. 22 Idaho at 132. The court's determination then centered on the meaning of the term "create" in the statute:

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The word “create” means to cause to exist or to bring into existence something which did not exist. Said highway district law does not create or purport to create any highway districts, but leaves the creation of such districts with the people. Then the question is presented: Did the legislature create the office of highway commissioner of Shoshone Highway District No. 2?

Id. at 132, 133. The court concluded that although the legislature had passed enabling legislation whereby electors and landowners within a particular territory could create a highway district, it was the local people who created the highway district and thereby brought the office of highway commissioner into existence. *Id.* at 134. Thus, the court held that the legislature had not “created” the office and the legislator was free to accept his appointment to the position.

The analysis of *Gooding* appears equally applicable to the issue of whether it is permissible under § 59-102 for a state legislator to accept employment with a local public school district. While it is true that the state legislature makes annual appropriations to the Foundation Program to be distributed to the local school districts, it is the locally elected board of trustees which determines the employee positions available within the local school district and selects the personnel to fill those positions. The state legislature’s role in authorizing funds for public school districts is not sufficiently direct to conclude that the legislature is “creating” employee positions within the school district. Therefore, a legislator who accepts employment with a local school district does not violate Idaho Code § 59-102.

D. *Idaho Code § 59-201.* The requirement of Idaho Code § 59-201 that legislators must not be interested in any contracts made by the body of which they are members is limited to situations involving direct legislative action. Contracts found to be prohibited by cases construing § 59-201 all involve cases in which the public official in question has personally and directly benefitted by the action of the official himself or by the board or body of which the official is a member. *See, e.g., Anderson v. Lewis*, 6 Idaho 21, 52 P. 163 (1898) (contract between secretary of state and printing company whereby secretary of state received part of compensation payable to printing company); *Nuckols v. Lyle*, 8 Idaho 589, 70 P. 401 (1902) (contract by board of school trustees with wife of one member of the board); *Robinson v. Huffaker*, 23 Idaho 173, 129 P. 334 (1912) (contract or lease with board of county commissioners for use of real or personal property owned by member of board).

The New Mexico Attorney General Opinion cited a New Mexico Supreme Court decision which, like *Gooding*, *supra*, requires a direct link before it can be concluded that the legislature authorized the contract. The opinion discussed *State ex rel. Baca v. Otero*, 33 N.W. 310, 267 P. 68 (1928), as follows:

The *Baca* court held that a general appropriations bill alone does not “authorize” a contract of employment with the state. This case indicates that we must look at more substantive statutory provisions:

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The test would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.

Note, "Legislative bodies-conflict of interest," 7 N.M. L.Rev. 296 (1967)

N.M.A.G. Opinion No. 88-20 at 18.

As discussed above, Idaho's public school system still gives local school boards the ultimate decision-making authority over the fiscal affairs of school districts and sole authority to contract with school district employees. The legislature has limited its role to approving general appropriations to the Foundation Program. Under the *Baca* court's analysis, such appropriations do not "authorize" the contracts of public school district employees, because school districts in Idaho can raise additional money through local property taxes to pay employee contracts that exceed the general appropriations. Thus, it does not appear under Idaho's public school system that a state legislator violates Idaho Code § 59-201 by contracting with or accepting compensation from a local public school district.

Conclusion

A review of Idaho's constitutional and statutory provisions governing the qualifications for serving in the Idaho state legislature and the provisions governing the permissible activities of state legislators does not indicate that public school district employees are prohibited from serving in the legislature, or that state legislators are prohibited from accepting contracts with the local public school districts. Idaho Code § 67-2402 specifically excludes public school districts from the executive branch of state government. Thus, public school teachers who serve in the legislature do not violate Idaho Code § 59-511 or the separation of powers requirement of art. 2, § 1. Likewise, the state legislature's limited role in Idaho's public school system is not sufficiently direct to conclude that a legislator who accepts an employment contract with a public school district violates Idaho Code §§ 59-102 or 59-201.

In answering the question you have raised, it is important to recognize that Idaho's legislature is a "citizen legislature" rather than a full time professional legislature. As such, all members of the legislature have varying interests outside the legislature which may from time to time be directly or indirectly impacted by the legislation which they enact. Given the fact that Idaho statutory provisions governing conflicts of interest are very general in nature, a broad and liberal interpretation of those provisions might well prevent many honest, competent and dedicated legislators from serving the constituents they were elected to represent.

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The Idaho Supreme Court and the state legislature itself have addressed these considerations by not applying conflict of interest provisions overbroadly, yet applying them effectively to prevent the mischief of self-interested legislation or official action in clear cases where the conflict of interest is direct and personal. Public school teachers and administrators have historically been allowed to serve in the legislature, and it does not appear that their interests are sufficiently direct or personal to warrant their exclusion under present Idaho law.

Sincerely,

ERIC E. NELSON
Deputy Attorney General

November 2, 1988

The Honorable Joe R. Williams
State Auditor
700 West State Street
Boise, Idaho 83720

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

Re: Calculation of Credited State Service

Dear Mr. Williams:

This is in response to your request for an interpretation of provisions of H.B. 419 enacted by the legislature in 1988. The act amends Idaho Code § 67-5332 to change the formula by which credited state service is calculated.

You have asked if credited state service for overtime work should be calculated on the basis of time worked or on the basis of the time and one-half pay rate. For example, should an employee working eight hours of overtime and receiving time and one-half pay (12 hours pay) be credited with eight hours of credited state service or 12 hours of credited state service. You have also asked if employees who terminate and receive a payoff of accrued vacation leave balances should accrue credited state service on such balances for purposes of sick and vacation leave.

Idaho Code § 67-5332 provides that the credited state service provisions of the section shall be used "For the purposes of payroll, vacation or annual leave, sick leave and for

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other applicable purposes. . . .” The only exception to the calculation provisions of the section deals with retirement system entitlements. 1988 legislative amendments to the section were made in subsections (3) and (5) as follows:

(3) One (1) hour of credited state service shall be earned by each eligible state officer or employee for each hour, or major fraction thereof, that the officer or employee ~~is present for duty~~, receives pay, whether for hours worked or on approved leave as provided in subsection (4) of this section.

(4) Credited state service shall be earned when on approved leave with pay, on approved vacation leave, approved military leave, on approved sick leave, and holidays.

(5) ~~Work in any kind of overtime situation shall not be credited state service for the purposes of this section.~~

The amendments shown above change the basis upon which credited state service is earned from “hours present for duty” to hours for which the employee “receives pay.” The amendments also repeal the prohibition against receiving credited state service for overtime pay.

The effect of the amendments is to calculate credited state service based upon hours for which employees receive pay rather than on the hours they are present for duty. Thus, an employee receiving time and one-half overtime pay, e.g., 12 hours of pay for an eight hour shift, would now accrue credited state service based upon the 12 hours of pay received. Hours present for duty is no longer the relevant standard and the prohibition against receiving credited state service for the overtime pay is no longer applicable. As noted above, calculation rules apply for purposes of payroll, vacation or annual leave, sick leave and other applicable purposes. The calculation rules do not apply to retirement system calculations pursuant to Idaho Code § 67-5332(5).

You have also asked if employees who separate and receive a payoff of vacation leave accruals would accrue additional credited state service as a result of the payoff. Additional credited state service would not be earned from a payoff of vacation leave. Idaho Code § 67-5332(3) provides that employees receive credited state service for hours they receive pay “for hours worked or *on approved leave*.” An employee receiving a payoff is neither working nor “on approved leave.” Thus, an employee should not receive credited state service for a payoff of vacation leave.

Sincerely,

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

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 13, 1988

Clifford V. Long
Bonneville County Board of Commissioners
605 North Capital Avenue
Idaho Falls, Idaho 83402

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

Re: City and County Responsibilities for Cost of Detention

Dear Mr. Long:

I apologize for the delay in replying to your request for legal guidance.

Your questions deal with the incarceration of both juvenile and adult offenders. Specifically, you have asked for legal guidance on the following issues:

1. When is an offender (minor or adult) to be incarcerated by the city and when by the county?
2. May the county seek reimbursement for the cost of holding city prisoners?
3. In the case of a juvenile who is a city prisoner, can the city be charged for costs of incarceration if the minor is placed outside the county?

The policy of the state, as expressed in sections 31-2202, 31-2227 and 31-2604, Idaho Code, is that the primary duty to enforce the penal provisions of any and all state statutes is vested in the sheriff and prosecuting attorney of each county. While both the sheriff and prosecutor have discretion as to how the criminal laws are to be enforced in their jurisdiction, they have no choice but to enforce the law or be removed from office.

Cities have the authority to appoint police officers who, by statute, have the power to enforce state law within their jurisdictions. However, cities have no affirmative duty to appoint such officers. The decision to appoint city police officers is discretionary, not mandatory. *State v. Whelan*, 103 Idaho 651, 653, 561 P.2d 916 (1982).

It is the sheriff, however, who has the duty "to take charge of and keep the county jail and the prisoners therein." Section 31-2202, Idaho Code. Because the sheriff operates on behalf of the county in carrying out this duty, the county must bear "the expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail." Section 31-3302(3), Idaho Code.

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Section 20-612, Idaho Code, requires the sheriff to accept all prisoners. “The sheriff must receive all persons committed to jail by competent authority.” More specifically, statutes require that room be made in county jails for prisoners charged by other law enforcement agencies, federal prisoners (section 20-615, Idaho Code), prisoners arrested by Idaho State Police (section 19-4809, Idaho Code), and city prisoners (sections 50-302A and 20-605, Idaho Code).

The question of which governmental entity must bear the costs of housing city prisoners was addressed by the Idaho Supreme Court in *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986). The court held that despite their apparent directive to the contrary, the statutes require the city to reimburse the county only when the county arranges to house the city prisoners in other counties (i.e., those situations where a prisoner is held in a facility other than one in the county where the ordering court is located). *Bannock*, 110 Idaho at 295.

In summary, with regard to adult prisoners, the general rules are that cities have a responsibility to reimburse the county for city prisoners who violate city ordinances and for those city prisoners held out-of-county. Cities do not have financial responsibility for other city prisoners held in county facilities. In particular, the county, not the city, must pay the cost of incarcerating prisoners who are arrested for state motor vehicle law violations. *Bannock*, 110 Idaho at 295.

Your final question, which pertains to juvenile offenders, requires a slightly different analysis. To begin with, counties are responsible for all costs of detention of juveniles who are under the purview of the Youth Rehabilitation Act. Section 16-1812, Idaho Code; *Merritt v. State*, 108 Idaho 20, 696 P.2d 87 (1985). If the juvenile under the purview of the Youth Rehabilitation Act is detained within the county, the county is liable for costs. Likewise, if the juvenile under the purview of the Youth Rehabilitation Act is detained in a facility outside the county, in a private facility or home, or in a facility operated by another governmental entity, the financial responsibility remains with the county of the ordering court. Sections 16-1812(1) and (3), Idaho Code.

The Youth Rehabilitation Act does not apply to juveniles who violate traffic, wine, alcohol, tobacco, or watercraft laws, nor does it apply to fish and game violations or to violent juvenile offenders. Section 16-1803, Idaho Code. Incarceration of juveniles who come within these exceptions to the Youth Rehabilitation Act is controlled by the general rules dealing with adult offenders.

This is an informal and unofficial expression of the views of this office based upon the research of the author. It is supplied to you for your guidance.

Very truly yours,

JOHN J. McMAHON
Chief Deputy Attorney General

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