

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
AND
SELECTED INFORMAL
GUIDELINES
FOR THE YEAR
1989**

Jim Jones
Attorney General

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Jim Jones
Attorney General

INTRODUCTION

One of my most dreaded tasks each year is to prepare an introduction for the annual opinion book. It is not enough to just say that the enclosed opinions represent all of the official opinions for 1989 and a selection of the more important or interesting unofficial guidelines. Everyone knows that. Besides, if you don't say more there is a lot of blank space on the introductory page.

Therefore, one must think of something important, intelligent, or entertaining to say, along with the purely introductory remarks. It is not an easy task, especially when you have the abiding feeling that no one ever reads the introduction anyway. Besides, there isn't enough space to really get into any particular subject in enough depth to really capture anyone's attention, let alone to receive journalistic honors.

That is why Lois Hurless, the office administrator, finds herself in the position of continually, but politely, reminding me that I need to prepare an introduction for the opinion book. It usually gets done, as in this instance, after about ten reminders and when the publisher is crowding the deadline. So, having been sufficiently prepared and working under significant pressure to get the job done, here goes.

It is with great pleasure that I introduce the official opinions and more significant unofficial guidelines prepared by my office during 1989. This product represents the hard work of a dedicated staff that strives to make the state's law firm one of the best in the state. I am very proud of that staff and of the work that it produces for the people of Idaho. I would like to add something of importance, intelligence, or great timeliness but, unfortunately, there is not enough room left on this page. Let it suffice to say that I hope our readers find this work to be of value.

JIM JONES
ATTORNEY GENERAL

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1989

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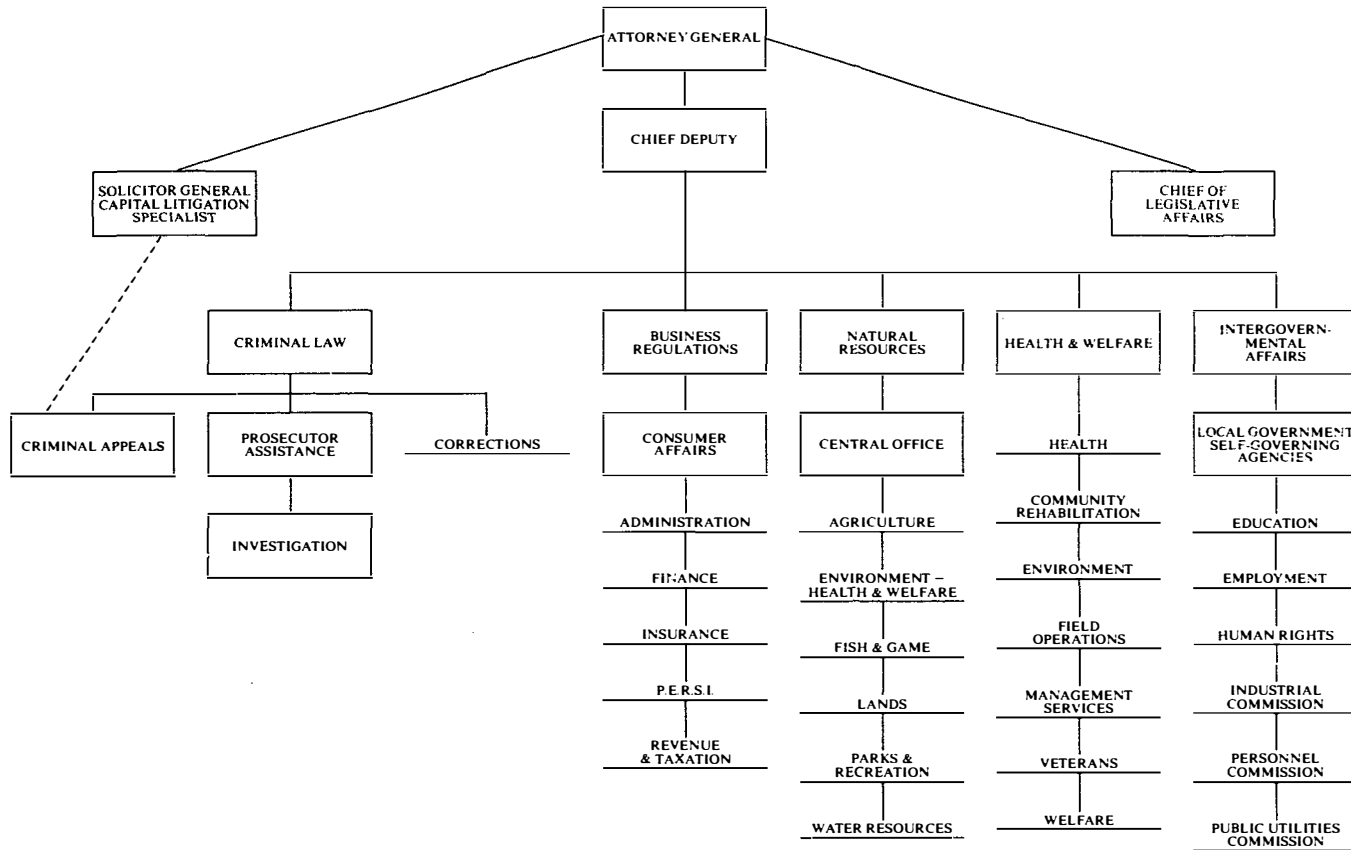
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ORGANIZATION CHART – Office of the Attorney General



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1989**



Jim Jones
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 89-1

R. Keith Higginson, Director
Department of Water Resources
Statehouse Mail
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Do Idaho counties have the authority to enter into an agreement with counties of Utah and Wyoming to develop a joint water project on the Bear River?
2. Does the Idaho Water Resource Board have authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, or within Utah or Wyoming?
3. If a joint project is developed in Idaho, is project water allocated to Utah and Wyoming chargeable to their shares of Bear River water under the compact?
4. May any portion of Idaho's share of the waters of Bear River under the Bear River Compact be allocated for use in another state?
5. If there is an interbasin transfer of Bear River water from a joint project in Idaho, would this create a legal precedent affecting other river basins in the state?

CONCLUSIONS:

1. Idaho counties have authority to join in an agreement with counties of Utah and Wyoming to develop a joint water project on the Bear River. Under Idaho law, however, the purposes of the water project must be limited to the irrigation or drainage of lands in the respective counties.
2. The Idaho Water Resource Board has authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, Utah, or Wyoming. However, the Idaho Legislature must authorize construction of the project before the Idaho Water Resource Board may issue the revenue bonds.
3. If a joint water project on the Bear River is developed in Idaho, water allocated for beneficial use in Utah and Wyoming will be charged against Utah's or Wyoming's share of water under the Amended Bear River Compact.

4. Idaho's share of Bear River water under the Bear River Compact cannot be allocated for use in another state.

5. An interbasin transfer of Bear River water from a joint project in Idaho to Utah or Wyoming will not create a legal precedent affecting other river basins in the state.

ANALYSIS:

Question No. 1

Your first question asks whether counties in Idaho have authority to enter into agreements with counties in Utah and Wyoming to develop a joint water project on the Bear River. The Joint Exercise of Powers Act, Idaho Code §§ 67-2326 to 67-2333 (1980 and Supp. 1988), authorizes public agencies in Idaho to enter into cooperative agreements with other public agencies in Idaho and other states. Idaho Code § 67-2327 defines "public agency" to mean any city or political subdivision of this state, including counties.

Idaho Code § 67-2326 states the purpose of the act:

It is the purpose of this act to permit the state and public agencies to make the most efficient use of their powers by enabling them to cooperate to their mutual advantage and thereby provide services and facilities and perform functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.

Idaho Code § 67-2328(a) spells out the circumstances under which a public agency may participate in a joint exercise of powers:

(a) *Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority; and the state or public agency of the state, may exercise such powers, privileges and authority jointly with the United States, any other state, or public agency of any of them, to the extent that the laws of the United States or sister state, grant similar powers, privileges or authority, to the United States and its public agencies, or to the sister state and its public agencies; and provided the laws of the United States or a sister state allow such exercise of joint power, privilege or authority.*

The state or any public agency thereof when acting jointly with another public agency of this state may exercise and enjoy the power, privilege and authority conferred by this act; but nothing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone. (Emphasis added.)

Idaho counties desiring to exercise their powers jointly with counties of Utah and Wyoming to develop a joint water project on the Bear River are subject to the above restrictions. The Idaho counties must first possess the independent authority to develop a water project before they are authorized to exercise those powers jointly with counties in Utah and Wyoming. *Id.* The counties of Utah and Wyoming are required to possess similar authority to develop a water project and to exercise those powers jointly with Idaho counties. *Id.* Whether or not the counties of Utah and Wyoming possess such authority is a question best answered by their respective states and is not addressed in this opinion.

Any joint or cooperative exercise of powers under the act requires a formal agreement between the cooperating public agencies. Idaho Code § 67-2328. That section also prescribes the form of the agreement and various substantive provisions which must be included such as the duration of the agreement, financing provisions, and various administrative provisions.

Any agreement under the act involving a sister state must be filed with the Idaho Secretary of State. Idaho Code § 67-2329. The agreement shall not become effective until an opinion from the Attorney General, requested by the Secretary of State, states the agreement does not violate the U.S. or Idaho constitution or any Idaho statute. *Id.* Failure of the Attorney General to render an opinion within thirty days of receipt from the Secretary of State constitutes approval of the agreement.

As noted above, to enter into a joint exercise of powers agreement, Idaho counties must have independent authority to engage in the type of activity contemplated. Thus, it is necessary to consider the independent authority of counties in Idaho to develop water projects.

Idaho Code § 31-827 pertains to the construction of water projects. It authorizes the boards of county commissioners to expend up to "\$1000 in procuring data, surveys, estimates, measurements, maps, plats, and all other matter which may be necessary to the promotion of any irrigation scheme or system," provided a petition is filed with the board signed by at least one hundred (100) taxpayers of the county requesting such expenditure.

The provisions of title 42, ch. 28, Idaho Code, give broader authority to counties for the construction of water projects. For example, Idaho Code § 42-2801 authorizes Idaho counties to act independently or jointly to promote the irrigation and drainage of lands lying within their respective borders, provided that county bonds issued or sold for such purposes shall be approved by a two-thirds vote of the electors of the counties. A county acting independently under Idaho Code § 42-2801 is authorized to develop a water project only for the irrigation or drainage of lands within that county. If a county develops a project jointly with other Idaho counties, lands within each participating county may be served by the project. Likewise, if one or more Idaho counties develop a water project jointly with one or more authorized Utah or Wyoming counties having similar powers, lands within the cooperating counties of each state may be served by the project.

Idaho Code §§ 31-827 and 42-2801 make it clear that counties have broad authority to engage in water projects if the purpose of the project is irrigation or drainage of lands within the respective counties; however, there are no statutes conferring on counties the authority to produce and sell hydroelectric power. The legislature, by way of contrast, has expressly granted to irrigation districts the power to construct and operate electric power plants pursuant to Idaho Code § 42-313. Likewise, the legislature has expressly conferred on cities the authority to own and operate electric power plants pursuant to Idaho Code § 50-325. This implies that the legislature did not intend to confer such powers on counties.

The absence of statutory authority for counties to engage in power projects is important since counties have only such powers as are specifically delegated by law or reasonably implied from powers delegated. Idaho Constitution, art. XVIII, § 11; *Shillingford v. Benewah County*, 48 Idaho 447, 452, 282 P. 864, 866 (1929).

Since the legislature has not given Idaho counties authority to produce and sell electric power as separate entities, Idaho counties cannot exercise such powers jointly with counties in Utah or Wyoming. Idaho counties lack authority to enter into an agreement with counties of other states to develop a joint water project for the production and sale of hydroelectric power.

In conclusion, Idaho counties have authority to join in an agreement with counties of Utah and Wyoming to develop a joint water project on the Bear River, assuming the counties in the sister states possess like authority. Under Idaho law, however, the purposes of such a water project must be limited to the irrigation or drainage of lands within the respective counties. In order to participate in a joint hydroelectric project, interested counties should seek legislation authorizing them to enter into such agreements.

Question No. 2

The second question asks whether the Idaho Water Resource Board has authority to issue revenue bonds, either separately or jointly with the other compacting states, to fund Idaho's share of a joint water project on the Bear River within Idaho, or within Utah or Wyoming. Before addressing this question, it is necessary to review Idaho's role in the management of the waters of the Bear River.

Since 1958, the waters of the Bear River have been governed by a compact among the states of Idaho, Utah and Wyoming. Congress consented to the original compact in the Act of March 17, 1958, Pub. L. No. 85-348, 72 Stat. 38. The compacting states negotiated an Amended Bear River Compact in 1978. Congress consented to these amendments in the Act of February 8, 1980, Pub. L. No. 96-189, 94 Stat. 4. The legislatures of Idaho, Utah and Wyoming had ratified the compact earlier. Idaho Code § 42-3402 (Supp. 1988); Utah Code Ann. § 73-16-2 (1980); Wyo. Stat. § 41-12-101 (Supp. 1988).

Article VII of the amended compact recites the policy of the compacting states to encourage additional water projects on the Bear River:

It is the policy of the signatory states to encourage additional projects for the development of the water resources of the Bear River to obtain the maximum beneficial use of water with a minimum of waste, and in furtherance of such policy, authority is granted within the limitations provided by this compact, to investigate, plan, construct, and operate such projects without regard to state boundaries, provided that water rights for each such project shall, except as provided in article VI, paragraphs A and B thereof, be subject to rights theretofore initiated and in good standing.

Idaho Code § 42-3402 (Amended Bear River Compact, art. VII).

With this introduction we now turn to the question of the authority of the Idaho Water Resource Board to issue revenue bonds for a water project on the Bear River. The board is a constitutional entity established in 1965 pursuant to Idaho Const. art. XV, § 7. The constitutional provision, as amended in 1984, reads:

§ 7. State Water Resource Agency.— There shall be constituted a *Water Resource Agency*, composed as the Legislature may now or hereafter prescribe, which *shall have power to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency*

projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; *all under such laws as may be prescribed by the Legislature*. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its admission to the Legislature.

Idaho Const., art. XV, § 7 (emphasis added).

The legislature established the Idaho Water Resource Board as the constitutional water agency called for by the constitutional provision. Idaho Code § 42-1732 (Supp. 1988). Idaho Code § 42-1734 lists the following pertinent powers and duties of the board:

(1) To have and exercise all of the rights, powers, duties and privileges vested by article XV, section 7, of the constitution of this state in the water resource agency

. . . .

(5) To generate and wholesale hydroelectric power at the site of production if such power production is connected with another purpose for such project.

(6) To file applications and obtain permits in the name of the board, to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects. Such filings and appropriations by the board, or any water rights owned or claimed by the board, shall be made in the same manner and subject to all of the state laws relating to appropriation of water, with the exception that the board will not be required to pay any fees required by the laws of this state for its appropriations. The filings and appropriations by the board shall be subject to contest or legal action the same as any other filing and appropriation and such filings and appropriations shall not have priority over or affect existing prior water rights of any kind or nature; *provided that the board shall have the right to file for water rights with appropriate officials of other states as trustee for project users, and to do all things necessary in connection therewith;*

(7) *To finance said projects with revenue bonds or such moneys as may be available;*

....

(11) *To present to the governor for presentation to the legislature not later than the 30th of November prior to the convening of a regular legislative session the final report containing the complete plans, costs and feasibility estimates for any water project which the board recommends that the state construct in accordance with the comprehensive state water plan; and to construct any water project specifically authorized by the legislature;*

Idaho Code § 42-1734(1),(5),(6),(7),(11) (Supp. 1988) (emphasis added).

The only pertinent constitutional and statutory limitation placed on the board's power regarding either financing or construction of water projects is the requirement of legislative authorization to construct a project. Idaho Code § 42-1734(11).¹ There appear to be no limitations on the board's financing authority.² This difference is not easily explained because the policy reasons are substantially the same for requiring legislative approval either of financing or of construction of water projects. However, this difference in statutory authority has few practical consequences because it is unlikely that any bonding authority would accept the risk of financing a water project without legislative approval.

Since the Idaho Water Resource Board is a "public agency," it may exercise its powers, privileges and authority jointly with the states of Utah and Wyoming. Idaho Code § 67-2328(a). Thus, the board has authority to issue revenue bonds to fund Idaho's share of a joint water project on the Bear River within Idaho, Utah or Wyoming. This joint exercise of power is subject to the requirements that the other states have the power to issue similar bonds in their respective states and the authority to jointly exercise that power with the Idaho Water Resource Board.

In conclusion, if specific authorization is given by the Idaho legislature, the Idaho Water Resource Board may construct water projects on the Bear River in Idaho, Utah, or Wyoming. The board could issue revenue bonds to fund Idaho's share of a joint water project constructed by another entity without legislative approval.

Question No. 3

If a joint Bear River water project is developed in Idaho, question number three asks whether project water allocated to Utah and Wyoming is chargeable to their shares of Bear River water under the compact?

The compact divides the Bear River and its tributaries into three divisions. The three divisions are designated the Upper, Central and Lower Divisions:

3. "Upper Division" means the portion of Bear River from its source in the Uinta Mountains to and including Pixley Dam, a diversion dam in the Southeast Quarter of Section 25, Township 23 North, Range 120 West, Sixth Principal Meridian, Wyoming;
4. "Central Division" means the portion of Bear River from Pixley Dam to and including Stewart Dam, a diversion dam in Section 34, Township 13 South, Range 44 East, Boise Base and Meridian, Idaho;
5. "Lower Division" means the portion of the Bear River between Stewart Dam and Great Salt Lake, including Bear Lake and its tributary drainage;

Idaho Code § 42-3402 (Amended Bear River Compact, art. II).

Article V of the amended compact allocates water depletions in the Lower Division, which are not based on beneficial use prior to January 1, 1976, for use in Idaho and Utah. Article V specifically provides that:

A. Water rights in the Lower Division acquired under the laws of Idaho and Utah covering water applied to beneficial use prior to January 1, 1976, are hereby recognized and shall be administered in accordance with state law based on priority of rights as provided in article IV, paragraph A3. Rights to water first applied to beneficial use on or after January 1, 1976, shall be satisfied from the respective allocations made to Idaho and Utah in this paragraph and the water allocated to each state shall be administered in accordance with state law. Subject to the foregoing provisions, the remaining water in the Lower Division, including ground water tributary to the Bear River, is hereby apportioned for use in Idaho and Utah as follows:

- (1) Idaho shall have the first right to the use of such remaining water resulting in an annual depletion of not more than 125,000 acre-feet.
- (2) Utah shall have the second right to the use of such remaining water resulting in an annual depletion of not more than 275,000 acre-feet.

(3) Idaho and Utah shall each have an additional right to deplete annually on an equal basis, 75,000 acre-feet of the remaining water after the rights provided by subparagraphs (1) and (2) above have been satisfied.

(4) Any remaining water in the Lower Division after the allocations provided for in subparagraphs (1), (2), and (3) above have been satisfied shall be divided; thirty (30) percent to Idaho and seventy (70) percent to Utah.

B. Water allocated under the above subparagraphs shall be charged against the state in which it is used regardless of the location of the point of diversion. (Emphasis added.)

Similarly, the compact language implies that additional storage rights developed by the compacting states in the Central and Upper Divisions of the Bear River above Stewart Dam be charged against the state responsible for the storage and use of the water. For example, art. VI, para. A, grants 35,500 acre-feet of storage per year “for use in Utah and Wyoming” on an equal basis, and 1,000 acre-feet of storage per year on Thomas Fork “for use in Idaho.” Above these amounts, art. VI, para. B, grants an additional 70,000 acre-feet of annual storage “for use in Utah and Wyoming to be divided equally” and 4,500 acre feet of Bear River annual storage “for use in Idaho.”

If water surplus to that allocated under paragraphs A and B of art. VI occurs in the Central and Upper Divisions, para. C of art. VI provides how the three states may utilize this surplus water. Paragraph C defines surplus water as water “that otherwise would be bypassed or released from Bear Lake at times when all other direct flow and storage rights are satisfied.” Storage rights under paragraph C shall be exercised with equal priority among the three states on the following basis: “six (6) percent thereof to Idaho; forty-seven (47) percent thereof to Utah; and forty-seven (47) percent thereof to Wyoming.”

It is concluded that, as is the case with the Lower Division under art. V of the compact, any water allocated in the Central and Upper Divisions under art. VI shall be charged against the state or states in which the water is used regardless of the location of the point of diversion.

Question No. 4

Question four asks whether any portion of Idaho’s share of Bear River water

under the compact legally can be allocated for use in another state. We analyze this question first with regard to the other two signatory states, then with regard to non-signatory states.

The compact clause of the U.S. Constitution requires that congressional consent be given before any state may “enter into any agreement or compact with another state.” U.S. Const. art. I, § 10, cl. 3. Once congressional consent has been given, the interstate compact is transformed “into a law of the United States.” *Cuyler v. Adams*, 449 U.S. 433, 438, 101 S. Ct. 703, 707, 66 L. Ed.2d 641, 648 (1981). “One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.” *Texas v. New Mexico*, 462 U.S. 554, 564, 103 S. Ct. 2558, 2565, 77 L. Ed.2d 1, 12 (1983). Since Congress has given consent to the Amended Bear River Compact, Act of Feb. 8, 1980, Pub. L. No. 96-189, 94 Stat. 4, the compact has the force and effect of federal law.

The supremacy clause of the Constitution requires that laws of the United States be treated as “the supreme law of the land.” U.S. Const. art. VI, cl. 2. All state laws in direct conflict with federal laws are preempted by the federal laws.

Article VIII of the Bear River Compact mandates the following with respect to water diverted for use in another state:

A. No state shall deny the right of the United States of America, and subject to the conditions hereinafter contained, no state shall deny the right of another signatory state, any person or entity of another signatory state, to acquire rights to the use of water or to construct or to participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals, and conduits in one state for use of water in another state, either directly or by exchange. Water rights acquired for out-of-state use shall be appropriated in the state where the point of diversion is located in the manner provided by law for appropriation of water for use within such state.

....

E. Rights to the use of water acquired under this Article shall in all respects be subject to this Compact.

Idaho Code § 42-3402 (Amended Bear River Compact, art. VIII).

The conclusion to be drawn with regard to the other two signatory states is that Bear River water may be appropriated and diverted in Idaho for use in Utah or

Wyoming. However, water put to beneficial use in Utah or Wyoming is, by definition, not part of Idaho's share of Bear River water and such water will be charged against Utah's or Wyoming's share of Bear River water under the compact. Any state law to the contrary will be preempted, since the compact has the force and effect of federal law.

The compact is silent on the second part of this question, i.e., does not say whether any of Idaho's share of Bear River water may be acquired for use by a non-signatory state. The Amended Bear River Compact neither expressly grants nor denies non-signatory states the right to use Bear River water.

Restrictions preventing the transport of water across state boundaries arguably raise an issue involving the commerce clause of the U.S. Constitution. See *Sporhase v. Nebraska*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed.2d 1254 (1982). The *Sporhase* decision, however, is not controlling if the restriction preventing the transport of water across state boundaries is a result of federal rather than state law.

In a case decided subsequent to *Sporhase*, the Ninth Circuit Court of Appeals held: "[T]he Yellowstone River Compact was approved by Congress; because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections; therefore, the compact cannot, by definition, be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack." *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569-570 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S. Ct. 2288, 90 L. Ed.2d 729 (1986). The same characterization is applicable to the Amended Bear River Compact.

When Congress consents to an interstate compact, the construction of that compact "presents a federal question." *Cuyler v. Adams*, *supra*. For that reason, when interpreting interstate compacts the Supreme Court has turned "to federal not state law." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 280, 79 S. Ct. 785, 789, 3 L. Ed.2d 804, 809 (1959). In *Cuyler*, the Court construed the interstate compact in light of the purpose of the compact, as reflected in the structure of the compact, "its language, and its legislative history." *Cuyler*, 449 U.S. at 450, 101 S. Ct. at 712, 66 L. Ed.2d at 655.

The major purposes of the Amended Bear River Compact enunciated in art. I, para. A, are "to remove the causes of present and future controversy over the distribution and use of the waters of the Bear River; to provide for efficient use of water for multiple purposes; to permit additional development of the water resources of Bear River; to promote interstate comity; and to accomplish an equitable apportionment of the waters of the Bear River among the compacting States."

Idaho Code § 42-3402. Although none of these purposes by themselves mandates the exclusion of non-signatory states from acquiring Bear River water, the purposes, structure, language and legislative history of the compact weigh in favor of exclusion.

For example, art. VIII, para. A, of the compact mandates that “no state shall deny the right of another signatory state, any person or entity of another signatory state, to acquire rights to the use of water . . . in one state for use of water in another state, . . .” If the compact was not intended to restrict the use of water to the compacting states, the term “signatory state” would not have been used. In addition, when a joint water commissioner is required for an interstate tributary in any of the divisions, the proportion of the compensation and expenses paid to such a commissioner “by each [signatory] state shall be determined by the ratio between the number of acres *therein* which are irrigated by diversions from such tributary, and the total number of acres irrigated from such tributary.” Amended Bear River Compact art. IV, para. C (emphasis added). This compensation plan does not provide for any diversions of water outside of the signatory states. If Congress had intended to allow diversions of water outside of the signatory states, it would have provided for the non-signatory states’ participation in the paying of expenses.

The legislative history for the compact also supports the conclusion that Bear River water was intended to remain in the signatory states. For example, Senator Watkins, one of the sponsors of the bill to give congressional consent to the Bear River Compact, requested action on the bill be expedited “so that the available water can be utilized in the communities and farming areas of the three-State Bear River Basin.” 103 Cong. Rec. 1628 (1957).

Also, the House report on the original Bear River Compact states that the compact “[g]rants additional rights to store upstream from Stewart Dam certain specified quantities of water for further development and use in Idaho, Utah, and Wyoming.” H.R. Report No. 1375, 85th Cong., 2d Sess. 2 (1958). There is no hint that Bear River water could be used outside the signatory states.

In conclusion, Bear River water may be diverted in Idaho for use in Utah or Wyoming. However, Bear River water put to beneficial use in Utah or Wyoming is, by definition, part of Utah’s or Wyoming’s share. Otherwise, there would be no “apportionment of the waters of the Bear River among the compacting states.” Amended Bear River Compact art. I, para. A. Further, the compact restricts the use of Bear River water within the boundaries of the compacting states. This conclusion is supported by the purposes, structure, language and legislative history of the compact.

Question No. 5

If there is an interbasin transfer of Bear River water from a joint project in Idaho, question number five asks whether this would create a legal precedent affecting other river basins in the state.

As previously stated, the Amended Bear River Compact has the effect of federal law. The compact requires that Idaho allow other signatory states, and any person or entity of another signatory state, to acquire rights to the use of water in Idaho for use in Utah or Wyoming. Thus, any interbasin transfer of Bear River water from Idaho to Utah or Wyoming is effectively controlled by the compact rather than by Idaho law. Article I of the compact states that, "No general principle or precedent with respect to any other interstate stream is intended to be established."

Because the compact, rather than state law, will control the occurrence of interbasin transfers of Bear River water from Idaho to Utah or Wyoming, such transfers will not create a legal precedent affecting other river basins in Idaho. Based upon the conclusion that the compact restricts the use of Bear River water to the signatory states, it is not necessary to consider the possible precedent created by a transfer of Bear River water to a non-signatory state.

Authorities Considered:

1. *Constitutions*

Idaho Constitution art. XV, § 7.
Idaho Constitution art. XVIII, § 11.
U.S. Constitution art. I, § 10, cl. 3.
U.S. Constitution art. VI, cl. 2.

2. *Idaho Statutes*

Idaho Code § 31-827.
Idaho Code § 42-313.
Idaho Code § 42-1732.
Idaho Code § 42-1734.
Idaho Code § 42-2801.
Idaho Code § 42-3402.
Idaho Code § 50-325.
Idaho Code § § 67-2326 to 67-2333.
Idaho Code § 67-2326.
Idaho Code § 67-2327.

Idaho Code § 67-2328.

Idaho Code § 67-2329.

3. *Idaho Cases*

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

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Shillingford v. Benewah County, 48 Idaho 447, 282 P. 864 (1929).

4. *Other Statutes*

Act of March 17, 1958, Pub. L. No. 85-348, 72 Stat. 38.

Act of February 8, 1980, Pub. L. No. 96-189, 94 Stat. 4.

Utah Code Ann. § 73-16-2 (1980).

Wyo. Stat. § 41-12-101 (Supp. 1988).

5. *Other Cases*

Cuyler v. Adams, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed.2d 641 (1981).

Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568 (9th Cir. 1985), *cert.denied* 476 U.S. 1163, 106 S. Ct. 2288, 90 L. Ed.2d 729 (1986).

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed.2d 804 (1959).

Sporhase v. Nebraska, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed.2d 1254 (1982).

Texas v. New Mexico, 462 U.S. 554, 103 S. Ct. 2558, 77 L. Ed.2d 1 (1983).

6. *Other Authorities*

H.R. Rep. No. 1375, 85 Cong., 2d Sess. (1958).

103 Cong. Rec. 1628 (1957).

DATED this 19th day of January, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

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

¹This opinion does not address whether this limitation on the board's authority to construct water projects is valid. Idaho Const. art. XV, § 7 specifically authorizes the board to construct and operate water projects "all under such laws as may be prescribed by the Legislature." In *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983), the Idaho Supreme Court voided as unconstitutional a statutory provision authorizing legislative oversight regarding the board's water planning functions. The court interpreted the quoted phrase as applying "primarily to procedural matters, and not to the specific, substantive grants of power enumerated in art. 15, § 7." *Id.* 104 Idaho at 573, 661 P.2d at 739. In 1984, the electorate approved an amendment to Idaho Const. art. XV, § 7, that specifically authorized legislative oversight of the board's water planning functions. The amendment in 1984 did not address the board's power to construct and operate water projects.

²There appear to be no limitations on the board's financing authority. The board's authority to issue revenue bonds for water projects has been held not to create an "impermissible state debt or liability." *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 556, 548 P.2d 35, 56 (1976).

ATTORNEY GENERAL OPINION NO. 89-2

TO: G. Anne Barker, Administrator
Division of Public Works
Idaho Department of Administration
502 North 4th Street
Boise, Idaho 83720
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. With regard to public works projects, what is the limit for project size beyond which the project must be advertised and competitively bid? Are there any exceptions?
2. With regard to public works projects, can \$5,000 worth of material be purchased and installed by in-house maintenance personnel?
3. Is there a distinction to be made between a "public works" project and a "maintenance" project? If so, what should be the guidelines for making this distinction and how are the two types of projects affected by Idaho Code with respect to size of the project, advertising and competitive bidding? (For example: A \$7,000 pump may fail. The purchase is made through the division of purchasing. The pump is installed by an in-house maintenance staff. Does "maintenance" include changes to the structure or fixtures that require adherence to the Uniform Building Code?)
4. Under miscellaneous maintenance projects, the past practice of the division of public works was to pay the labor costs associated with the employees of state agencies doing public works projects. Can the permanent building fund be used to pay the salaries of state employees?
5. Finally, would you clarify for me the exception for using inmate labor to do public works projects?

CONCLUSIONS:

1. Except as to certain exempt entities such as the University of Idaho, jurisdiction of projects which cost more than \$5,000 resides in the department of administration, division of public works. The procedure for calling of bids set forth in Idaho Code § 67-5718 must be used as to all contracts let unless an emergency is declared as provided in Idaho Code § 67-5711B.

2. When the cost of a project including materials exceeds \$5,000, the department of administration, division of public works, may choose to use in-house maintenance personnel on the project.

3. The statutes do not define jurisdiction of the department of administration, division of public works, in terms of maintenance versus non-maintenance projects. Rather, department of administration jurisdiction depends upon whether the project involves construction, alteration, equipping and furnishing, or repair of buildings or improvements of public works. Installation of a \$7,000 pump in a state building would involve equipping the building and the department would have jurisdiction.

4. The permanent building fund advisory council may pay other agencies for services pursuant to interaccount agreements. Agencies utilizing state operating or dedicated accounts could expend the funds for salaries to the extent permitted by their appropriations. Payments from the permanent building fund to trust accounts or agency asset accounts could be expended in the same manner as other receipts to those accounts.

5. Inmate labor may be used in public works projects only when the work is performed in accordance with Idaho Code § 67-5713.

ANALYSIS:

The scope of our review is limited to those projects that come within the purview of the department of administration, division of public works. Idaho Code § 67-5711. We have not reviewed "public works" projects under the control of other state agencies, such as the University of Idaho, etc., or other political subdivisions having authority to perform "public works" construction as defined by Idaho Code § 54-1901.

1. *Department Of Administration Jurisdiction And Bidding Requirements Apply To Projects Which Cost More Than \$5,000.*

Idaho Code § 67-5711 is the principal statute defining the dollar amount of projects supervised by the department of administration. It provides in pertinent part:

The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, subject to the approval of the permanent building fund council, to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing and re-

pair of any and all buildings, improvements of public works of the state of Idaho, the cost of which construction, alteration, equipping and furnishing or repair exceeds the sum of five thousand dollars (\$5,000) provided, that the director or his designee, and permanent building fund council shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code.

Thus, if the cost of construction, alteration, equipping and furnishing or repair of public buildings or improvements of public works exceeds \$5,000, the department of administration has jurisdiction over the project. Subject to the approval of the permanent building fund council, the department of administration is empowered to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of such projects.

In letting contracts the department of administration must follow the procedure for the calling of bids provided in Idaho Code § 67-5718. The statute is mandatory in this regard, providing in pertinent part that “the director . . . *shall*, in the letting of contracts under this section, comply with the procedures for the calling of bids provided in section 67-5718, Idaho Code; . . .” Idaho Code §§ 67-5711.

Idaho Code § 67-5718 sets forth the procedure used by the department of administration, division of purchasing, when purchasing goods and services for state agencies. Accordingly, the same procedure for the calling of bids must be used by the department of administration, division of public works, when letting any contract for a public works project under its jurisdiction.

The only exception provided from the bidding procedures of Idaho Code § 67-5718 is the exception for emergency contracting provided in Idaho Code § 67-5711B. That section permits the use of emergency public works contracts “when there exists a threat to public health, welfare, or safety under emergency conditions.” The section provides for a declaration of emergency under the following conditions:

The administrator [of the division of public works] may declare an emergency when one (1) or more of the following conditions exist: an imminent life-threatening environment; or an imminent threat to property; or an imminent loss of significant state resources.

In summary, when total project costs exceed \$5,000, the department of administration, division of public works, has jurisdiction over the project. The procedure for calling for bids of Idaho Code § 67-5718 must be used by the department unless an emergency is declared as provided in Idaho Code § 67-5711B.

2. *The Department Of Administration May Permit Use Of In-house Personnel On Projects.*

For projects over \$5,000 subject to department of administration jurisdiction, we have been asked if in-house personnel may be used to perform part or all of the labor involved in such projects. The portion of Idaho Code § 67-5711 relating to contracting includes the following language:

The director. . . is authorized and empowered. . . to let all contracts for and have charge of and supervision of the construction. . . . [The director] shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code;. . .

Thus, if a project is within the jurisdiction of the department of administration, the department has charge of and supervision of the construction. The department is empowered to let all contracts which are entered into in connection with the project, and is required to follow statutory bid procedures when contracting. The language does not require that all work be done pursuant to contract. Rather, it grants contracting jurisdiction to the department of administration and requires the department to follow bid procedures when contracting. Consequently, the statute does not prohibit the department of administration from using in-house personnel in performance of some or all of the labor on a public works project.

This conclusion is reinforced by the fact that the procedure of Idaho Code § 67-5718 for calling for bids exempts from its provisions the use of regularly employed personnel. That section sets forth the general procedures for the purchase of goods, services, parts, supplies and equipment. "Services" is defined in Idaho Code § 67-5716(5) as:

Personal services, in excess of personnel regularly employed for whatever duration and/or covered by personnel system standards, for which bidding is not prohibited or made impractical by statute, rules and regulations or generally accepted ethical practices.

Thus, the general bidding procedure of Idaho Code § 67-5718 is not violated by the use of regularly employed personnel. Rather, the section excludes regularly employed personnel from its requirements. In short, neither the language of Idaho Code § 67-5711 nor the bidding procedure of Idaho Code § 67-5718 implies any restriction on the use of in-house personnel on projects controlled by the department of administration.

Since the department of administration has "charge of and supervision of" such projects, any state personnel used would be required to follow all directions of the department in connection with the project. As to any portion of the project contracted out, the department of administration would, as mentioned earlier, be subject to the statutory requirement that the department "shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5718, Idaho Code."

If an agency desires to use its own in-house personnel on a project a question can arise as to proper measurement of project cost. Project cost will determine whether the department of administration or the particular agency has jurisdiction over the project. As discussed above, the department of administration only has administrative jurisdiction if "the cost of . . . construction, alteration, equipping and furnishing or repair exceeds the sum of five thousand dollars." If all work on a project is contracted out, it can be readily determined whether the five thousand dollar amount is exceeded. However, if an agency desires to use its own in-house personnel to perform part of a contract, the statutes do not specify how the five thousand dollar amount is to be calculated.

We recommend the following method of calculation as a practical approach consistent with the statutory scheme. The time required by in-house personnel should be estimated as accurately as possible. The time required should be multiplied by the wage rates of the employees involved including fringe benefits. If estimated as accurately as possible, this should provide a reasonable method of estimating the cost to an agency of using its own personnel. Other out-of-pocket costs to an agency should also be included in the calculation. General overhead expenses should not be included since these costs would be incurred whether or not the project were contracted out. If the above estimated costs, together with any goods or services to be purchased in connection with the project, exceed five thousand dollars, the project should be referred to the department of administration.

3. *Department Of Administration Jurisdiction Is Not Determined By A Project's Characterization As A Maintenance Or Non-Maintenance Project.*

We have also been asked if there is a distinction between "public works" projects subject to department of administration jurisdiction and "maintenance" projects not subject to department of administration jurisdiction. Idaho Code § 67-5711 provides in pertinent part that the department of administration has jurisdiction of:

. . .the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho, the cost of which. . .exceeds the sum of five thousand dollars (\$5,000). . .

The statute does not directly express an exception for maintenance or other types of projects. Rather, it expresses the types of activities included within the jurisdiction of the department of administration. These include construction, alteration, equipping and furnishing and repair of any and all buildings [or] improvements of public works. Consequently, it is not pertinent whether a project could be characterized as “maintenance.” Rather, jurisdiction depends only upon whether the project involves construction, alteration, equipping and furnishing or repair of a building or improvement of a public work.

For example, a roof “maintenance” project which involved roof “repair” would be subject to the jurisdiction of the department of administration provided the cost of the repair exceeded \$5,000.

Similarly, if a pump in a building failed, requiring the installation of a new \$7,000 pump, it would be irrelevant whether the change could be characterized as “maintenance.” The installation of the new pump would involve “equipping” the building at a cost exceeding \$5,000. Consequently, the project would be subject to department of administration jurisdiction.

4. *Limitations Upon The Use Of Permanent Building Funds For Payment Of Salaries Of Employees Of Other Agencies.*

Your next question asks if permanent building funds may be used to pay the salaries of employees of other agencies involved in public works contracts. Idaho Const. art. 7, § 13, provides:

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

Thus, the availability of funds for payment of salaries depends upon the appropriation involved and the general statutes dealing with appropriations. The general statutes dealing with appropriations are codified at chs. 35 and 36, title 67, Idaho Code. Chapter 313, 1988 Session Laws, sets forth the most recent appropriation for the permanent building fund. Section 1 of the act states, in pertinent part, that the appropriation is:

... for the purpose of paying the cost of any land, building, equipment, or the rehabilitation, renovation or repair of the following. . .

Thereafter, the act makes various lump sum appropriations for various projects. Section 4 of the act exempts the appropriations from Idaho Code § 67-3516 and from ch. 36, title 67, Idaho Code (the Standard Appropriations Act). The Standard Appropriations Act includes various restrictions, including restrictions

on the use of appropriations for payment of salaries and wages. (See, e.g., Idaho Code § 67-3602.) However, as noted above, section 4 exempts the permanent building fund appropriation from those restrictions.

Similarly, Idaho Code § 67-3516 provides rules for interaccount billings between agencies when one agency provides another agency with goods and services. Since section 4 exempts the permanent building fund appropriation from Idaho Code § 67-3516, these rules and restrictions would also not apply.

Thus, it appears that the permanent building fund advisory council is given wide latitude in the manner in which it expends its appropriations, provided the expenditures are for the purposes of the appropriations (i.e., payments for land, buildings, equipment, rehabilitation, renovation or repair). For example, with the council's consent, another agency could provide employees to assist with a project and permanent building funds could be paid to the agency for the services provided.

Whether an agency receiving permanent building funds could use those funds in the current fiscal year would depend upon its own appropriation. In general, an agency providing goods or services to another agency may be paid for those goods or services. However, if the collecting agency is operating with state operating funds or dedicated funds, the funds may be expended in the current fiscal year only to the extent provided in its appropriation. Idaho Code § 67-3516(3). If the collecting agency is funded with a trust account or agency asset account, it may expend the funds in the same manner as other receipts for those accounts. Idaho Code § 67-3516(3).

Although the permanent building fund advisory council may pay other agencies for services rendered, the council should consider the impact of such a decision on the appropriation process. For example, the legislature may have appropriated funds to an agency to pay the salary of various employees. The agency might also receive funds from the permanent building fund for services provided by the same employees. By receiving two payments for the same employees, an agency's budget could expand beyond that anticipated by the legislature if the employees are funded from trust accounts or agency asset accounts.

The example points out that payment from the permanent building fund for services rendered by an agency can impact the appropriation process in certain circumstances. Therefore, we recommend the joint finance-appropriations committee be consulted concerning the policy to be established regarding payments to other agencies for services rendered.

In summary, the permanent building fund advisory council may agree to pay other agencies for services rendered in connection with a permanent building fund project. The collecting agency may expend those receipts in the current fiscal year if authorized by its own appropriation or if it is operating with a trust or agency asset account which does not require prior legislative authorization for expenditures from the account. We recommend, however, that the joint finance-appropriations committee be consulted concerning the policy to be established regarding payments to other agencies for services rendered by their employees.

5. *Use Of Inmate Labor On Public Works Projects.*

Question five asks for a clarification regarding inmate labor on public works projects. This question was first addressed in 1978 by Attorney General Opinion 78-2. In 1978, the legislature clarified, by the addition of Idaho Code § 67-5713, the circumstances under which inmate labor could be utilized on public works projects.

That statute authorizes the administrator of the division of public works, subject to permanent building fund advisory council approval, "to construct or to alter either in whole or in part state owned correctional facilities" with inmate labor. It is clear that the work performed by the inmate labor is under the supervision of the administrator of the division of public works and thus must be done in compliance with written plans and specifications prepared by licensed architects and engineers. The only exception is work performed under the supervision of the division of public works pursuant to a declared emergency under Idaho Code § 67-5711B.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

Idaho Const. art. 7, § 13.

2. *Idaho Statutes*

Idaho Code § 54-1901.
Idaho Code § 67-3516.
Idaho Code § 67-3602.
Idaho Code § 67-5711.
Idaho Code § 67-5711B.
Idaho Code § 67-5713.
Idaho Code § 67-5716(5).
Idaho Code § 67-5718.

Chapter 35, Title 67, Idaho Code.
Chapter 36, Title 67, Idaho Code.
Chapter 313, 1988 Session Laws.

3. *Other Authorities Cited*

Attorney General Opinion 78-2.

DATED this 23rd day of January, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Mike Jones
Deputy Attorney General
Department of Administration

David G. High
Deputy Attorney General
Chief, Business Regulation
and State Finance Division

ATTORNEY GENERAL OPINION NO. 89-3

TO: Richard P. Donovan, Director
State of Idaho
Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Must the Idaho Department of Health and Welfare immediately apply the amendments to Section 1917(c) of the Social Security Act (42 U.S.C. 1396p) that were enacted by U.S. Public Law 100-360 and subsequently amended by U.S. Public Law 100-485, or must the department await consideration by the next regular session of the Idaho Legislature of conforming amendments to chapter 2, title 56, section 56-214, Idaho Code?

CONCLUSION:

The Idaho Department of Health and Welfare must await state legislation required to conform with U.S. Public Law 100-360 and U.S. Public Law 100-485.

ANALYSIS:

Background:

The federal statutory provisions concerning the Medicaid program appear at Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* The purpose of the Medicaid program is to enable any state:

As far as practicable under the conditions in said state, to furnish (1) medical assistance on behalf of families with dependent children and aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . . .

While participation in the Medicaid program is voluntary, a state that chooses to participate must comply with all requirements imposed by the federal statutory provisions and by regulations promulgated by the Secretary of the U.S. Department of Health and Human Services. *See, for example, Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511 (5th Cir. 1983); and, *Massachusetts Association of Older Americans v. Sharp*, 700 F.2d 749 (1st Cir. 1983).

The Medicare Catastrophic Coverage Act of 1988, U.S. Pub. L. No. 100-360, § 303 (1988), as amended by the Family Support Act of 1988, U.S. Pub. L. No. 100-485 (hereinafter "MCCA"), requires certain income and resource protections for the "community" spouse of a nursing home resident receiving Medicaid assistance. The MCCA also contains new mandatory transfer of assets penalties and repeals all transfer of assets penalties under the Supplemental Security Income Program.

Section 303(g)(2) of the MCCA provides that the amended provisions of § 1917(c) of the Social Security Act are effective and apply to assets transferred on or after July 1, 1988. Section 303(g)(5), however, provides that where the Secretary of the U.S. Department of Health and Human Services determines that state legislation is required in order for the state to apply the new federal provisions, the state may continue to apply its policies as they existed prior to July 1, 1988, until the first day of the next quarter following the close of the next regular session of the state legislature.

Existing Statutory Authority:

The state's enabling legislation, Idaho Code § 56-209b, references Title XIX of the Social Security Act in regard to who shall be awarded medical assistance. Idaho Code § 56-203(a) empowers the Idaho Department of Health and Welfare to enter into contracts and agreements with the federal government "whereby the state of Idaho shall receive federal grants-in-aid or other benefits for public assistance and public welfare purposes under any act or acts of congress heretofore or hereafter enacted." Subsection (b) of Idaho Code § 56-203 authorizes the department to cooperate with the federal government in carrying out the purposes of any federal acts pertaining to public assistance or welfare services. Subsection (g) authorizes the department to define persons entitled to medical assistance in such terms as will meet requirements for federal financial participation in medical assistance payments. Idaho Code § 56-209b provides that medical assistance shall be awarded to persons who are recipients of categorical programs as mandated by Title XIX of the Social Security Act. The definition of "medical assistance" in Idaho Code § 56-201(o) governs "payments for part or all of the cost of such care and services allowable within the scope of Title XIX of the federal Social Security Act as amended as may be designated by Department rule and regulation."

These Idaho Code provisions provide the delegation of power by the legislature to the department to define persons entitled to medical assistance and to provide for the means and procedure to grant such medical assistance benefits to eligible individuals. *Tappen v. State, Department of Health and Welfare*, 102 Idaho 807, 641 P.2d 994 (1982).

The Idaho Administrative Procedure Act in Idaho Code § 67-5201(7) defines a “rule” as “any agency statement of general applicability that implements or prescribes law or interprets a statute as the statute applies to the general public.” Thus, the department would have to implement the provisions of a statute by promulgation of a rule or regulation. *Bingham Memorial Hospital v. Idaho Department of Health and Welfare*, 108 Idaho 346, 699 P.2d 1360 (1985). The provisions affecting eligibility or level of benefits or the treatment of income and resources in the medical assistance program would have to be promulgated by rule by the department consistent with the state’s enabling statutes.

It may be argued that the department has the authority to adopt rules or regulations pursuant to existing state or federal law. The test for determining whether rules and regulations have a statutory basis takes various forms, two of which seem particularly relevant to your inquiry. First is the rule that the validity of a rule or regulation will be sustained so long as a reasonable relationship exists between the rule and enabling legislation. *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 36 L.Ed.2d 318, 93 S.Ct. 1652 (1973). This is particularly so where the empowering provision of the statute, such as Idaho Code § 56-202, states simply that an agency may make such rules as may be necessary to carry out the provisions of this act. The companion principle provides that it is not necessary that the legislative authority be set forth in express terms where the rule or regulation may be reasonably implied to carry out the purposes of the statutory scheme as a whole. *Longbridge, Inc. Co. v. Moore*, 23 Ariz. App. 353, 533 P.2d 564 (1975); *Tapen v. State*, *supra*.

Applying these legal principles to the current text of Idaho Code §§ 56-209e and 56-214, compared with the provisions of the MCCA, indicates a conflict between the federal and state law at the present time. Such a conflict cannot be resolved by a rule or regulation because a rule or regulation does not have the force and effect of law to amend or modify a provision of the Idaho Code.

“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” *State v. Purcell*, 39 Idaho 642, 649, 228 P. 796 (1924). The statutory authorizations contained in the Idaho Code merely authorize the department to comply with existing federal statutes and regulations in order to maximize the amount of federal financial participation to the medical assistance program of the state. The legislature has not delegated to the federal government its authority to prescribe the state’s medical assistance program requirements. See *Idaho Savings & Loan Assoc. v. Roden*, 82 Idaho 128, 350 P.2d 225 (1960); *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975); *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 708 P.2d 147 (1985).

Our review of the specific language in the authorizing statutes and in the legislative history fails to reveal an adoption by reference of Title XIX of the Social Security Act. The legislature has not used the phrase “incorporated by reference,” “as set forth in,” or any other language indicating a legislative intent to incorporate by reference the Social Security Act as if it were set out in the Idaho Code. (*Compare for example* the specific language in Idaho Code § 63-2434.)

The general rule for statutory construction regarding incorporation by reference was set out in the case of *Nampa and Meridian Irr. Dist. v. Barker*, 38 Idaho 529, 533, 223 P. 529 (1924), as follows:

Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto. Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications to the statute so taken unless it does so by express intent. . . .

There is another form of adoption wherein the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied.

In other words, even if it could be assumed that the Social Security Act was adopted by reference by the authorizing statute, the adoption pertains only to the Social Security Act provisions existing at the time of the adoption and not to subsequent amendments such as the MCCA. *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029 (1925).

As a general rule, when a statute adopts a part or all of another statute, the adoption takes the statute as it exists at that time, and does not include subsequent additions or modifications of the adoptive statute, unless expressly so declared. *See, for example, Rainwater v. United States*, 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946 (1958); and *Hassett v. Welch*, 303 U.S. 303, 82 L.Ed. 858, 58 S.Ct. 559 (1938).

Therefore, assuming that the Idaho Legislature could adopt by reference Title XIX of the Social Security Act, any subsequent addition or modification of the Social Security Act would not be incorporated into Idaho law absent an express declaration. We have failed to locate such an express declaration. Further, we have determined that the department has no authority to implement the MCCA by rule or regulation. Therefore, we are compelled to the conclusion that state legislation is required in order for the state to conform to the new federal provisions enacted by the MCCA. In the absence of such enabling legislation, the department would not meet the deadline set for compliance with the MCCA program, i.e., on or before the first day of the next quarter following the close of the current regular session of the Idaho Legislature.

AUTHORITIES CONSIDERED:

1. *Idaho Statutes*

Idaho Code § 56-201(o).
 Idaho Code § 56-202.
 Idaho Code § 56-203.
 Idaho Code § 56-209b.
 Idaho Code § 56-209e.
 Idaho Code § 56-214.
 Idaho Code § 56-218.
 Idaho Code § 63-2434.
 Idaho Code § 67-5201(7).

2. *United States Statutes*

42 U.S.C. § 1396p.

3. *U.S. Supreme Court Cases*

Hassett v. Welch, 303 U.S. 303, 82 L.Ed. 858, 59 S.Ct. 559 (1938).

Mourning v. Family Publication Service, Inc., 411 U.S. 356, 36 L.Ed.2d 318, 93 S.Ct. 1652 (1973).

Rainwater v. United States, 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946 (1958).

4. *Federal Cases*

Mississippi Hospital Association, Inc. v. Heckler, 701 F.2d 511 (5th Cir. 1983).

Massachusetts Association of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983).

5. *Idaho Cases*

Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 108 Idaho 346, 699 P.2d 1360 (1985).

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

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

Idaho Savings & Loan Assoc. v. Roden, 82 Idaho 128, 350 P.2d 225 (1960).

Nampa and Meridian Irr. Dist. v. Barker, 38 Idaho 529, 533, 223 P. 529 (1924).

State v. Purcell, 39 Idaho 642, 649, 228 P. 796 (1924).

Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

Tappen v. State, Department of Health and Welfare, 102 Idaho 807, 641 P.2d 994 (1982).

6. *Other State Cases*

Longbridge, Inc. Co. v. Moore, 23 Ariz. App. 353, 533 P.2d 564 (1975).

DATED this 8th day of February, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Mark J. Mimura
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Michael DeAngelo
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ATTORNEY GENERAL OPINION NO. 89-4

TO: The Honorable Cecil D. Andrus
Governor, State of Idaho
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

Is the state required to pay Emergency Communications Act charges for 911 service pursuant to Idaho Code § 31-4804? If so, is the state nevertheless exempt from making such payments pursuant to Idaho Constitution, art. 7, § 4?

CONCLUSIONS:

Emergency Communications Act charges were not intended to apply to the state. If applied to the state, the charges would likely be held to violate Idaho Constitution, art. 7, § 4.

ANALYSIS:

A. *Constitutional Considerations*

The Emergency Communications Act was enacted in 1988 to provide an alternative to property taxes for funding county 911 emergency communication systems.

As discussed below, Emergency Communications Act charges are taxes rather than fees. Consequently, we have considered the applicability of Idaho Constitution art. 7, § 4, which prohibits payment of certain taxes by the state and political subdivisions.

The distinction between "taxes" and "fees" was most recently discussed by the Idaho Supreme Court in *Brewster v. City of Pocatello*, 88 I.S.C.R. 1431 (December 29, 1988). The case involved an ordinance which purported to impose a "street restoration and maintenance fee" upon all owners of property adjoining streets. Owners were to be charged based upon a formula reflecting the traffic generated by the particular property.

The court held the charge was a tax rather than a fee, stating:

We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets.

We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions. In a general sense *a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.*

...

We hold therefore, that the attempted imposition of the "fee" by the city of Pocatello is in reality the imposition of a tax.

88 I.S.C.R. at 1435. [Emphasis added].

Thus, a fee is "a charge for a direct public service rendered to a particular consumer." A tax is "a forced contribution by the public at large to meet public needs," regardless of whether a direct public service is provided to the particular consumer. Mere availability of public streets to adjacent property owners was not equivalent to a direct public service to a particular consumer. Thus, the charge was a tax rather than a fee.

In our opinion, the Emergency Communications Act charge is likewise a tax rather than a fee. The "line user fee" is described as follows in Idaho Code § 31-4804:

The telephone line user fee provided pursuant to the provisions of this chapter shall be a uniform amount not to exceed one dollar (\$1.00) per month per exchange access line, trunk line, network access register, or equivalent, and such fee shall be used exclusively to finance the initiation, maintenance, or enhancement of a consolidated emergency communicationssystem within the boundaries of one (1) county. The fee shall be collected from customers on a monthly basis by all telecommunications entities which provide local telephone service within the county, . . .

Thus, the charge is defined as a uniform amount per exchange access line, trunk line, network access register, or equivalent and the charge is collected from telephone customers. The charge does not fit the definition of a fee given in *Brewster, supra*. In that case, the mere availability of public streets adjoining one's property was not equivalent to a direct public service rendered to a particular consumer. Likewise, mere availability of 911 service to phone customers is not equivalent to a direct public service rendered to a particular consumer. As such, the charge is a tax rather than a fee.

Idaho Constitution art. 7, § 4, provides:

The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation.

This constitutional provision has been construed as applying to property taxes, taxes in lieu of property taxes, and license taxes upon all public property. *Robb v. Nielson*, 71 Idaho 222, 229 P.2d 981 (1951); *State ex rel. Pfost v. Boise City*, 57 Idaho 507, 66 P.2d 1016 (1937); *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933). The exemption of public property from the "taxation" specified in Idaho Constitution art. 7, § 4, however, has been construed as not applying to excise taxes. *State ex rel. Pfost v. Boise City*, 57 Idaho 507, 66 P.2d 1016 (1937).

Since Idaho Constitution art. 7, § 4, only applies to certain types of taxes, it is necessary to consider the type of tax involved in the Emergency Communications Act. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938), describes three categories of taxes. The court quoted earlier Idaho case law with approval as follows:

Excises, in their original sense, were something cut off from the price paid on sale of goods, as a contribution to the support of government. The word has, however, come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation. (*Diefendorf v. Gallet*, 51 Idaho 619, 633, 10 P.2d 307 (1932))

Thus, the court recognized three categories of taxes: excise taxes, taxes levied directly on persons (poll tax), and taxes levied on property (property tax).

Later, in *Employment Security Agency v. Joint Class A School District*, 88 Idaho 384, 400 P.2d 377 (1965), the court recognized license taxes as distinct from excise taxes, holding the employment security tax to be an excise tax, not a license tax. The court noted that the employment security tax was an excise upon the privilege or right of employing others whereas a license tax permits an individual to work in a certain field.

As noted previously, Idaho Constitution art. 7, § 4, exempts public entities from property taxes, taxes levied in lieu of property taxes, and license taxes. (Poll taxes likewise could not apply to public entities since poll taxes are by definition taxes upon persons.) However, as noted previously, excise taxes may be applied to public entities.

Of the tax types recognized by the court, it is apparent that the Emergency Communications Act charge is neither a poll tax (a tax on persons) nor a license tax (a tax upon a business or profession).

The Emergency Communications Act charge does have characteristics of both a tax in lieu of property tax and an excise tax. However, the tax would appear to be best characterized as a tax in lieu of property tax. It is imposed in a uniform amount per item of property (exchange access line, trunk line, network access register or equivalent). Also, Idaho Code § 31-4803(5) provides:

Any net savings in operating expenditures realized by any taxing district utilizing a consolidated emergency communication system shall be used by that taxing district for a reduction in the ad valorem tax charges of that taxing district.

We infer from this provision that the legislature intended the tax as an alternative to the property tax. If construed to be a tax in lieu of property tax, the state cannot constitutionally pay it. *Robb v. Nielson, supra*. That case involved a statute providing for payments by the Idaho Department of Fish and Game under a formula approximating what would have been paid by a private party. The court found the statute to be unconstitutional holding:

Under our constitutional provisions, the legislature cannot, either directly or indirectly, tax or authorize the taxation of public property, or provide for the same result, and cannot waive the exemption provided for in the constitution and voluntarily pay taxes on public property.

We are constrained to hold that said Chapter 85 indirectly provides for taxation of state lands by authorizing payments which accomplish the same result as taxation, and that it is void because of conflict with Article VII, Section 4 of the constitution.

71 Idaho at 228.

Thus, if Emergency Communications Act charges are viewed as a means of indirectly taxing public property, the charges are unconstitutional. Our hesitation in labeling the charges as property taxes is due to the fact that while the legislature apparently intended the charge as an alternative to property taxes for funding 911 service, the formula by which the tax is imposed is quite different from the normal ad valorem tax formula.

The tax could, in the alternative, be viewed as an excise tax (a tax upon the performance of an act or the enjoyment of a privilege). It might be viewed as a tax upon the right or privilege to access 911 service. The problem with this analysis is that Idaho Code § 31-4811 requires all pay telephones to be converted to permit 911 dialing without deposit of a coin or other charge to the caller. In other words, the act contains provisions to make 911 service universally available whether or not a charge is imposed. This provision does not support the theory that the tax is imposed for the right or privilege to access 911 service.

In our opinion the tax is something of a hybrid between a property and privilege tax. Consequently, it is somewhat difficult to predict how it would be treated by the Idaho Supreme Court. However, it was apparently intended as an alternative to property taxes which public entities are prohibited from paying. Consequently, it would likely be held that public entities are prohibited from paying it pursuant to Idaho Constitution art. 7, § 4.

B. Statutory Interpretation

In addition to the potential constitutional problems with the Act discussed above, we have also considered whether the statute should be interpreted as applying to the State of Idaho.

As discussed above, Idaho Code § 31-4804 provides for a means of financing emergency communications systems in the form of a “telephone line user fee” of \$1.00 “per exchange access line, trunk line, network access register, or equivalent,” to be collected from “customers” on a monthly basis by “all telecommunications entities” providing local telephone service within the county. The Act does not define “customers.”

There is no language in the Emergency Communications Act which states whether the legislature intended the State of Idaho to be subject to the monthly charge. However, there is language in the Act from which it may be logically inferred that the legislature intended that the state not be subject to the charge.

Section 31-4803(5) of the Act provides that any net savings in operating expenditures caused by “utilizing a consolidated emergency system” shall be applied to reduce ad valorem taxes of that taxing district. As discussed above, this language, which tends to equate the monthly user fees with ad valorem taxes, may indicate a legislative intent that the State of Idaho not be subject to the fees, in view of the state’s exemption from property taxes as provided in article 7, section 4, of the Idaho Constitution.

The legislature’s intent that the State of Idaho not be subject to the user fee is most clearly revealed in the Statement of Purpose for HB 577, which became the Emergency Communications Act. In the Statement of Purpose, the legislature stated that enactment of the Emergency Communications Act would have “*no fiscal impact*” upon the State of Idaho. In view of the multitude of telephone lines maintained by the state, the legislature’s unequivocal language that the Act would have no fiscal impact on the State of Idaho is clear evidence the legislature did not intend the act to apply to the state.

In determining what construction to place on a statute, legislative intent is controlling. *In Interest of Miller*, 110 Idaho 298, 299, 715 P.2d 968 (1986); *Gumprecht v. City of Coeur d’Alene*, 104 Idaho 615, 618, 661 P.2d 1214 (1983).

Consequently, Emergency Communications Act charges imposed by Idaho Code § 31-4804 should not be construed as applying to the state.

AUTHORITIES CONSIDERED:

1. *Constitutions*

Idaho Constitution, art. 7, § 4.

2. *Statutes*

Chapter 48, Title 31, Idaho Code.

Idaho Code § 31-4803(5).

Idaho Code § 31-4804.

Idaho Code § 31-4811.

3. *Cases*

Brewster v. City of Pocatello, 88 I.S.C.R. 1431 (December 29, 1988).

City of Idaho Falls v. Pfost, 53 Idaho 247, 23 P.2d 245 (1933).

Employment Security Agency v. Joint Class A School District, 88 Idaho 384, 400 P.2d 377 (1965).

Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 618, 661 P.2d 1214 (1983).

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

In Interest of Miller, 110 Idaho 298, 299, 715 P.2d 968 (1986).

Robb v. Nielson, 71 Idaho 222, 229 P.2d 981 (1951).

State ex rel. Pfof v. Boise City, 57 Idaho 507, 66 P.2d 1016 (1937).

DATED this 17th day of April, 1989.

JIM JONES
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State of Idaho

Analysis by:

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A. RENE' FITZPATRICK
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ATTORNEY GENERAL OPINION NO. 89-5

TO: Rayburn Barton
Executive Director
State Board of Education
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Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Idaho College Work Study Program established under chapter 44, title 33, Idaho Code, unconstitutional as applied to postsecondary institutions with religious affiliations?

CONCLUSION:

Yes. The Idaho College Work Study Program established under chapter 44, title 33, Idaho Code, as applied to postsecondary institutions controlled by a church, sectarian or religious denomination, violates art. 9, § 5, of the Idaho Constitution.

ANALYSIS:

The 1989 legislature announced the public policy and purpose of the work study program in what is now codified as Idaho Code §§ 33-4402 and 4404:

The legislature hereby recognizes and declares that it is in the public interest to assure educational opportunity to Idaho postsecondary students. The Idaho work study program is an employment program designed to allow resident needy students to earn funds to assist in attending accredited institutions of higher education in Idaho.

...

The purpose of the program is to expand employment opportunities for resident students. Employment may be in jobs at accredited institutions of higher education or in approved off-campus jobs. Students with financial need are to benefit through the program, and to do so while gaining work experience. Accordingly, efforts should be made whenever possible to provide job opportunities to students which relate to their academic and career goals.

Funds under this program may be used to pay up to eighty percent (80%) of earnings in on-campus jobs. Program funds may also be used to pay up to fifty percent (50%) of earnings for approved off-campus jobs where the jobs are directly related to the student's course of academic study and the employer pays fifty percent (50%) of the earnings. Program funds may also be used to fund up to ten percent (10%) of the total match required for the federal college work study program. Idaho program funds used as match will be governed by federal college work study policy. However, institutional funds used for federal matching purposes shall not be less than the amount allocated for the prior year.

The state board of education is directed to allocate program funds to eligible institutions based upon fall full-time equivalent enrollment in a manner established by board rule. Generally, employment which is allowable under the federal college work study program is allowed under the Idaho program. Each institution's financial aid office is responsible for ensuring that disbursements are made for appropriate work. Students must be paid by check or instrument which may be cashed by students on their own endorsement without further restrictions. The institution may credit earnings to the student's account only with written permission from the student. Idaho Code §§ 33-4401 through 33-4409.

The Idaho College Work Study Program does not violate the establishment clause of the first amendment of the United States Constitution. In *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), the Court held that the use of financial aid pursuant to Washington's vocational rehabilitation program to finance training for the ministry at a Christian college does not violate the establishment clause. The three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), was applied. First, the secular purpose of the legislation was clear. Second, the Court found that the primary effect of the legislation did not advance religion. Considerations were that the money was paid directly to the student, the aid was available without regard to the sectarian-nonsectarian nature of the benefited institution, and the record did not indicate that any significant portion of the aid expended as a whole would be used for religious education. The Court did not discuss directly the third prong of the test — that the legislation must not foster excessive government entanglement with religion.

On remand, however, the Washington Supreme Court held that the statute violates that state's constitutional provision prohibiting the appropriation of public money for religious instruction. *Witters v. Washington Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 (1989).

Applying the principles of *Witters*, the Idaho Work Study Program does not violate the United States Constitution. The purpose of the work study program, to expand employment opportunities for resident students, is secular. The primary effect of the legislation does not advance religion. Although the aid would be funneled through the colleges, their involvement would largely consist of fund disbursement and recordkeeping, which would not result in excessive entanglement.

The Idaho College Work Study Program does, however, violate art. 9, § 5, of the Idaho Constitution as construed by the Idaho Supreme Court. That section provides:

Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; . . .

The Idaho Supreme Court in *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), held that a statute which provided for the allocation of public funds to provide transportation for private school students, including students enrolled in parochial schools, violates art. 9, § 5. The court specifically rejected the “child benefit” theory, i.e., the contention that the public assistance “is being furnished to the children and not to the institution and hence does not constitute any aid or benefit to the sectarian institution.” 94 Idaho at 394, 488 P.2d at 864. The court likewise rejected the forerunner of the three-part *Lemon* test.

Idaho Const. art. 1, § 3, guarantees the exercise and enjoyment of religious faith and prohibits requiring a person to attend religious services, to support any particular religion or to pay tithes against his consent. Since these provisions of the Idaho Constitution are comparable to the free exercise and establishment clauses of the first amendment to the United States Constitution, the Idaho Supreme Court in *Epeldi* determined that the framers of the Idaho Constitution “intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution” when they included the art. 9, § 5, prohibition of appropriations in aid of any church or to help support and sustain any sectarian school. *Epeldi*, 94 Idaho at 395, 488 P.2d at 865. The court found that since an effect of the legislation was to aid parochial schools by bringing students to them, the legislation violated the Idaho Constitution.

The legislation establishing the Idaho College Work Study Program provides that jobs which are allowed under the federal college work study program generally are acceptable under the Idaho program. Neither the Idaho statutes nor the federal statutes limit the application of the Idaho Work Study Program to college educational institutions which are not sectarian. Since an effect of the legislation providing for the Idaho College Work Study Program is to use state funds to pay up to eighty percent of the salaries of students working for sectarian postsecondary institutions, the legislation clearly violates art. 9, § 5, by helping to support postsecondary institutions controlled by churches, sectarian or religious denominations.

A closer question is presented by the provisions of the Idaho College Work Study Program that allow program funds to be used to pay up to fifty percent of earnings for approved off-campus jobs. Since the legislation requires that the money be paid directly to the student without restriction, the benefit to the institution is not as clear. Several states with constitutional provisions similar to Idaho's prohibition of support to religious institutions have considered the constitutional validity of financial aid legislation. Legislation has been upheld so long as it included provisions requiring that there be no sectarian bent in the curriculum, *Americans United for Separation of Church and State Fund v. State*, 648 P.2d 1072, 1075, 1083-85 (Colo. 1982); that an approved educational institution have an independent governing board and academic freedom, *Id.*, *Americans United v. Rogers*, 538 S.W.2d 711, 721-22 (Mo.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); or that eligible educational institutions not be of predominantly sectarian character, *Alabama Educ. Ass'n v. James*, 373 So.2d 1076, 1078-81 (Ala. 1976).

The Washington Supreme Court considered legislation which created an agency to purchase loans made to eligible students by financial and educational institutions. That state's constitution provides:

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian influence.

Wash. Const. art. 9, § 4. The Washington Constitution further states:

No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Wash. Const. art. 1, § 11. Although the Washington legislation, like the Idaho legislation in question, did not require the money be used for tuition, the court stated:

Part of the loaned funds will most certainly be used to pay tuition, and the remainder will benefit the college in many ways by assisting the student to stay in school. . . .

Washington State Higher Educ. Assistance Auth. v. Graham, 34 Wash. 2d 813, 529 P.2d 1051, 1054 (1974). Using language from a previous case, the Washington court stated:

Any use of public funds that benefits schools under sectarian control or influence—regardless of whether that benefit is characterized as “indirect” or “incidental” — violates this provision.

Id., 529 P.2d at 1053-54 (quoting *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973, 981 (1973)).

In consideration of the Idaho Supreme Court’s strict interpretation and application of art. 9, § 5, in *Epeldi*, 94 Idaho at 396, 488 P.2d at 866, the use of public funds to pay up to fifty percent of the earnings from approved off-campus jobs of students of an educational institution controlled by a church, sectarian or religious denomination also would violate the Idaho Constitution. Although the money is paid directly to the student, the award of funds is based upon the student’s financial need, meaning the student’s financial ability to meet the institutionally defined cost of education. Idaho Code § 33-4403(3) (1989). Like the Washington loan program, the Idaho funds likely would be used to pay tuition and would support the institution by assisting the student to stay in school. Providing Idaho College Work Study Program funds to students of an institution controlled by a church, sectarian or religious denomination in this manner would violate the Idaho Constitution.

AUTHORITIES CONSIDERED:

1. *Constitutions*

First Amendment, U.S. Constitution.

Article 9, § 5, Idaho Constitution.

2. *United States Statutes*

42 U.S.C. § 2753(b)(1)(C) (1989).

3. *Idaho Statutes*

Idaho Code §§ 33-4401 through 33-4409 (1989).

4. *United States Cases*

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986).

5. *Idaho Cases*

Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

6. *Other State Cases*

Witters v. Washington Comm'n for the Blind, 112 Wash.2d 363, 771 P.2d 1119 (1989).

Americans United for Separation of Church and State Fund v. State, 648 P.2d 1072, 1075, 1083-85 (Colo. 1982).

Americans United v. Rogers, 538 S.W.2d 711, 721-22 (Mo.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

Alabama Educ. Ass'n v. James, 373 So.2d 1076, 1078-81 (Ala. 1976).

Washington State Higher Educ. Assistance Auth. v. Graham, 34 Wash. 2d 813, 529 P.2d 1051, 1054 (1974).

DATED this 7th day of June, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Barbara Reisner, Legal Intern

ATTORNEY GENERAL OPINION NO. 89-6

TO: Richard A. Vernon, Director
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Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

What duty does the Idaho Department of Corrections and its employees have to protect staff members and inmates from inmates who are HIV positive, or who have ARC or AIDS, as a result of the state mandated testing of the prison population?

CONCLUSION:

The duty of the Idaho Department of Corrections to inmates and staff is to take reasonable measures to ensure their safety. No greater liability is created by reasonably restricting access to patient information. In fact, under some circumstances, failure to protect the confidentiality of such information could expose the department to liability.

ANALYSIS:

The Department of Corrections has a duty to the general inmate population, to employees of the prison and to HIV-infected inmates. Each duty has different elements that are based on statute, common law and common sense. This opinion will discuss each duty separately.

Duty to the General Inmate Population

The United States Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals in confinement. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the United States Supreme Court recognized that the eighth amendment's prohibition against cruel and unusual punishment, made applicable to the states through the fourteenth amendment's due process clause, *Robinson v. California*, 370 U.S. 660 (1962), requires the state to provide adequate medical care to incarcerated prisoners. 429 U.S. at 103-104. The Court reasoned that because the prisoner is unable "by reason of the deprivation of his liberty to care for himself," it is only just that the state be required to care for him. *Id.*, quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E., 291, 293 (1926). The Court, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), extended this analysis

beyond the eighth amendment setting, holding that incarceration does not deprive a person of all substantive liberty interests and that there is a right to personal security which constitutes a historic liberty interest protected by the due process clause.

Taken together, *Estelle* and *Youngberg* stand for the proposition that when the state takes inmates into its custody and holds them against their will, the Constitution imposes upon it a corresponding duty to assume some responsibility for their safety and general well being. To make an eighth amendment claim based upon failure to provide medical care, a plaintiff must show a deliberate indifference by prison authorities to serious medical needs of inmates. Liability "[r]equires, at a minimum, that the prison officials have realized that there was imminent danger and have refused — conscientiously refused, knowingly refused — to do anything about it." *Duckworth v. Fransen*, 780 F.2d 645, 653 (1985). The Supreme Court quoted the *Duckworth* standard with approval in *Whitley v. Albers*, 475 U.S. 312 (1986). Nonetheless, the penal institution is not an absolute insurer of the safety of the inmates. *Parker v. State*, 282 So.2d 483 (La. 1973). A prison authority is held to a standard of reasonable care; in order to hold the authority liable, the complainant must show foreseeable harm and failure to use reasonable care in preventing harm. *Walkerv. Foti*, 530 So.2d 661 (La. App. 4th Cir. 1988).

The unnecessary exposure of inmates to communicable diseases, in particular, is a violation of the state's duty to care for the safety of the inmates and is prohibited by the eighth amendment. *Wilson, et al. v. State of Idaho*, 113 Idaho 563, 746 P.2d 1022 (Ct.App. 1987). See also, *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Madison County Jail Inmates v. Thompson*, 773 F.2d 834 (7th Cir. 1985); *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985); and *Blake v. Hall*, 668 F.2d 52 (1st Cir. 1981). Thus, the Department of Corrections has an affirmative duty to protect the inmate population from the infection of HIV. One court has found that the failure to screen incoming prisoners for communicable diseases was a violation of this duty. *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981). The Federal Bureau of Prisons has begun mandatory testing of all federal prisoners for HIV antibodies. See, Federal Bureau of Prisons Operations Memo No. 73-87(6100), Human Immunodeficiency Virus Admission and Re-reliance Program (June 24, 1987).

The State of Idaho has likewise recognized this duty. Idaho Code § 39-604 states in part:

- (1) All persons who shall be confined or imprisoned in any state prison facility in this state shall be examined for on admission, and again before release, and, if infected, treated for the diseases enumerated in Idaho

Code § 39-601 [venereal diseases] and this examination shall include a test for HIV antibodies or antigens . . .

The only judicial construction to date of this particular statute and of the Department of Corrections' more general duty to provide reasonable care to protect inmates from AIDS occurred in December of 1988, when the Fourth Judicial District Court for the County of Ada heard an action brought by two inmates of the Idaho State Correctional Institution against the State of Idaho. The petitioners, in essence, alleged that the Department of Corrections had failed to exercise reasonable care by failing to have all inmates tested for communicable diseases and by failing to have those prisoners found to be infected with HIV segregated from the general population. The petition was dismissed after the court scrutinized the medical practices and regulations in place at the prison and found them adequate to prevent the unnecessary exposure of inmates to communicable diseases. The decision by Judge Dennard set forth the prison's practices as follows:

Since September of 1987, all incoming inmates have been specifically tested for HIV. This is part of an overall medical examination given by either Dr. Mutch or his physician's assistant, under his supervision. Medical histories are also taken. Each incoming inmate is giving [sic] a broad blood screen which can detect abnormalities that might suggest the presence of other infectious diseases. If, upon such examination and testing, there is a medical indication of possible infectious disease, further testing is administered as necessary to aid in the diagnosis of the disease. If an inmate has an infectious disease, he is given the appropriate medical treatment. If the disease he has is infectious and the risk of infection to other inmates is high, he is isolated during the infectious stage, and then returned to the general inmate population. This would be the case with an infectious disease such as tuberculosis. Isolation for diseases such as the form of hepatitis which is transmitted only through the oral/fecal route, is not considered medically appropriate. The same is true for other forms of hepatitis which can be transmitted only through an exchange of blood serum, or bodily fluids, including through sexual intercourse. Infected inmates are counseled as to these risks of transmission, and are not isolated since quarantine is not considered medically appropriate in the general public population under the same medical circumstances.

Similarly, a person who tests positive for HIV, is not quarantined since there is no risk of transmission unless the infected inmate engages in the high risk activities of sharing needles during intravenous drug use, or homosexual conduct. Each inmate is specifically counseled as to these activities and their potential for transmitting the virus, not only by Dr. Mutch, but also by the local health authorities. They are told that if they

engage in such activities, they will be isolated from other inmates. Each infected inmate is seen by Dr. Mutch on a regular basis, the frequency depending upon the inmate's condition. On each visit with Dr. Mutch, he gives the infected inmate a complete physical examination and questions him as to abstinence from the activities in which the virus can be transmitted. Dr. Mutch also seeks the input from the prison authorities on whether the inmate has engaged in any of these high-risk activities.

At present, the Department of Corrections, acting upon the medical advice of Dr. Mutch, its Acting Medical Director, has determined that inmates infected with HIV will be given appropriate medical treatment; they will be educated and counseled as to the risks and manner of transmitting the virus; they will be regularly monitored for compliance with directives not to engage in any high risk behavior; but will not be segregated from the general population unless medically appropriate on a case by case basis, or unless the inmate ignores the admonition about prohibited behavior and engages in activities which may transmit the virus to other inmates.

Having set forth the prison's medical policies and practices, Judge Dennard next evaluated those policies and practices in light of contemporary medical knowledge of AIDS-related conditions:

This course of treatment is the same course of treatment provided for a member of the general public population. People outside of the prison who have HIV are not quarantined. In fact, disclosing the fact they are infected or treating them differently from non-infected persons is most often prohibited by the courts, rather than mandated. See *Journal of the American Medical Association*, Vol. 257, No. 3, Page 344, 'The Initial Impact of AIDS on Public Health Law in the United States-1986,' for a general discussion of legal issues raised by AIDS.

HIV cannot be transmitted through casual contact. It requires the exchange of bodily fluids which occurs primarily though [sic] the sharing of needles during intravenous drug use and through homosexual activity. Both activities are prohibited in a prison environment. Not only are inmates aware they will be disciplined for engaging in these prohibited activities, the department has also enacted regulations which inform inmates about these high risk activities and their relation to the transmission of AIDS. These regulations also spell out how inmates will be tested and treated for HIV, ARC and AIDS. It has been made clear, not only to the infected inmate, but also to the general inmate population, abstinence from these high risk activities is necessary to avoid HIV infection.

According to Mr. Murphy, the Director of the Department of Corrections, very few correctional facilities have opted to segregate *all* inmates infected with HIV, from the general prison population. The Federal Bureau of Prisons has determined that only HIV infected inmates who have exhibited predatory or promiscuous behavior, will be segregated from the general population. *Bureau of Prisons, Control, Custody, Care, Treatment and Instruction of Inmates*, 28 C.F.R. Part 541. It appears that segregation is neither medically mandated, or [sic] the accepted standard in penal institutions, except for infected inmates who demonstrate a proclivity for engaging irresponsibly in high-risk activities.

The court concluded that the department's medical practices and regulations relating to AIDS are reasonable under the circumstances:

I therefore conclude, as a matter of law, that the present medical practices and regulations in place at the prison are adequate to prevent the unnecessary exposure of inmates to communicable diseases, including HIV, and that the conditions complained of by these petitioners are insufficient to state a claim of cruel and unusual punishment under the eighth amendment. I do not believe that contemporary standards of decency require that an inmate infected with HIV be segregated from other inmates unless that inmate has demonstrated a proclivity to engage in conduct which poses a high risk of transmission of the virus to other inmates. There is no segregation or quarantine of members of the general population except under those similar circumstances and I see no special circumstances by reason of a person's confinement in prison, to warrant different treatment of infected inmates. By reason of this conclusion, the writ of habeas corpus will be quashed and the petitioner's petitions are dismissed. I will grant petitioners leave, however, to reopen these proceedings in the event it can be shown that prison authorities have not promptly investigated and acted upon the information that came to light in the course of this hearing regarding the conduct of the HIV infected inmate presently under Mr. Mutch's care. If it is determined that this inmate has disregarded Dr. Mutch's directives about engaging in high-risk activities, then appropriate action on the part of the authorities to prevent any future occurrence of this conduct would be mandated under this decision.

Hays v. State, Case Nos. HC2799 and 2800, Ada County, M. Dennard (Memorandum Decision and Order, dated December 23, 1988).

This opinion accepts Judge Dennard's decision that the Department of Corrections' policy and practices, as followed in November of 1988, are sufficient to provide the reasonable protection of inmates required by the Constitution of the United States.

Duty to Staff

Prison administrators are charged with the responsibility of ensuring the safety of prison staff, administrators and visitors as well as an obligation to take reasonable measures to guarantee the safety of inmates. *Whitley v. Albers*, 475 U.S. 312 (1986). However, absent a statute imposing such liability, a prison, like any other employer, is not an insurer and is liable only for negligence. *Curtis v. Deatley*, 104 Idaho 787, 663 P.2d 1089 (1983); *Shirts v. Schultz*, 76 Idaho 463, 285 P.2d 479 (1955).

The duty of the Department of Corrections to its staff is to take reasonable precautions to prevent the spread of communicable disease. What constitutes "reasonable" regarding HIV infection must be defined in relation to the probability of infection, the steps taken by the department to maintain control, and what alternatives may exist to current practice.

HIV cannot be transmitted through casual contact. It requires the exchange of bodily fluids, primarily through the sharing of needles during intravenous drug use and through homosexual activity. *Hays v. State*, p. 1. The third and only other relevant method of transmittal in the prison environment is blood transfer through open wounds. Data from several United States studies suggest that the risk of HIV infection due to accidental needle sticking or puncture wounds is extremely small. The National Institute of Justice AIDS Bulletin, October 1987 reported that only three United States health workers (.005% of 666 persons) who were not in a high risk group tested positive for the HIV antibody after direct blood to blood contact. Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. No. 87-18 (1987), citing *AIDS in Correctional Facilities: Issues and Options*, National Institute of Justice (2nd Ed. May 1987).

Not surprisingly, the risk associated with open wound and mucous-membrane (e.g., eyes, nose, mouth) exposures is even lower, as reported in a Center for Disease Control surveillance study, where 172 health care workers had open wounds or mucous-membranes exposed to the blood of HIV infected patients. None of these workers became infected. E. McCray, *The Co-operative Needlestick Surveillance Group: Occupational Risk of AIDS Among Health Care Workers*, New Eng. J. of Med., 314, 1127 to 1132 (1986). In a NIH study, no infections occurred among 229 health care workers with similar mucous-membrane exposures. Finally, in a study at the University of California, 34 health care workers with open wound or mucous-membrane exposures were tested and none were positive for HIV antibodies. D.K. Henderson, A.J. Saah, B.J. Zak, et al., *Risk of Nosocomial Infection with HTLV-3/LAV in a Large Cohort of Intensively Exposed Health Care Workers*, Annals of Internal Medicine, 104, 644 to 647

(1986). Four hundred thirty-five health care workers with non-needle stick exposures to HIV infected blood have been followed in prospective studies and none have become infected. Nevertheless, the Center for Disease Control has always believed that infection through such exposures is possible, although the risk is still considered extremely low. *AIDS Bulletin*, National Institute of Justice (October 1987).

A recent study conducted by the National Institute of Justice found that there were no known cases of AIDS, ARC or HIV seropositivity among correctional institution staff as a result of contact with inmates. Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. No. 87-18 (1987).

The National Institute of Justice has directly addressed the duty of correctional departments to their employees:

Departments are not legally required to ensure the absolute safety of their employees but only to adhere to a reasonable standard of care. Just as an agency would only be liable for a gunshot wound or other injury incurred in the line of duty if established safety procedures had been violated or the Department had been otherwise negligent, so in the case of HIV infection, such negligence would also need to be shown. (Of course, worker's compensation might well apply to either case, but would not entail the serious consequences of a finding of departmental liability.) The most obvious form of negligence would be failure to provide adequate training on precautionary measures against HIV infection. This would be a particular problem if the officer's infection could be shown to have resulted, even in part, from a failure to follow precautions.

AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p.105 (February 1988).

Idaho Code § 20-209, "Control and Management of Penitentiary and Inmates," states in part, "(3) The State Board of Correction should provide educational and informational services to inmates housed in Idaho and to its department employees in order to assure that the transmission of HIV within correctional facilities is diminished." Thus, the Department of Corrections has a statutory duty to provide adequate training in the prevention of AIDS to its employees.

The Idaho Legislature may have provided a window of opportunity to go beyond current prison policy and inform staff of persons infected, under the rationale of self-protection:

[T]here is a need for certain individuals to know the patient's condition so that they may be protected from the disease or protect themselves and others closely associated with the patient.

Idaho Code § 39-609. To use this clause to justify disclosing the identity of HIV infected inmates, however, the Department of Corrections must show "there is a need" for such disclosure. This statutory provision must further be read in conjunction with the Idaho Legislature's other declarations of intent regarding the confidentiality of AIDS information:

It is the intent of this chapter to observe all possible secrecy for the benefit of the sufferer so long as the said sufferer conforms to the requirements of this chapter . . .

Idaho Code § 39-606.

[I]t is hereby declared to be the policy of this state that an effective program of preventing AIDS must maintain the confidentiality of patient information and restrict the use of such information solely to public health requirements . . .

Idaho Code § 39-609.

The state obviously recognizes the need for secrecy and has legislated its requirement. The Department of Corrections must show a specific need to release the information. Since the prison's practices in protecting the general inmate population have been found reasonable without the release of the names, *Hays v. State, supra*, it would follow that these same practices are reasonable for the protection of staff.

The Nevada Attorney General concluded in Opinion No. 87-18, Prisons: Confidentiality of Medical Information Concerning AIDS, that disclosure must be limited to those "who have a legitimate medical need to know in connection with the prevention and control of AIDS." This does not include all correctional officers. Since mandatory testing has been performed upon entry to the prison only since September 1987, approximately 50% of the inmates have not been tested. *See, Hays v. State, supra*, p.13. The Nevada Attorney General warns that:

[A] list of inmates who have tested positive will not represent an accurate and complete list of the pool of those infected. In fact, such a list may indeed create additional risk to correctional officers because of the misleading nature of the information which may result in an unintentional

disregard for prescribed safety precautions through a false sense of security.

Nevada Att'y Gen. Op. No. 87-18, *supra*.

Realistically, it is difficult to maintain the confidentiality of sensitive AIDS related information in prisons and jails; however, because of potentially serious consequences of unauthorized disclosure, it is essential that correctional authorities preserve confidentiality. No disclosure should be made except where clearly required by medical, safety, or institutional security considerations. Policies should be adopted and enforced which specify clearly who is permitted to receive information, what information is to be disclosed, and under what circumstances. Vague policies permitting disclosure to those with a "need to know" would not be sufficient. *AIDS in Correctional Facilities*, 3rd Ed., National Institute of Justice, p.108 (February 1988).

Duty to Infected Inmates

Idaho Code § 20-209, "Control and Management of Penitentiary and Inmates," states in part,

(2) The state board of correction is authorized to provide medical and counselling services to those inmates who have been exposed to the HIV (human immunodeficiency virus) which causes acquired immunodeficiency syndrome (AIDS) or, who have been diagnosed as having contracted human immunodeficiency viral disease.

The language of this statute authorizes the Department of Corrections to treat HIV infected inmates. Moreover, the constitutional requirements under the eighth amendment, as previously cited, demand that reasonable treatment be given. The counseling of infected inmates has been determined to be one component of the reasonable course of action. *See, Hays v. State, supra*, pp. 9,10,11,13; Nevada Att'y Gen. Op. No. 87-18, *supra*, pp.134,144; *AIDS in Correctional Facilities*, 3rd Ed., National Institute of Justice, pp.39 *et seq.* (February 1988).

Another component of reasonable treatment of infected patients is maintenance of confidentiality. The safety of an AIDS infected inmate is at stake when his condition is disclosed. Disclosure may place an inmate in a very difficult and dangerous situation in the institution. As stated in 54 Clev. Clinic J. of Med., 478 (1987), "The stigma that accompanies a diagnosis of AIDS, based on fear and society's attitude toward drug users and homosexuals, presents a factor beyond the control of the infected individual." *Doe v. Prime Health/Kansas City, Inc.*, Dist. Ct. for Johnson County, KS 1018 (1988). The Kansas court was referring to

the effect of disclosure on an individual in the general population. The possible effect of disclosure on a prisoner in the inmate population of the prison is more extreme. Within the confines of the prison, the infected prisoner is likely to suffer from harassment and psychological pressures. *Doe v. Coughlin*, 697 F.Supp. 1234 (N.D.N.Y. 1988). As mentioned above, the Idaho Legislature has adopted a strong policy favoring confidentiality of information regarding infected individuals. Adherence to this policy is particularly important in the prison population. Disclosure would not be justified absent a clear need and a demonstration that disclosure would accomplish a greater degree of control over the confirmed seropositive prisoners now in the prison than is exercised through the current practices of the medical staff.

These legislative and prison policies are echoed in the opinions of two recent court decisions. In a suit by a prison inmate against the prison medical personnel for disclosing to non-medical staff that he had tested positive for AIDS, the court concluded “. . . that there is a constitutional right to privacy in one’s medical records and in the doctor-patient relationship; that this right is not relinquished automatically when a person is incarcerated as the result of a criminal conviction.” *Woods v. White*, 689 F.Supp. 874, (W.D. Wis. 1988). The court based this decision, in part, upon *Whalen v. Roe*, 429 U.S. 589 (1977). In *Whalen*, a unanimous Court identified two interests encompassed by the right to privacy, one of which “is the individual interest in avoiding disclosure of personal matters.” Another court followed this line of cases when it provided injunctive relief to an inmate requesting he not be placed in segregated housing for the AIDS-infected. “In the court’s view there are few matters of a more personal nature . . . than the manner in which he [the inmate] reveals that diagnosis [AIDS] to others The court determines that the prisoners subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis.” *Doe v. Coughlin*, *supra*, at 1237, 1238.

Summary

The Department of Corrections owes a duty to inmates and staff to take reasonable measures to ensure their safety. These reasonable measures include acting to prevent the spread of communicable diseases and to provide safety to inmates. The question as to how to meet this obligation is a universal prison problem. The National Institute of Justice states that:

Many correctional systems are worried about their potential liability for HIV infections which occur among inmates while incarcerated and among staff while on the job. There are serious difficulties in linking infection with a particular episode; however, correctional systems can probably eliminate any potential liability, and maximize safety in their

institutions, by taking all reasonable steps to prevent inmates from being victimized and providing all inmates and staff with clear and complete training on how to avoid becoming infected with HIV.

AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p.108 (February 1988).

This opinion concludes that the state is meeting its fourth, eighth and fourteenth amendment obligations to the inmate population. The precautions outlined above, in addition to proper training and education, appear to be sufficient to meet the reasonable safety requirements of the prison personnel.

The policy and practices of the Department of Corrections, and its employees, as outlined in this opinion, are sufficient under current medical knowledge to fulfill any duties that could result from the knowledge of inmate HIV infection.

AUTHORITIES CONSIDERED:

1. *Constitutions*

United States Constitution Amendment IV.
United States Constitution Amendment VIII.
United States Constitution Amendment XIV.

2. *Idaho Statutes*

Idaho Code § 20-209.
Idaho Code § 39-601.
Idaho Code § 39-604.
Idaho Code § 39-606.
Idaho Code § 39-609.

3. *United States Supreme Court Cases*

Estelle v. Gamble, 429 U.S. 97 (1976).

Rhodes v. Chapman, 452 U.S. 337 (1981).

Robinson v. California, 370 U.S. 660 (1962).

Whalen v. Roe, 429 U.S. 589 (1977).

Whitley v. Albers, 475 U.S. 312 (1986).

Youngberg v. Romeo, 457 U.S. 307 (1982).

4. *Other Federal Cases*

Blake v. Hall, 668 F.2d 52 (1st Cir. 1981).

Doe v. Coughlin, 697 F.Supp. 1234 (N.D.N.Y. 1988).

Duckworth v. Fransen, 780 F.2d 645, 653 (1985).

Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985).

LaRue v. Manson, 651 F.2d 96 (1981).

Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985).

Woods v. White, 689 F.Supp. 874 (W.D. Wis. 1988).

5. *Idaho Cases*

Curtis v. Deatley, 104 Idaho 787, 663 P.2d 1089 (1983).

Hays v. State, Case Nos. HC2799 and 2800, Ada County, M. Dennard (Memorandum Decision and Order, dated December 23, 1988).

Shirts v. Schultz, 76 Idaho 463, 285 P.2d 479 (1955).

Wilson, et al. v. State of Idaho, 113 Idaho 563 (Ct.App. 1987).

6. *Other Jurisdictions*

Doe v. Prime Health/Kansas City, Inc., Dist. Ct. for Johnson County, KS 1018 (1988).

LaRocca v. Dalsheim, 467, N.Y.S.2d 302 (Sup. 1983).

Parker v. State, 282 So.2d 483 (La. 1973).

Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E., 291, 293 (1926).

Walker v. Foti, 530 So.2d 661 (La. App. 4th Cir. 1988).

7. *Other Authorities*

AIDS Bulletin, National Institute of Justice (October 1987).

AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p. 108 (February 1988).

Federal Bureau of Prisons Operations Memo, No. 73-87 (6100), Human Immunodeficiency Virus Admission and Re-reliance Program (June 24, 1987).

D.K. Henderson, A.J. Saah, B.J. Zak, et al., *Risk of Nosocomial Infection with HTLV-3/LAV in a Large Cohort of Intensively Exposed Health Care Workers*, *Annals of Internal Medicine*, 104, 644 to 647 (1986).

Journal of the American Medical Association, Vol. 257, No. 3, Page 344, The Initial Impact of AIDS on Public Health Law in the United States - 1986.

E. McCray, *The Co-operative Needlestick Surveillance Group: Occupational Risk of AIDS Among Health Care Workers*, *New Eng. J. of Med.*, 314, 1127 to 1132 (1986).

Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. NO. 87-18 (1987).

54 *Clev. Clinic J. of Med.*, 478 (1987).

DATED this 12th day of June, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Michael Stoy
Deputy Attorney General
Department of Health and Welfare

ATTORNEY GENERAL OPINION NO. 89-7

TO: Honorable Myron Jones
State Representative, District 29
Malad Summit
Malad, ID 83252

Honorable Ron Vieselmeyer
State Representative, District 2
4050 Sky Harbor Drive
Coeur d'Alene, ID 83814

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Is it lawful to use tax dollars for the lobbying efforts of a private association?
2. Are the Idaho Association of Counties and the Association of Idaho Cities private or public?
3. If the associations are "public" are their financial and deliberative records open to the public?
4. Is it lawful for elected officials to discuss and determine public policy at private (association) meetings?

CONCLUSIONS:

1. Payment of dues to municipal leagues or associations by cities and counties is an expenditure for a public purpose permitted by the Idaho Constitution and statutes. The use of those dues for lobbying efforts is permissible if the lobbying is for an appropriate public purpose.
2. As nonprofit corporations, the Association of Idaho Cities and Idaho Association of Counties are private entities. However, the validity of these entities has been recognized by the legislature by their inclusion in the Idaho public employee retirement system.
3. Association records are not public records. However, records from the association maintained by city and county officials are public records.

4. Elected officials may discuss potential public policy issues and determine association policy at association meetings. But local public policy must be determined and adopted only after compliance with Idaho law.

ANALYSIS:

I. PARTICIPATION IN A MUNICIPAL LEAGUE

You have asked several questions concerning a city's or county's participation in a municipal league such as the Association of Idaho Cities (AIC) or Idaho Association of Counties (IAC). In order to address your questions, it is necessary to raise and discuss the more basic question of the ability of cities and counties to become members of municipal leagues or associations and to pay membership fees or dues from public funds. The analysis of this question requires a review of Idaho's constitution, statutes and case law as well as of the purposes of these associations. However, there are no Idaho cases directly on this point and it will be necessary to review case law from other jurisdictions that have addressed this issue.

Two issues must be considered for a determination that expenditure of funds for membership dues is lawful. First, the purpose for the expenditure must be a public purpose. *City of Glendale v. White*, 194 P.2d 435, 437 (Arizona 1948). Second, the action must be taken pursuant to powers expressly granted by the state or necessarily implied from express grants of power. *Id. See, Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980); *State v. Frederic*, 28 Idaho 709, 715, 155 P. 977, 979 (1916).

A. Public Purpose

The expenditure of public money by a city or county is addressed by Idaho Constitution art. 12, § 4, which provides:

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

Under this provision it has been held that city and county expenditures are appropriate for purposes which are "public," as opposed to "private." *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917). The power of municipal corporations is limited to those "functions and purposes which are municipal and public in character as distinguished from those

which are private in character and engaged in for private profit.” *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 346, 353 P.2d 767 (1960). A “public purpose” is defined as “an activity that serves to benefit the community as a whole and which is directly related to the functions of government.” *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 559, 548 P.2d 35 (1976).

The Idaho courts on many occasions have applied the general notion of a “public purpose” to specific fact situations to determine whether the governmental appropriation or expenditure in question was for a public purpose. Thus, expenditures have been held to be for a public purpose when made for highways and public safety, *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939), and *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966); general education and college dormitories, *Davis v. Moon*, 77 Idaho 146, 289 P.2d 614 (1955); and water and hydroelectric development, *Idaho Water Resource Board v. Kramer*, *supra*. To the contrary, expenditures for payment of dues to a fire insurance association for the benefit of private citizens, *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, *supra*, and issuance of municipal bonds for acquisition of industrial and commercial concerns for lease and use by a private company, *Village of Moyie Springs v. Aurora Mfg. Co.*, *supra*, are not for a public purpose, and are thus in violation of the Idaho Constitution. The court also has given some general guidance as to what constitutes a public purpose by commenting favorably on expenditures for sewer and water facilities, urban renewal, crime prevention and other acts for the protection of the public health, safety and welfare. *Id.*

Thus, the question is whether an expenditure by a city or county for membership in an organization such as AIC or IAC is for a public purpose. To answer this question it is necessary to review the purposes of these organizations.

The AIC and IAC are incorporated under the laws of the state of Idaho as non-profit corporations. The purposes of these organizations, as set forth in their articles of incorporation on file with the secretary of state, include providing programs, information and a forum for exchange of ideas to assist city and county officials in the performance of their duties, making recommendations to the governor and legislature on issues affecting city and county government, and providing litigation assistance. Thus, the purposes of these private entities clearly are designed to assist city and county governments to carry out their duties.

Furthermore, the state legislature has chosen to recognize these organizations as “governmental entities” by defining them as an employer for public employment retirement purposes. In Idaho Code § 59-1302(15), “employer” is defined as:

the state of Idaho, or any political subdivision or governmental entity, provided such subdivision or entity has elected to come into the system. *Governmental entity means any organization composed of units of government of Idaho or organizations funded only by governmental or employee contributions or organizations who discharge governmental responsibilities or proprietary responsibilities that would otherwise be performed by government.* All governmental entities are deemed to be political subdivisions for the purpose of this act. [Emphasis added.]

This provision was added specifically so that employees of the AIC, IAC and similar organizations could participate in the state retirement system. Currently, employees of the AIC and IAC take advantage of this program.

In *Hays v. Kalamazoo, et al.*, 316 Mich. 443, 25 N.W.2d 787, 169 ALR 1218 (1947), the Michigan Supreme Court specifically cited the purposes of the municipal leagues as appropriate and consistent with the public purpose doctrine. The Michigan Municipal League had as its purposes:

The improvement of municipal government and administration through co-operative effort; and this purpose shall be advanced by the maintenance of a central bureau of information and research; by the holding of annual conventions, schools and short courses; by the publication of an official magazine; by the encouraging of legislation beneficial to the municipalities of Michigan and the citizens thereof; by the rendering of such special and general services as may be deemed advisable; and by the fostering of municipal education and a greater civic consciousness among the citizens of the municipalities of Michigan.

25 N.W.2d at 789. The Michigan Supreme Court found that the city:

had the right to join the Michigan Municipal League, to avail itself of the services rendered thereby, and to expend money out of public funds in payment therefor. The record fully justifies the conclusion that the welfare of the city was thereby served and, hence, that the purpose was a city public purpose.

Id. at 792. The court found that the cost of the services received was reasonable if not nominal and that to prevent the city from receiving the services:

would, obviously, result in preventing it from availing itself of services well adapted to promote the efficiency of the functioning of the municipal government.

Id. at 793.

In *City of Glendale, et al. v. White, supra*, the Arizona Supreme Court addressed the issue of whether a city could pay dues to a municipal league which provided services to member cities similar to those provided by the AIC and IAC. In construing the Arizona constitutional provision substantially similar to art. 12, § 4, of the Idaho Constitution, the court found that the payment of dues from government funds constituted an expenditure for a public purpose:

We do not believe that a municipal corporation ought to be required to exist in an intellectual vacuum bereft of the power to expend some of its funds in a reasonable effort to learn the manner in which complex municipal problems, arising from the operations involving both its governmental and proprietary capacities, are being solved in sister cities of the state, thereby improving the quality of service it renders its own taxpayers. Nor can we subscribe to the naive view . . . that every public official and employee assumes his office completely equipped with adequate knowledge of the manner in which his duties may best be performed. This is an unwarranted assumption based upon a false premise and is contrary to a realistic view of public administration.

194 P.2d at 441. Thus, while the cities did not have specific constitutional or statutory authority to become members of municipal leagues, the implied powers granted to cities, and the nature of the services provided to the cities by the leagues, provided the basis for finding that the expenditure of funds was for a public purpose and permissible under Arizona law.

Early cases which held that expenditure of public funds for membership dues in municipal leagues or similar organizations were unauthorized have been overruled. *Thomas v. Semple*, 112 Ohio 559, 148 N.E. 342 (1925), overruled, *State v. Hagerman*, 155 Ohio 320, 98 N.E.2d 835, 839 (1951); *Phoenix v. Michael*, 61 Ariz. 238, 148 P.2d 353 (1944), overruled, *City of Glendale v. White*, 194 P.2d at 441. As the *Glendale* court stated four decades ago:

We have reached the conclusion that the majority opinion in the *Michael* case forbidding municipalities in all events from availing themselves of the services of the Arizona Municipal League is wrong as it represents an ultra conservative view of the actualities confronting municipalities in these modern times.

Id.

It is our opinion that a similar result would be reached by the Idaho Supreme Court. The purposes of the AIC and IAC clearly are to assist cities and counties in carrying out their functions. As such, the expenditure of funds in this manner should be construed as for a public purpose.

A more specific question you pose is whether it is appropriate for the AIC and IAC to use membership fees paid by cities and counties to make recommendations to or to lobby the legislature or other governmental officials or agencies. In *Hays v. Kalamazoo*, *supra*, the Michigan Supreme Court specifically held that lobbying by cities and municipal leagues was permissible and was an appropriate expenditure for a public purpose. The court reasoned that it was proper for a city or municipal league to:

place before members of the legislature, including appropriate committees, views and information designed to aid deliberate and considered action, to the end that the interests of constituent municipalities may be properly protected, and the performance of the municipal functions contemplated by pertinent constitutional and statutory provisions may be aided, by appropriate and expedient legislation.

25 N.W.2d at 796. The AIC and IAC provide the same assistance to cities and counties in providing information to the legislature concerning problems affecting their respective jurisdictions and citizens. As long as the lobbying meets this criteria, we view the conduct as consistent with the “public purpose” doctrine. See generally, *McQuillin on Municipal Corporations*, § 39.23.

B. *Express or Implied Powers*

In addition to the requirement that city and county expenditures be for a public purpose, any action taken by a city or a county must be pursuant to the powers expressly granted by the state or necessarily implied from the express grants of power. See *Caesar v. State*, 101 Idaho at 160, 610 P.2d at 519; *State v. Frederic*, 28 Idaho at 715, 155 P. at 979. The powers granted to Idaho cities are enumerated in Idaho Code §§ 50-101 *et seq.* In addition to the specific powers granted to cities by the legislature, “Cities governed by this act . . . [may] contract . . . [may] exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.” Idaho Code § 50-301. The powers granted to Idaho counties are enumerated in Idaho Code §§ 31-101 *et seq.* A county has the power, “[t]o make such contracts . . . as may be necessary to the exercise of its powers,” Idaho Code § 31-604(3), and “[t]o do and perform all other acts and

things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.” Idaho Code § 31-828. Therefore, cities and counties have the power to expend funds for membership in the AIC and IAC. The Georgia Supreme Court considered the question whether use of tax funds to support lobbying by the Georgia Municipal Association and Association of County Commissioners was authorized and concluded:

Among the functions of officers of municipal corporations or counties is to represent the views of the constituents to law-making bodies in regard to pending issues affecting the political subdivision. Since it is the responsibility of the government entities to represent the views of their constituents in this manner, it is proper to carry out this function in concert with officials of other governmental bodies. If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box.

Peacock v. Georgia Municipal Association, 247 Ga. 740, 279 S.E.2d 434, 438 (1981). As long as the activities of the AIC and IAC are limited to those matters which cities and counties are authorized to participate in by Idaho law, Idaho cities and counties have the power to expend funds for membership in these organizations and support their lobbying activities.

II. PRIVATE CORPORATIONS

Although the AIC and IAC are considered “governmental entities” for public employment retirement purposes, they clearly are private corporations because they are not subject to governmental control:

The most important distinction between public and private corporations is with respect to governmental control. Public corporations, being mere instrumentalities of the state, are subject to governmental visitation and control, whereas the charter of a private corporation is a contract between the state and the corporation or incorporators, which, under the clause of the constitution of the United States prohibiting state laws impairing the obligation of contracts, renders such corporations not subject to visitation, control, or change by the state, except in the exercise of the police power.

18 C.J.S. *Corporations*, § 18 (1939); *see also*, 18 Am.Jur.2d. *Contracts* § 30 (1985). The test of a public corporation is whether the government has the sole right to regulate, control and direct the corporation. *Trustees of Columbia Academy v. Board of Trustees*, 262 S.C. 117, 202 S.E.2d 860, 864 (1974). Both the

AIC and IAC are nonprofit corporations established pursuant to the Idaho Non-profit Corporation Act, Idaho Code §§ 30-301 et seq. Pursuant to § 30-314 their affairs are managed by a board of directors. Their respective boards are composed of private individuals, who happen to be elected officials, but these organizations are not controlled by any government. Therefore, the AIC and IAC are private corporations.

III. RECORDS

As private associations the financial and deliberative records of the AIC and IAC are not open to inspection by the public as public records; however, if the records are kept in the office of a city or county official, they become open to inspection. Idaho Code § 59-1009 provides:

The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state.

“A public record is a ready and convenient means of information on all matters required to be of record.” *Moore v. Pooley*, 17 Idaho 57, 62, 104 P. 898, 900 (1909). The term “public records” includes a list of names obtained by an agency in the normal course of carrying out its duties, *Dalton v. Idaho Dairy Products Comm’n*, 107 Idaho 6, 10, 684 P.2d 983, 987 (1984); the records of a court of record, *Evans v. District Court*, 50 Idaho 60, 64, 293 P. 323, 325 (1930); and the results of a coroner’s inquest which is a public hearing, *Stattner v. City of Caldwell*, 111 Idaho 714, 716, 727 P.2d 1142, 1144 (1986). Financial and deliberative records of the AIC and IAC are not records that public officers are required to keep or obtain in the course of their official duties; thus, they are not “public records.” Records do not have to be “public records” to be open to inspection by the public. Pursuant to § 59-1009 citizens are authorized to inspect “other matters in the office of any officer.” Therefore, if an officer keeps the financial and deliberative records within his public office, they are open to inspection by citizens.

IV. POLICY DISCUSSIONS

Finally, you ask whether it is lawful for elected officials to discuss and determine public policy at association meetings. To the extent that information is presented to officials at association meetings for consideration as potential public policy issues or for future inclusion in current public policy, nothing in the law prevents officials from discussing the information at association meetings. To prohibit discussion of the information obviously would obstruct and limit a primary purpose of the associations, i.e., exchanging ideas between members.

However, this does not mean that city and county officials may discuss and deliberate towards a decision that would be effective in their respective jurisdictions. In order for each city or county to adopt public policy, compliance with Idaho law is mandatory. Thus, the elected officials must meet in their respective jurisdictions to deliberate on the policy issues, comply with the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347, and all other applicable laws in titles 31 or 50, Idaho Code, in order to give local effect to the policy.

CONCLUSION:

Based upon the foregoing analysis, it is appropriate for Idaho cities and counties to expend public funds for memberships in private organizations such as the AIC and IAC and to lobby or make recommendations to the legislature for a public purpose either as individual cities or counties or as an association; to discuss public policy and adopt association positions at association meetings; to make available to the public the records of association business maintained by them; and to adopt policy recommended at association meetings in accordance with Idaho law.

AUTHORITIES CONSIDERED:

1. *Constitutions*

Idaho Constitution art. 12, § 4.

2. *Statutes*

Idaho Code §§ 30-301, et seq.

Idaho Code §§ 31-101, et seq.

Idaho Code § 31-604.

Idaho Code § 31-828.

Idaho Code §§ 50-101, et seq.

Idaho Code § 50-301.

Idaho Code § 59-1302.

Idaho Code § 59-1009.

Idaho Code §§ 67-2340 through 67-2347.

3. *Idaho Cases*

Caesar v. State, 101 Idaho 158, 610 P.2d 517.

State v. Frederic, 28 Idaho 709, 155 P. 977 (1916).

School District No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917).

Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Ada County v. Wright, 60 Idaho 394, 92 P.2d 134 (1939).

Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966).

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

Moore v. Pooley, 17 Idaho 57, 104 P. 898 (1909).

Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 684 P.2d 983 (1984).

Evans v. District Court, 50 Idaho 60, 293 P. 323 (1930).

Stattner v. City of Caldwell, 111 Idaho 714, 727 P.2d 1142 (1986).

4. Cases From Other States

Hays v. Kalamazoo, et al., 316 Michigan 443, 25 N.W.2d 787 169 ALR 1218 (1947).

City of Glendale, et al. v. White, 194 P.2d 435 (Ariz. 1948).

Thomas v. Semple, 112 Ohio 559, 148 N.E. 342 (1925).

State v. Hagerman, 155 Ohio 320, 98 N.E.2d 835 (1951).

Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944).

Peacock v. Georgia Municipal Association, 247 Ga. 740, 279 S.E.2d 434 (1981).

Trustees of Columbia Academy v. Board of Trustees, 262 S.C. 117, 202 S.Ed.2d 860 (1974).

5. *Other Authorities*

McQuillin on Municipal Corporations, § 39.23.

18 C.J.S. *Corporations*, § 18 (1939).

18 Am.Jur.2d. *Contracts*, § 30 (1985).

DATED this 19th day of July, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Daniel G. Chadwick
Deputy Attorney General
Chief, Intergovernmental Affairs Division

ATTORNEY GENERAL OPINION NO. 89-8

TO: Idaho Transportation Board
Department of Transportation
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is it lawful to credit the general fund with interest accrued upon dedicated highway funds in light of Idaho Const. art. 7, § 17?

CONCLUSION:

Interest earnings upon funds dedicated to highway purposes by Idaho Const. art. 7, § 17, should be credited to the highway distribution account.

ANALYSIS:

Idaho Const. art. 7, § 17, provides:

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

Pursuant to this section, taxes upon motor fuels sold or used to propel motor vehicles on the highways and motor vehicle registration fees can only be used for administrative costs and for construction, repair, maintenance and traffic supervision of the state highways or for repayment of debts incurred for these purposes. The emphasized portion of the section prohibits diversion of these revenues to any other purpose. Thus, this opinion focuses upon the question whether investment of these revenues for non-highway purposes prior to their use for highway purposes amounts to a diversion of the revenues for non-highway purposes.

While the Idaho courts have not considered this question, the Idaho Supreme Court has required a strict application of highway revenues for the purposes enumerated in the constitution. For example, in *State ex rel. Moon v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956), the court held unconstitutional an appropriation of \$50,000 from the highway fund for the purpose of advertising the highways and the State of Idaho. The court rejected the argument that the expenditure came within the meaning of “administration” or “maintenance” of the state highway system. The court required motor fuel taxes and vehicle registration fees to be strictly applied for the purposes enumerated in Idaho Const. art. 7, § 17:

The people desire by the Constitution to prohibit the use of certain revenues for any purpose except as therein provided; to preserve and protect such revenue and fund, and make certain the money so collected from sources therein enumerated shall be used for the purposes specified therein and for no other purpose.

78 Idaho at 210.

The Idaho Supreme Court has not yet considered whether it is an improper diversion of highway revenues to invest them for the benefit of the general fund pending their use for highway purposes. However, the court has recently considered a very similar question in relation to investment of revenues from endowment lands. In *Moon v. State Board of Land Commissioners*, 111 Idaho 389, 724 P.2d 125 (1986), the court considered whether it was proper to credit the general fund with interest earnings from a state account used for the management of school endowment lands. The funds in the account came from a portion of the revenues from endowment lands. Idaho Const. art. 9, § 8, required the legislature to provide for:

the faithful application of the proceeds thereof in accordance with the terms of said grants . . .

The state treasurer argued that she was statutorily required to credit the general account with the interest earnings from the land board’s account. The court disagreed holding:

We hold in accordance with the position of the Land Board that the interest earned on the agency asset accounts is an integral part of the total monies received from school lands and must be used for the protection of the lands constituting the trust res or for school purposes in accordance with the terms of the trust established by our Constitution. Crediting such interest generated by the agency asset accounts to the general fund is a violation of the terms of the school endowment grant and our Constitution.

111 Idaho at 394. Thus, where the constitution required certain revenues to be faithfully applied in accordance with the terms of the school land grants, it was unconstitutional to invest the revenues for the benefit of the general account prior to expenditure of the revenues for land grant purposes.

The issue presented by the case was strikingly similar to the question you have asked with respect to highway funds. Both highway revenues and school endowment land revenues are constitutionally dedicated for specific purposes. Neither constitutional section says what is to be done with investment income upon the dedicated revenues prior to use of the revenues for dedicated purposes. Nevertheless, the court in *Moon, supra*, held it was unconstitutional to credit the general fund with interest earnings from the dedicated revenues. Likewise, we would expect the court to hold it unconstitutional to credit the general account with interest upon constitutionally dedicated highway revenues.

This conclusion is also supported by the judicial decisions of other jurisdictions which have considered the question in relation to dedicated highway revenues. For example, in *State v. Straub*, 400 P.2d 229 (1965), the Oregon Supreme Court considered whether interest earned on highway funds was constitutionally required to be credited to the highway fund. Oregon Const. art. 9, § 3a, provided in pertinent part:

(1) Except as provided in subsection (2) of this section, *revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:*

(a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and

(b) Any tax or excise levied on the ownership, operation or use of motor vehicles. (Emphasis added.)

The Oregon Supreme Court held:

It is apparent that the intent of the people when they adopted the amendment was to guarantee that none of the "proceeds" of the taxes and fees listed in the amendment would be diverted to any other purpose.

...

It is recognized that the people's approval of the amendment to Article IX Section 3 provides no actual expression of a will and intent that interest that may be earned by the accumulated revenues controlled by the amendment should accrue to the highway fund. There is a strong inference, however, that the clear intent of the people to compel the specific revenues to be used for one purpose implies that it would include all of the interest that would accrue during the State Treasurer's holding of the revenues for their eventual use. We so hold.

400 P.2d at 233.

Idaho's constitutional provision is very similar to Oregon's in its pertinent provisions. Idaho's constitution, like Oregon's, requires the "proceeds" of certain motor fuel taxes and certain other revenue to be used exclusively for enumerated highway purposes. Idaho's Const. art. 7, § 17, specifically provides that "no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purpose whatsoever." Idaho Const. art. 7, § 17, was ratified as a constitutional amendment at the general election held November 5, 1940. As in Oregon, Idaho's ballot proposition does not address the voters' intent with respect to disposition of interest earnings upon the dedicated revenues. Nevertheless, we agree with the Oregon Supreme Court's conclusion that the mandate of the people that specific revenues be used for one purpose implies that all the interest accrued during the treasurers' holding of the revenues likewise be dedicated to that purpose.

The Supreme Court of Missouri also considered the issue in relation to a similar constitutional provision in *State Highway Commission v. Spainhower*, 504 S.W.2d 121 (1973). Missouri Const. art. 4, § 30(b) provided:

For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, * * * shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other. (All the enumerated purposes are road purposes.)

The Missouri Supreme Court found:

This problem has not been considered in Missouri. It is clear, however, that the people of Missouri, by Article IV, Section 30(b), and the General Assembly, by its enactment of Section 226.220, *supra*, in interpretation

of Article IV, Section 30(b), intended that no money be diverted from the state road fund and no other use be permitted of the fund except for the enumerated state highway purposes.

504 S.W.2d at 125.

Based upon this finding and another constitutional provision requiring the state treasurer to hold all revenues for the benefit of the respective funds to which they belong, the Missouri court held it improper to credit the state's general account with interest income received from the state road fund. Thus, the decision was based in part upon constitutional language similar to Idaho Const. art. 7, § 17. We are aware of no cases from other jurisdictions reaching a contrary result with respect to dedicated highway funds.

In summary, the Idaho Supreme Court has construed Idaho Const. art. 7, § 17, to require dedicated highway revenues to be used solely for enumerated highway purposes. In the parallel context of dedicated revenues from endowment lands, the Idaho Supreme Court held it was improper to credit the general account with interest income derived from the dedicated revenues. The only cases from other jurisdictions considering the question have held that constitutionally dedicated highway revenues cannot be invested for the benefit of the states' general accounts. Consequently, we conclude that investment earnings upon funds dedicated to highway purposes by Idaho Const. art. 7, § 17, should be credited to the highway distribution account established by Idaho Code § 40-701. Such interest income should not be credited to the state general account.

We recommend that the accounts of the state be adjusted to give effect to the above conclusion, effective July 1, 1989. Adjustments beyond the current fiscal year cannot be made without a legislative appropriation, pursuant to Idaho Const. art. 7, § 13, which provides:

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

In *State v. Adams*, 90 Idaho 195, 409 P.2d 415 (1965), the Idaho Supreme Court construed this provision as prohibiting the state from refunding to the county the state's pro-rata share of a court ordered refund of taxes collected wrongfully in prior years without a legislative appropriation.

Since appropriations are made on a fiscal year basis, it is not a violation of Idaho Const. art. 7, § 13, to make necessary correction in accounts within a fiscal year. By making corrections within a fiscal year, each account merely receives the correct amount of revenue for the fiscal year and the correct amount of revenue is available for the legislative appropriations made from each account. Accordingly, we recommend that the accounts of the state be adjusted effective July 1, 1989.

AUTHORITIES CONSIDERED:

1. *Constitutions*

Idaho Constitution, art. 7, § 13.

Idaho Constitution, art. 7, § 17.

Idaho Constitution, art. 9, § 8.

Missouri Constitution, art. 4, § 30(b).

Oregon Constitution, art. 9, § 3a.

2. *Cases*

Moon v. State Board of Land Commissioners, 111 Idaho 389, 724 P.2d 125 (1986).

State v. Adams, 90 Idaho 195, 409 P.2d 415 (1965).

State v. Straub, 400 P.2d 229 (1965).

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

State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973).

3. *Statutes*

Idaho Code § 40-701.

DATED this 20th day of September, 1989.

JIM JONES
Attorney General
State of Idaho

Analysis by:

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

ATTORNEY GENERAL OPINION NO. 89-9

TO: Darrell Waller, Coordinator
Bureau of Disaster Services
Len B. Jordan Building
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. What are the authorities and responsibilities of the county commissioners to the citizens of an incorporated municipality in times of a disaster emergency?
2. How are these authorities and responsibilities affected by those of the mayor and/or city council?
3. Does the supervisory aspect of the county commissioners over the sheriff, under Idaho Code § 31-802, and, in turn, the sheriff's authorities and responsibilities within the municipality, provide a means for the commissioners to act within the municipality through the sheriff?
4. Is the implication of an emergency disaster planning requirement on mayors as contained in Idaho Code § 46-1009 strong enough to make such planning a legal duty?
5. If the county commissioners have no authority or responsibility for the citizens of the cities, what is the status of the county plans as currently promulgated in regard to these citizens? Does the fact that, in many cases, portions of these plans were produced with assistance from city fire, police and other city officials and which address locations within the city, alter the situation?
6. If the county commissioners have no authority in the municipality and the city leadership has no stated disaster emergency planning and response responsibilities, does the responsibility devolve upon any other agency?

CONCLUSIONS:

1. The responsibilities and authorities of the county commissioners to the citizens of an incorporated municipality in times of a disaster emergency are defined in the intergovernmental disaster emergency plan, if any, agreed to by the city. Idaho Const. art. 12, § 2, prohibits the county from unilaterally imposing its plan on an incorporated city.

2. Unlike counties, cities are not required to plan for disaster emergencies. Once a disaster emergency occurs within the city's limits, however, the city government has the responsibility to handle the situation.

3. Article 12, § 2, prohibits the sheriff or any other county official from interfering with a municipality.

4. The Idaho Disaster Preparedness Act of 1975 only "encourages" the cities to plan for disaster emergencies; the legislature does not require the cities to plan.

5. Plans voluntarily entered into among the various political subdivisions are valid under the Idaho Disaster Preparedness Act of 1975.

6. The cities have the ultimate authority to plan for disaster emergencies. Although not statutorily required to plan for disaster emergencies, cities are strongly urged to do so in order to minimize the risk of injury to their citizens.

ANALYSIS:

1. *County's Responsibility to Municipality in Times of Emergency.*

Under the Idaho Disaster Preparedness Act of 1975, all counties are required to participate in the preparation of a disaster emergency plan. Idaho Code § 46-1009(1) through (5) states:

- (1) Each county within this state shall be within the jurisdiction of and served by the bureau and by a county or intergovernmental agency responsible for disaster preparedness and coordination of response.
- (2) Each county shall maintain a disaster agency or participate in an intergovernmental disaster agency which, except as otherwise provided under this act, has jurisdiction over and serves the entire county, or shall have a liaison officer appointed by the county commissioners designated to facilitate the cooperation and protection of that subdivision in the work of disaster prevention, preparedness, response and recovery.

- (3) The chairman of the board of county commissioners of each county in the state shall notify the bureau of the manner in which the county is providing or securing disaster planning and emergency services. The chairman shall identify the person who heads the agency or acts in the capacity of liaison from which the service is obtained, and furnish additional information relating thereto as the bureau requires.
- (4) Each county and/or intergovernmental agency shall prepare and keep current a local or intergovernmental disaster emergency plan for its use.
- (5) The county or intergovernmental disaster agency, as the case may be, shall prepare and distribute to all appropriate officials in written form a clear and complete statement of the emergency responsibilities of all local agencies and officials and of the disaster chain of command.

The promulgation of a disaster emergency plan is part of the county's police power. See AGO 76-25, at p.110 (disaster preparedness plans are within the scope of police power jurisdiction). Nonetheless, article 12, § 2, of the Idaho Constitution prohibits a county from enforcing its police regulations within an incorporated municipality. *Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d 1073 (1983) ("This Court has previously held that following Article 12, § 2 of the Idaho State Constitution, a county cannot make police regulations effective within a municipality"); *Boise City v. Blaser*, 98 Idaho 789, 791, 572 P.2d 892 (1977) ("to give effect to a county permit within city limits would be to violate the separate sovereignty provisions of Idaho Const., art. 12, § 2, and the careful avoidance of any county/city jurisdictional conflict or overlap which is safeguarded therein"); *Clyde Hess Distributing Co. v. Borneville County*, 69 Idaho 505, 511, 210 P.2d 798 (1949) (whether the county regulation conflicts with any existing municipal ordinance is irrelevant, "[t]he question is one of power and not one of conflict"). Therefore, a county may not unilaterally impose its emergency disaster plan on a municipality.

The language of Idaho Code § 46-1009(2), "Each county shall maintain a disaster agency or participate in an intergovernmental disaster agency which, except as otherwise provided under this act, has jurisdiction over and serves the entire county," does not give the county's disaster agency jurisdiction over the incorporated municipalities within the county limits. It would be a violation of art. 12, § 2, to interpret that clause as granting such authority. The subordinate clause, "which . . . has jurisdiction over and serves the entire county," should be construed as referring to the intergovernmental disaster agency, not the county agency.

“Where two constructions of a statute are possible, one resulting in the statute being constitutional and the second rendering the statute unconstitutional, [the Idaho Supreme Court] will construe the statute . . . so as to avoid conflict with the constitution.” *Idaho State AFL-CIO v. LeRoy*, 110 Idaho 691, 698, 718 P.2d 1129 (1986).

That the county has no police power authority over an incorporated city does not necessarily mean the county has no responsibility during a disaster emergency. The State Disaster Preparedness Act of 1975 clearly contemplates the various political subdivisions will cooperate and help each other during an emergency. In promulgating the Act, the legislature found it necessary “to authorize the state and political subdivisions to execute agreements and . . . [t]o authorize and encourage cooperation in disaster prevention, preparedness, response and recovery.” Idaho Code § 46-1003(1), (6). Idaho Code § 46-1009 allows the counties to participate in an intergovernmental disaster emergency plan instead of one limited to the county. Once the county enters into an intergovernmental agreement, however, then the declaration of a local disaster emergency authorizes “the furnishing of aid and assistance thereunder.” Idaho Code § 46-1011(2). Therefore, the county’s responsibility to municipal citizens during a disaster emergency is determined by the intergovernmental disaster emergency plan.

2. *Authorities and Responsibilities of the Mayor and City Council to Their Citizens During a Disaster Emergency.*

The Idaho Disaster Preparedness Act of 1975 does not require cities to participate in an intergovernmental disaster emergency plan. Idaho Code § 46-1003 grants the cities the authority to participate in such a plan; Idaho Code § 46-1011 encourages the cities “to conclude suitable arrangement for furnishing mutual aid in coping with disasters.” Idaho Code § 46-1014 assumes that participation in intergovernmental planning is optional with the political subdivision:

Political subdivisions not participating in the intergovernmental arrangements pursuant to this act nevertheless shall be encouraged and assisted by the bureau to conclude suitable arrangement for furnishing mutual aid in coping with disasters. (Emphasis added.)

The Act defines “political subdivisions” as “any county, city, or other unit of local government.” Idaho Code § 46-1002. Although Idaho Code § 49-1009 requires the counties to prepare a disaster emergency plan, there is no comparable statute explicitly requiring the cities to participate. Indeed, in passing the Idaho Disaster Preparedness Act of 1975, the legislature repealed the previous law that explicitly authorized cities to prepare local plans to be submitted to the state bureau chief for his approval.

While not directed at disaster emergencies, Idaho Code § 50-302 does mandate that cities pass ordinances for the health, welfare and safety of the citizens:

Cities shall make all such ordinances, by-laws, rules, regulation [regulations] and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.

The mandate to pass ordinances “as may be expedient,” however, does not require a city to pass a particular ordinance. The city has the discretion to enact the disaster emergency ordinances, if any, it believes best promote the welfare of the city.

In the event of a local catastrophe, the mayor has the responsibility for declaring a disaster emergency under Idaho Code § 46-1011. Such a declaration triggers “any and all” emergency plans. The municipal government would ultimately be responsible for the handling of any municipal disaster emergency, regardless of the prior planning.

3. *Sheriff’s Authorities and Responsibilities Within the Municipality and the Commissioners’ Supervisory Powers.*

Idaho Code § 46-1009(6) states:

The sheriff of each county shall:

- (a) be the official responsible for coordination of all search and rescue operations within his jurisdiction;
- (b) prepare and keep current a plan to make use of the search and rescue capability and resources available within the county.

The board of county commissioners has the duty “[t]o supervise the official conduct of all county officers” under Idaho Code § 31-802. That responsibility, however, is circumscribed by Idaho Code § 31-801, which states:

The boards of county commissioners in their respective counties shall have jurisdiction and power, *under such limitations and restrictions as are prescribed by law*, as provided in the following sections, numbered 31-802 to 31-836, inclusive. (Emphasis added.)

Article 12, § 2, of the Idaho Constitution prohibits the county from interfering with the affairs of an incorporated municipality. Therefore, the county commissioners and sheriff may not constitutionally take over the duties of the municipality.

4. *Whether Idaho Code § 46-1009 Implies a Legal Duty on the Cities to Plan for Disaster Emergencies.*

Idaho Code § 46-1009, dealing with disaster agencies and services, pertains only to counties and intergovernmental disaster agencies and services; it does not mention cities. Idaho Code § 46-1011, dealing with local disaster emergencies, refers to cities, but does not require the cities to plan for a disaster emergency. Under Idaho Code § 46-1011, it is true, only the mayor of the city may declare a disaster emergency within the city: "A local disaster emergency may be declared only by a mayor or chairman of the county commissioners within their respective political subdivisions." However, as mentioned earlier, Idaho Code § 46-1014 clearly indicates that city planning for disasters is discretionary. The legislature has not specifically required cities to plan for disaster emergencies, and the requirement cannot be implied from the statutory language.

5. *Status of Current Plans Entered Into by City and County Government.*

The disaster emergency plans developed by county and city officials working together are valid. The Idaho Disaster Preparedness Act of 1975 authorizes the political subdivisions to enter into such agreements. Idaho Code § 46-1003(2). Because the cities voluntarily ratify the disaster emergency plans, art. 12, § 2, of the Idaho Constitution is not violated.

6. *Responsibility of Other Agencies to the Municipal Citizens.*

The bureau of disaster services "shall prepare, maintain, and update a state disaster plan based on the principle of self-help at each level of government." Idaho Code § 46-1006(2). Furthermore, it "shall participate in the development and revision of local and intergovernmental disaster plans." Idaho Code § 46-1006(3). The bureau's legislative mandate, therefore, is to oversee and coordinate, not to impose its plans on a city. The responsibility for planning for disaster emergencies within the municipal boundaries lies with the city.

Even though the Idaho legislature only "encourages" cities "to conclude suitable arrangement for furnishing mutual aid in coping with disasters," Idaho Code § 46-1010, the cities would be wise to develop comprehensive plans for disaster emergencies. The cities have the ultimate responsibility "to maintain the peace, good government and welfare of the [municipal] corporation." Idaho Code

§ 50-302. A city which has not adopted procedures and trained employees in emergency response is likely to approach a disaster with an ill-conceived approach and untrained officers and employees. In view of the strong legislative encouragement of city disaster planning, the bureau of disaster services should do what it can to urge cities to participate in development of intergovernmental disaster plans.

SUMMARY:

The Idaho Disaster Preparedness Act of 1975 requires the counties, but only “encourages” the cities, to enter into their own or an intergovernmental disaster emergency plan. Because responsibility for the health, welfare and safety of the municipal citizens rests with the city government, the county may not unilaterally impose its plan on the city. In the event of a disaster emergency within the municipal boundaries, the city is responsible for handling the crisis. Even though the city is not statutorily required to participate in a disaster emergency plan, the Office of the Attorney General strongly urges the cities to so participate in order to minimize potential injury resulting from future disasters.

AUTHORITIES CONSIDERED:

1. *Constitutions*

Idaho Constitution art. 12, § 2.

2. *Cases*

Boise City v. Blaser, 98 Idaho 789, 791, 572 P.2d 892 (1977).

Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 511, 210 P.2d 798 (1949).

Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073 (1983).

Idaho State AFL-CIO v. LeRoy, 110 Idaho 691, 698, 718 P.2d 1129 (1986).

3. *Statutes*

Idaho Code § 31-801.
 Idaho Code § 31-802
 Idaho Code § 46-1002.
 Idaho Code § 46-1003.
 Idaho Code § 46-1006.
 Idaho Code § 46-1009.
 Idaho Code § 46-1010.
 Idaho Code § 46-1011.
 Idaho Code § 46-1014.
 Idaho Code § 50-302.

DATED this 3rd day of October, 1989.

JIM JONES
 Attorney General
 State of Idaho

Analysis by:

Priscilla Hayes Nielson
 Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 89-10

TO: Martin L. Peterson
 Centennial Commission
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Idaho Centennial Commission liable for contract or tort claims resulting from local centennial committee activities and are volunteers working on local centennial activities personally liable for negligence claims arising out of centennial events?

CONCLUSION:

Questions of liability necessarily depend upon particular facts and circumstances. However, under normal circumstances, the Idaho Centennial Commission will not be liable for contract or tort claims arising from local centennial events. Under normal circumstances, volunteers at centennial events will be protected from personal liability to the same extent as regular employees of political subdivisions.

ANALYSIS:**A. *Background.***

The Idaho Centennial Commission was initially established in 1984 by Executive Order 84-13 and continued in 1986 by Executive Order 86-18. In 1988 the Idaho legislature adopted Senate Bill 1264 which established in the Office of the Governor the Idaho Centennial Commission. The Idaho Centennial Commission's charge is "to plan and coordinate activities relating to the celebration of this centennial of Idaho's statehood." Idaho Code § 67-1990.

The Idaho Centennial Commission in furtherance of its purpose contacted the county commissioners in all 44 Idaho counties urging them to establish "local centennial committees." Each county adopted a resolution designating an official centennial committee. In certain instances the county named city-sponsored centennial committees or non-profit organizations or other private associations.

It is our understanding the Idaho State Centennial Commission does not exercise any supervision or control over the local committees' activities. However, the commission does provide upon request technical assistance to local committees. The principal function of the Idaho Centennial Commission with respect to local committees has been the sharing of revenues received from the sale of Idaho centennial license plates. This revenue sharing has taken two forms. First, each local committee designated by the county receives a share of revenue based upon centennial license plate sales within the county. There are no strings attached to these distributions. Second, the commission makes grants to certain sponsors of centennial events who apply for funding for specific projects. If approved, the project sponsor must make financial reports of expenditures to assure that expenditures are made for the projects funded. However, the commission does not pre-approve expenditures or otherwise oversee implementation of the projects.

B. *Liability for Contracts.*

The first part of your inquiry concerns contractual liability of the commission

for contracts made by local committees. Three basic types of contractual arrangements are recognized by the courts. They are: (1) the express contract, wherein the parties expressly agree regarding a transaction; (2) the implied in fact contract, wherein there is no express agreement, but the conduct of the parties implies an agreement from which an obligation in contract arises; and (3) the implied in law contract or quasi contract. *Continental Forest Products, Inc. v. Chandler Supply Company*, 95 Idaho 739, 518 P.2d 1201 (1974).

An express contract is the easiest contract to identify because the parties manifest their agreement by words. An example of an express contract would be a written agreement by a local committee to lease a photocopy machine.

An implied contract is somewhat more difficult to identify because the parties' agreement is manifested by conduct. The contract could be partly express and partly implied in fact. For example, if a local committee needed an office painted and it telephoned a painting contractor to come to the office to paint, it may be inferred that the local committee has agreed to pay the painter a reasonable fee for his services, although nothing is said of this.

It is our understanding that local committees are not authorized to and in fact do not make contracts for the commission. Consequently, the commission will not be liable on the basis of express or implied contract theory.

A contract implied in law, or quasi contract, is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. Thus, a quasi contract is the most difficult contract to identify. It is a non-contractual obligation which is treated procedurally by the courts as a contract. The function of the quasi contract is to prevent the unjust enrichment of a party.

It is possible an unassumed risk may arise under a quasi contractual theory for which the Idaho Centennial Commission may become responsible. For example, the Idaho Centennial Commission may know that a local centennial organization is holding an event to benefit the Idaho Centennial Commission. If, under the facts, it appears inequitable to allow the commission to receive the benefits of the event without paying for it, a court could apply equitable principles and find the Idaho Centennial Commission responsible to make restitution for costs of the event to the extent the commission benefitted from it. For example, if a local fund raising activity were undertaken to raise funds for the centennial commission, it would be inequitable to allow the commission to receive revenues from the event unless those contracting with the local committee were paid first. Given our understanding of the nature of the centennial commission's normal relationship to local committees (i.e., a funding source for them), it seems unlikely the commis-

sion would be viewed as a party unjustly enriched by the local committees' activities.

C. Liability for Torts.

The second part of your question deals with the commission's potential tort liability for torts committed in conducting local events. A tort is the wrongful invasion and harm of an interest protected by law. *Just's, Inc. v. Arrington Construction Company*, 99 Idaho 462, 583, P.2d 997 (1978). For example, if someone is injured as a result of negligence in conducting an activity, the injured person may sue for damages caused by the negligence.

The Idaho Tort Claims Act defines the liability of governmental entities such as the Idaho Centennial Commission for torts committed by governmental entities and their employees. As defined in the act, a "governmental entity" includes a state commission and a political subdivision such as a county, city or municipal corporation. Idaho Code §§ 6-902(1), 6-902(2), 6-902(3).

The Idaho Tort Claims Act defines an employee at Idaho Code § 6-902 as follows:

4. "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, 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, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.

Pursuant to the tort claims act, the centennial commission would be liable for torts of a local centennial committee only if the local committee was an "employee" of the centennial commission as defined in the act. Pursuant to the definition of "employee," a local committee would not be an "employee" of the commission unless it was acting on behalf of the commission in any official capacity and was not acting as an independent contractor.

Based upon our understanding of the normal relationship between the commission and local committees, it appears unlikely a local committee would be considered to be an employee of the commission. Since the official status of local committees is granted by county resolution, it is probable local committees would be viewed as acting in an official capacity on behalf of the county, rather than on behalf of the commission.

In cases in which local committees applied for and received grants to conduct specific projects, they might be viewed as conducting activities on behalf of the commission. However, in such cases they would probably be viewed as acting as independent contractors rather than as employees.

The courts have stated in reviewing whether an individual is an employee or independent contractor that the determination must be made on a case by case basis. *Sines v. Sines*, 110 Idaho 776, 718 P.2d 1214 (1986). The integral test for determining whether a person or group is acting as an employee as opposed to an independent contractor is:

Whether a contract gives, or the “employer” assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain results.

Anderson v. Farm Bureau Insurance Company, 112 Idaho 461, 732 P.2d 699 (Idaho App. 1987).

Thus, if the Idaho Centennial Commission has no right to control and it does not control the time, manner and method of conducting the local centennial activities, then the local committees would normally be viewed as independent contractors rather than employees of the commission. Consequently, based upon our understanding of the normal relationship between the commission and local committees, it is unlikely the commission would be liable for tort claims based upon local centennial events.

Circumstances could arise in which the Idaho Centennial Commission could be liable for acts of an independent contractor. The Idaho Supreme Court found that a city may be found liable for property damages caused by an independent contractor’s blasting when city officers, after due notice of the dangerous condition, failed to remedy the dangerous condition. *Lundahl v. City of Idaho Falls*, 78 Idaho 338, 303 P.2d 667 (1956). The *Lundahl* case illustrates the potential for governmental entities’ broad liability for failure to act when placed on notice of a hazard or dangerous condition.

D. *Tort Claims Act Exemptions.*

The Idaho Tort Claims Act exempts governmental entities from liability in several circumstances. Idaho Code §§ 6-904, 6-904A, 6-904B. Of these listed exceptions, one of particular significance to the Idaho Centennial Commission is the exception set forth at Idaho Code § 6-904(1). It has been called the “discretionary function” exception to liability. It states:

Exceptions to Governmental Liability. - A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion is abused.

The court in *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986), adopted the "planning/operational test" for determining whether an act is discretionary and immune under § 6-904(1). The court, shortly after the *Sterling v. Bloom* decision, provided clarification of the "planning/operational" test in *Jones v. City of St. Maries*, 111 Idaho 733, 727 P.2d 1161 (1986). The court said:

The planning/operational test provides immunity for planning activities - activities which involve the establishment of plans, specifications and schedules where there is room for policy judgment in decisions. Operational activities - activities involving the implementation of statutory and regulatory policy - are not immunized and, accordingly must be performed with ordinary care. [Citations omitted.]

Jones v. City of St. Maries, supra, at 735-736.

The authority granted to the Idaho Centennial Commission by Idaho Code § 67-1990 is "to plan and coordinate activities relating to the celebration of this centennial of Idaho's statehood." It would appear that these functions would generally fall within the discretionary function exception of Idaho Code § 6-904(1). It is our understanding the commission is normally involved only in planning activities as defined in *Jones supra*, (i.e., establishment of plans, specifications and schedules where there is room for policy judgment in decisions). We understand the commission is not involved in the operational activities. Thus, the "discretionary function" exception from liability should normally provide protection for the commission's activities.

E. *Volunteer Liability.*

You have asked us if volunteers involved in local centennial events are protected from claims by the Idaho Tort Claims Act. In our opinion, they are protected by

the act. If sued, they would be defended and indemnified to the same extent as other employees of a governmental entity. As noted previously, Idaho Code § 6-902(4) defines employee to include “persons acting on behalf of the governmental entity in any official capacity . . . whether with or without compensation.” Consequently, it is not material that volunteers do not receive compensation for purposes of the tort claims act. Also, volunteers would normally be acting pursuant to instructions of local committee officials and thus would not be acting as independent contractors.

Local committees are officially appointed by resolutions of the boards of county commissions. Based upon these resolutions, we concluded above that local committees would probably be viewed as acting officially on behalf of the counties rather than on behalf of the commission. However, whether viewed as acting on behalf of the commission or the counties, volunteers for local committees would be acting in an official capacity on behalf of a governmental entity. Therefore, in our opinion, they would be protected from personal liability to the same extent as other employees of a governmental entity.

The opinions expressed above are intended to address general liability issues based upon our understanding of the normal relationships among the commission, the counties and the local centennial committees. However, the results in any given case will depend upon the specific facts involved. Depending upon the specific facts, other issues might also be raised. Hopefully, the general discussion above will be of assistance to you.

AUTHORITIES CONSIDERED:

1. Cases

Anderson v. Farm Bureau Insurance Company, 112 Idaho 461, 732 P.2d 699 (Idaho App. 1987).

Continental Forest Products, Inc. v. Chandler Supply Company, 95 Idaho 739, 518 P.2d 1201 (1974).

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

Just's, Inc. v. Arrington Construction Company, 99 Idaho 462, 583, P.2d 997 (1978).

Lundahl v. City of Idaho Falls, 78 Idaho 338, 303 P.2d 667 (1956).

Sines v. Sines, 110 Idaho 776, 718 P.2d 1214 (1986).

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

2. *Statutes*

Idaho Code § 6-902.
 Idaho Code § 6-904.
 Idaho Code § 6-904A.
 Idaho Code § 6-904B.
 Idaho Code § 67-1990.

DATED this 16th day of October, 1989.

JIM JONES
 Attorney General
 State of Idaho

Analysis by:

David G. High
 Deputy Attorney General
 Chief, Business Regulation
 and State Finance Division

Michael R. Jones
 Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 89-11

TO: Yvonne S. Ferrell, Director
Idaho Department of Parks and Recreation
Statehouse Mail
Boise, ID 83720

Request for Attorney General's Opinion

RE: Use of Moneys in County Vessel Fund and State Waterways Improvement Fund

QUESTION PRESENTED:

You have asked for legal guidance regarding appropriate uses of moneys in the county vessel funds and the state waterways improvement fund (WIF). For each account you inquired as to the propriety of expenditures for roads and for each of the following specific activities:

Items used solely for boaters and boating activity:

1. Boat docks
2. Boat ramps
3. Boat pumpout facilities (on-the-water boat sewage removal facilities)

Items subject to multiple users:

1. Restroom facilities
2. Parking areas
3. Picnic facilities
4. Camping facilities
5. Landscape improvements
6. Fishing docks (land access only - no boat access)

CONCLUSION:

Moneys in the county vessel funds can be spent only on water-related recreational boating improvements. This includes, but is not limited to, boat docks, ramps, pumpout facilities, and boat trailer parking, and on enforcement of boating laws.

Moneys in the WIF may be expended for land based projects, but must be for the primary benefit of boaters engaging in boating activities, and must fall within or be incidental to the following categories: protection and promotion of safety; waterways improvement; development/improvement of boating related parking, ramps, or moorings; waterways marking; search and rescue. Permissible expenditures would include but are not limited to boat docks, ramps, pumpout facilities, restrooms, camping facilities and picnic areas which are primarily accessed by boat, and items incidental to such development, including landscaping.

ANALYSIS:

Your letter expresses a concern about the propriety of expending moneys in the county vessel funds and the WIF on particular types of projects. While the funds are both related to boating activities, each has different revenue sources and statutory directives for expenditures of the moneys.

A. *County Vessel Fund (Idaho Code § 67-7013(7))*

The county vessel funds, as currently constituted, are made up of revenues collected from the sale of boat registrations ("numbering") and use permits. The revenues from the sale of registrations and use permits are first remitted to the state treasurer for deposit in the state vessel account (85%) and the park and recreation account (15%). The funds in the state vessel account are then returned to the eligible counties under a user designation system set out in Idaho Code § 67-7013(5). The moneys in the county vessel fund are tightly restricted in the purposes for which they can be spent. The moneys "shall be used and expended by the board of county commissioners for the exclusive purpose of maintaining and improving the public waters of this state for recreational boating purposes and for law enforcement activities related to the enforcement of the provisions of law." Idaho Code § 67-7013(7).

This statutory directive is clear and unambiguous. The moneys in the county vessel funds can be spent only (1) to maintain and improve the public waters for recreational boating purposes, and (2) for boating law enforcement. The first provision limits the expenditure of these funds in several ways. Expenditures are primarily for the benefit of recreational boaters engaging in boating activities; these activities must be in, on, or very near the water. This clearly includes boat docks, boat ramps, and boat pumpout facilities.

Boat trailer parking would also be an appropriate expenditure of county vessel funds because boat launching facilities (docks and ramps) usually require the use of a vehicle and trailer which must be stored on land while the boating activity occurs on the water.

The remaining facilities enumerated in your opinion request -- roads, rest-rooms, picnic facilities, camping facilities, landscaping, and land access fishing docks — do not appear to be facilities that maintain or improve “the *public waters* of this state for recreational boating purposes.” (Emphasis added.)

In summary, the statute expressly limits the expenditure of county vessel funds to water-based recreational boating improvements and enforcement of boating laws. Expenditure of county vessel funds for other purposes, either land-based, or for other than recreational boating, is clearly improper.

B. *State Waterways Improvement Fund (Idaho Code § 57-1501)*

The state waterways improvement fund was created in 1963. The purposes of the WIF are broader than those of the county vessel funds. WIF funds can be used “for the protection and promotion of safety, waterways improvement, creation and improvement of parking areas for boating purposes, making and improving boat ramps and moorings, marking of waterways, search and rescue, and all things incident to such purposes including the purchase of real and personal property.” Idaho Code § 57,1501, 1963 Idaho Session Laws, Ch. 175, § 3, p.500. While § 57-1501 has subsequently been amended on two occasions, the cited language appears unaltered in the current code.

Funding for the WIF has always come from state gasoline tax revenues. Initially the program was funded by a one percent (1%) share of these revenues. In creating the WIF the legislature stated:

The legislature hereby finds a fact that of all the taxes collected under Section 49-1210 and Section 49-1231, Idaho Code, 1.4% are derived from motor fuels and special fuels used for marine purposes to propel vessels on the inland and surrounding waterways of this state and that .4% is sufficient to pay the costs of administration and claimed refunds by marine users of special fuels. The legislature hereby declares that it is the policy of this state to use the funds derived from the sale of motor fuels and special fuels for marine use to improve boating facilities throughout this state.

1963 Idaho Session Laws, Ch. 174, § 1, p.500.

The gas tax distribution has been changed several times since 1963, but a portion of the revenue has always gone to the WIF. The current distribution formula, found at Idaho Code § 63-2412, recognizes that not all gasoline was purchased for use on the state’s roads and highways (which prior to 1963 received one hundred percent (100%) of the gas tax revenue). The separation of tax revenue generated

by the sale of marine fuels was simply a refinement of the user-pay system for funding roads and highways which the gas tax provided.

The statutory limitations on the expenditure of funds in the WIF are also clear and unambiguous, though of somewhat broader scope than those imposed on the county vessel funds. Permissible uses are: (1) protection and promotion of safety; (2) waterways improvement; (3) development/improvement of boating related parking; (4) development/improvement of boat ramps; (5) development/improvement of boat moorings; (6) waterways marking; (7) search and rescue; and (8) anything incident to the enumerated uses, including the purchase of property both real and personal. The common limiting feature here is that all the items listed are boating related, a fact which parallels the source of the funding as boating-generated tax revenue. Unlike the county vessel funds, expenditures for land-based boating activities are proper under the WIF.

When one applies the provisions of § 57-1501 to the items enumerated in your opinion request, the items sort themselves out appropriately. Boat docks, boat ramps, and boat pumpout facilities are clearly permissible, as are restrooms, parking facilities, picnic facilities, camping facilities, and landscaping, *when these items are primarily for the benefit of boaters engaging in boating activities*. It would be unrealistic to expect that boaters would have the exclusive use of these facilities developed with WIF moneys. On the other hand, use of WIF moneys for the development of projects with little or no benefit to boaters would be contrary to the existing user-pay funding scheme.

The expenditure of WIF moneys on the construction and/or maintenance of roads is repugnant to the WIF funding scheme. The WIF was created specifically because of the inequity of spending marine fuel revenues for non-marine uses. Currently, only a small percentage of gas tax revenue (less than one percent (1%) goes to the WIF) with the bulk of gas tax revenue going to roads. To spend the small proportion of gas tax revenues going to the WIF on roads would be a step back to the days before 1963 when boaters received no benefits from their boating-generated tax dollars. This result would be clearly contrary to the existing statutory scheme.

In summary, proposed expenditures of WIF moneys should be scrutinized to assure that they come within the eight permissible categories for expenditures, and that boaters engaging in boating activities will be the primary beneficiaries of the funds. Expenditures that are outside the scope of § 57-1501, or that provide no benefits or only incidental benefits to boaters are improper.

Both § 67-7013(7) and § 57-1501 show the evolution in the funding mechanisms for the support of recreational boating programs toward a user supported system. This parallels the phenomenal growth of recreational boating activities in the state and the resultant need for increased boating facilities. The careful expenditure of funds in compliance with the statutory provisions will assure compliance with the express intent of the legislature.

AUTHORITIES CONSIDERED:

1. *Cases*

Nicolaus v. Bodine, 92 Idaho 639, 641, 448 P.2d 645, 647 (1968).
Webster v. Board of Trustees, 104 Idaho 342, 659 P.2d 96 (1983).

2. *Idaho Statutes*

Idaho Code § 57-1501.
 Idaho Code § 63-2412.
 Idaho Code § 67-7013.

3. *Idaho Session Laws*

1949 Idaho Sess. Laws, Ch. 203, p.423 (H.B. 154).
 1951 Idaho Sess. Laws, Ch. 55, p.79 (H.B. 22).
 1961 Idaho Sess. Laws, Ch. 281, p.499 (S.B. 233).
 1963 Idaho Sess. Laws, Ch. 174, p.500 (S.B. 256).
 1969 Idaho Sess. Laws, Ch. 210, p.611 (S.B. 1223).
 1977 Idaho Sess. Laws, Ch. 122, p.261 (S.B. 1183).
 1980 Idaho Sess. Laws, Ch. 246, p.568 (S.B. 1438).

DATED this 27th day of October, 1989.

JIM JONES
 Attorney General
 State of Idaho

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**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 1989**



Jim Jones
Attorney General
State of Idaho

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 3, 1989

Honorable Rod Beck
Idaho State Senate
Statehouse Mail

Honorable Brent Brocksome
Idaho State House of Representatives
Statehouse Mail

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

Dear Senator Beck and Representative Brocksome:

Your letter of December 6, 1988, asks our opinion as to the appropriateness of action recently taken by Governor Andrus directing his agency department directors "to implement a minimum state employee wage schedule." Specifically, you ask us to review two questions:

1. Does the Governor have statutory or other legal authority to mandate such an increase and change in the current system; and
2. Is this increase a violation of the existing statutes and/or the authorized pay plan commonly called the Hay System?

"We treat the two questions as one. If the Governor's action violates existing statutes, then he has no legal authority to take that action.

At the outset, it is well to state what is at issue. The Governor's action of November 25, 1988, as noted in your letter, took the form of a "memorandum" to his agency department directors. It was not a formal executive order, as reported in some quarters.

Second, the memorandum does not disrupt the normal hiring or pay scale process. State employees will still be hired at step A in the proper Hay Plan pay grade for their job classification. Only after probation is completed does the Governor's directive come into play. At that time, he instructs the agency heads to move those who successfully complete probation to \$5.39 per hour, the federal poverty level for a family of four. The directive will not result in any employee being paid above the maximum step in the assigned pay grade.

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The affected pay grades are numbers 17, 18 and 19 in the state personnel system. Employees in pay grade 17 will receive a 15% increase upon successful completion of probation. At present, there are 43 employees in pay grade 17, occupying such positions as human services aide, motor vehicle operator I, language lab assistant, kitchen helper and office clerk.

Employees in pay grade 18 will receive a 10% increase upon successful completion of probation. At present, there are 19 employees in that pay grade, occupying the positions of canteen worker and homemaker.

Employees in pay grade 19 are not affected by the Governor's directive because their six-month pay increase, after successful completion of probation, would bring them to \$5.39 in any case.

The statute controlling wage increases is Idaho Code § 67-5309C, which reads in pertinent part:

It is hereby declared to be the intent of the legislature that the advancement of an employee to steps providing an increased salary within each pay grade shall be based solely on merit, including factors such as increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position.

The "solely on merit" language of this statute could be read to require that a high standard of performance be reached before granting a pay increase and as precluding an across-the-board increase of the kind directed in the Governor's memo. In practice, since 1976, agencies have uniformly granted at least a 5% increase to all employees who successfully complete their probationary period. The long-standing practice of an administrative agency in carrying out its statutory duties is entitled to deference and, when long acquiesced in by the legislature, is generally held to be persuasive in interpreting a statute's mandate. Davis, *Administration Law Treatise*, § 29.13 (1984). Thus, it is our conclusion that a post-probation increase of the magnitude mentioned in the Governor's memorandum would not violate the "merit" pay system outlined in Idaho Code § 67-5309C.

The precise implementation of the increase is more problematic. The Governor's memorandum directs agency heads to identify all permanent classified employees who are below \$5.39/hour and prepare an EIS-3 advancing them to at least \$5.39/hour, effective December 11, 1988. This advance, according to the Governor's memorandum, will not require a performance evaluation. This precise mechanism for implementing the merit increase is not contemplated in the statute or rules. The controlling statute, once again, is Idaho Code § 67-5309C, which states:

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No employee shall advance to a higher step within a pay grade without an affirmative certification for such purpose by the employee's immediate supervisor, approved by the department director or the director's designee, . . .

The Personnel Commission's implementing regulations state that "Performance evaluations shall be . . . used as the affirmative certification for merit increases (ref. Section 67-5309C(c), Idaho Code); . . ." IDAPA 28.21.A.3. Thus, it is clear that the performance evaluation cannot be dispensed with before advancing the employee to the \$5.39 step of the pay grade in question.

While we have not conducted a detailed investigation of the employees involved, we are informed by the Personnel Commission that the individual agencies are carrying out the Governor's directive properly.

The Personnel Commission rules leave to individual agencies the discretion to define the general terms "increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position." It would not be unreasonable for an agency to adopt the policy that these goals would be negated if the state employee were forced to draw welfare to meet the federal poverty level. Furthermore, a move to \$5.39 per hour would help close the gap on the lower salary line and bring classes closer to the pay line established by Personnel Commission studies. That pay line is currently \$5.42 per hour at 100 points in the Hay System (approximately pay grade 17).

To carry out the Governor's directive within the confines of existing statutes and rules, agencies would simply need to modify the "salary administration policies" they are required to "adopt and file with the Personnel Commission" pursuant to IDAPA 28.07.G.1. That modification might take the form of a policy stating that "completion of the probationary period will result in approximately a 5% increase or \$5.39, whichever is less."

It is our conclusion, therefore, that while the Governor's memorandum did not correctly identify the precise mechanism for implementing his directive, that directive can be carried out by agencies without violating existing statutes, rules or regulations.

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

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 9, 1989

The Honorable Atwell J. Parry
State Senator, District 11
Idaho State Senate
STATEHOUSE MAIL

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

Re: County Fair Board Budgeting

Dear Senator Parry:

In your letter of January 25, 1989, you ask several questions concerning the budgetary and financing process for fair boards established by the provisions of Idaho Code §§ 22-201 through 209 and §§ 31-822 and 31-823. The responses to your questions will be by subject rather than by individual response to each question that you posed.

1. *Budget Timing and Procedure.* Section 22-206 sets forth the budget procedure and timing for county fair boards. The reference to the term "Idaho budget law" in this section does not have any relevance to the operation of the statute. The Idaho budget law referenced includes those sections found at §§ 67-3501 et seq., which relate to the state budget. These sections have no effect on the functions of the fair board.

The timing for preparation of the budget for county fair boards begins on the first Monday of February of each year when the county fair board must meet for the preparation of the budget. The language in § 22-206 states that the fair board must set the budget and deduct the probable income from the fairs that will be conducted and any treasury balance. Then the board must certify to the county commissioners the amount of the budget. The county can then levy an amount for fair purposes that cannot exceed the difference between the total budget and the probable income of the fair and the balance on hand in the treasury.

2. *Levy Authority.* The county fair board may levy up to one-half mill on each dollar of assessed valuation of taxable property in the county for purposes of raising the amount necessary to meet the budget needs of the fair. This levy must be provided for in the budgeting process. In addition, the county may levy an amount of up to one mill on each dollar of taxable property in the county for fair purposes. Idaho Code § 31-823. However, the fair board and county levy combined cannot exceed a total of one mill. The amount of the levy is not automatic, but must be set

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within the budgeting process by the fair board and the county commissioners. An election is not required to put this levy in place. Nor will the statutes need to be amended in order to give effect to this levy authority.

In addition to the levies discussed above, Idaho Code § 31-822 provides for a one-half mill levy for the purposes of purchasing a site, grounds or park on which to hold public fairs, to build suitable buildings and provide for the maintenance of buildings. This levy is in addition to the total one mill levy which can be assessed for operating purposes. Again, this levy is not automatic but requires affirmative action by the county commissioners to give it effect within the budget process. The fair board generally requests the commissioners to include the levy in the county fair budget. There is no requirement that a county be a part of a fair district in order to implement this particular levy. However, the levy in § 31-822 can be assessed if the county is a part of a fair district.

3. *Miscellaneous.* If police and fire protection services are provided by the county, they will be a county expense and not chargeable to the fair board. If a contract is made with the city to provide these services, then the county is obligated to pay for the services independently of the budget of the fair board. Idaho Code § 22-209. All levies discussed in this letter are subject to the limitations imposed by the one percent initiative.

I hope this has been responsive to the questions raised in your letter. If you have additional questions, please do not hesitate to contact our office.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 17, 1989

The Honorable Jim Stoicheff
House Minority Leader
House of Representatives
State Capitol
Statehouse Mail

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

Re: Smoke Management Act, Idaho Code §§ 39-2301 to 2305

Dear Representative Stoicheff:

In your letter of January 12, 1989, you asked whether a representative of the Clean Air Coalition has made a correct interpretation of the Smoke Management Act, Idaho Code §§ 39-2301 to 2305. The question presented is whether the Smoke Management Act, in conjunction with Idaho Code § 52-108, provides grass growers more protection from nuisance lawsuits than the Right to Farm Act, Idaho Code §§ 22-4501 to 4504, provides to farmers in general.

I. The Smoke Management Act

The Smoke Management Act, Idaho Code §§ 39-2301 to 2305, establishes a voluntary smoke management program designed to promote agricultural activities relying on grass seed field burning while minimizing any potential effects field burning has on air quality. To accomplish this, the Smoke Management Act created a Smoke Management Advisory Board to advise the Director of the Idaho Department of Health and Welfare in the administration and enforcement of the Smoke Management Act by overseeing funds deposited into the Agricultural Smoke Management Account (Account). The Account was created by the Smoke Management Act to provide funds for implementation of the Smoke Management Program. The Account also provides funds to research the development of alternative crops which do not require burning, to research improved burning practices for crops which may require burning, and to research alternatives to field burning. The Account is funded by a fee to be paid to the Department of one dollar (\$1.00) for each acre of crop land to be burned.

The Smoke Management Act authorizes the open burning of grass seed fields. Specifically, the Smoke Management Act states as follows:

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The open burning of plant life grown in agricultural fields shall be an allowable form of open burning when the provisions of this section are met, for the purpose of:

- (a) Disposing of crop residues;
- (b) Developing physiological conditions conducive to increased crop yields; or
- (c) Controlling diseases, insects, pests or weed infestations.

Idaho Code § 39-2305(1). The Smoke Management Act also requires any person conducting agricultural field burning in Kootenai and Benewah Counties to make every reasonable effort to burn only when weather conditions are conducive to good smoke dissipation as determined by the industry-conducted Smoke Management Program, and the burning does not violate current state and federal air quality standards. Persons conducting agricultural field burning in Benewah and Kootenai Counties must also register each field with the Department of Health and Welfare each year burning is conducted. Idaho Code §§ 39-2305(2)(a) and (3). In sum, the open burning of agricultural grass seed fields is authorized by the Smoke Management Act.

Idaho Code § 52-108 states that, “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.” The open burning of agricultural grass seed fields is done under the express authority of the Smoke Management Act. As a result, grass growers conducting field burning in compliance with the Smoke Management Act are generally immune from suits for public or private nuisance. *See, City of Twin Falls v. Harlan*, 27 Idaho 769, 151 P. 1191 (1915) (ditch constructed and maintained under express authority of a statute cannot be deemed a nuisance) and *City of Lewiston v. Isaman*, 19 Idaho 653, 115 P. 494 (1911) (cellar-way and doors in sidewalk maintained by authority of law cannot be deemed a nuisance). Presumably, grass growers conducting field burning in a manner inconsistent with the Smoke Management Act could be sued for public or private nuisance. For instance, persons conducting agricultural field burning for purposes other than those specified in the Smoke Management Act may be subject to suit for public or private nuisance.

II. The Right to Farm Act

The Right to Farm Act, Idaho Code §§ 22-4501 to 4504, was enacted to provide farmers a measure of protection from nuisance lawsuits. The Idaho Legislature, in enacting the Right to Farm Act, found that agricultural activities conducted on farm land in urbanizing areas are often subjected to nuisance lawsuits,

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and that such suits encourage and even force the premature removal of farm lands from agricultural uses. Idaho Code § 22-4501.

The Right to Farm Act provides as follows:

No agricultural operation or an appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided, that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent operation of any agricultural operation or an appurtenance to it.

Idaho Code § 22-4503. Agricultural operation is defined to include, without limitation, “any facility for the growing, raising or production of agricultural, horticultural and viticultural crops and vegetable products of the soil, poultry and poultry products, livestock, field grains, seeds, hay, apiary and dairy products, and the processing for commercial purposes of livestock or agricultural commodities.” Idaho Code § 22-4502(1).

Under the Right to Farm Act, farmers may not be used for public or private nuisance, as a result of changed conditions in surrounding nonagricultural activities, when their agricultural operation has been ongoing for more than one year, and the operation was not a nuisance at the time it began. Farmers may be used for public or private nuisance when: (1) the agricultural operation was, at its commencement, a public or private nuisance, or (2) the agricultural operation is a nuisance as a result of improper or negligent operation. Grass growers conducting agricultural field burning in compliance with the Smoke Management Act, on the other hand, are generally immune from public or private nuisance lawsuits, regardless of when the agricultural field burning was commenced. Therefore, farmers are afforded less protection from public or private nuisance lawsuits by the Right to Farm Act than grass growers conducting field burning in compliance with the Smoke Management Act.

III. Conclusion

The Smoke Management Act, in conjunction with Idaho Code § 52-108, provides grass growers with more protection from public or private nuisance lawsuits than the Right to Farm Act provides to farmers in general. Agricultural grass seed field burning conducted in compliance with the Smoke Management Act cannot, pursuant to Idaho Code § 52-108, be deemed a nuisance. The Right to Farm Act, on the other hand, protects farmers from public or private nuisance

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lawsuits only when their agricultural operation has been conducted for more than a year, the operation was not a nuisance at the time it began, and the operation is not conducted improperly or negligently.

If our office can be of further assistance, please call.

Sincerely,

John C. McCreedy
Deputy Attorney General

February 23, 1989

The Honorable Janet S. Hay
Idaho State Representative
Statehouse Mail

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

Re: House Bill 223

Dear Representative Hay:

You have requested legal guidance from this office regarding House Bill 223. This bill, denominated the "open enrollment" proposal, would permit appropriated state funds to follow a student from one school or district to another. Therefore, it is, as you have noted, sometimes called a "voucher" plan. You question whether this proposal could be extended to include private and parochial schools. For the reasons stated below, it is my conclusion that extension of the plan to parochial schools would violate art. 9, § 5, of the Idaho Constitution.

Art. 9, § 5, of the Idaho Constitution provides as follows:

Sectarian appropriations prohibited. — Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain

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any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose.

In the case of *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), the Idaho Supreme Court reviewed this constitutional provision. In that case the Idaho Supreme Court stated:

However, unlike the provisions of the federal constitution, the Idaho Constitution contains provisions specifically focusing on private schools controlled by sectarian, religious authorities. In considering the provisions of Idaho Const. art. 9, § 5, set out above, one cannot help but first be impressed by the restrictive language contained therein. . . By the phraseology and dictation of this provision, it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution.

The court then held that the transportation of students to a parochial school on public school buses violated this provision of the Idaho Constitution.

Extending the voucher plan to parochial schools would run afoul of the Idaho Constitution, as interpreted by the court in the *Epeldi* case. This prohibition does not appear to apply to private schools operated by non-sectarian authorities. In order to pass constitutional muster, then, the provisions of the bill should be limited to public and non-sectarian private schools.

I hope that this answers your question. If there is anything further that I can provide, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 23, 1989

Lon F. Davis, Esq.
Staff Attorney
Administrative Office of the Courts
Supreme Court Building
STATEHOUSE MAIL

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

Re: Idaho Death Penalty

Dear Lon:

This is in response to your memorandum of March 17, 1989, addressed to members of the Appellate Rules Advisory Committee.

Your comment relating to death penalty cases that "the Supreme Court [of Idaho] has recently ruled a number of times that the rules regarding stays control over the statute" which limits such stays is a matter of considerable concern to this office.

Notwithstanding the provision of Idaho Code § 19-2715 that once the state appellate process has been completed "no further stays of execution shall be granted to persons sentenced to death," the advisory committee now proposes to recommend to the court, over my objection, an amendment to Rule 13(q) which provides that the supreme court may grant a stay to "any party who has failed to get one from the district court." Although you state that I have not pointed out "exactly" why I believe that there is a conflict, I think it is entirely clear without elaboration that a rule allowing "any party" to obtain a stay contradicts a statute (§ 19-2715) which absolutely forbids stays after final decision in death penalty cases.

Permit me to remind you of this historical fact: After I argued in the *Creech* case that the court should adopt a procedural rule along the lines later embodied in Idaho Code § 19-2715, the court, through you, requested that this office draft and propose legislation designed to prevent stalling in capital cases. The result was Idaho Code § 19-2715. I recognize that the process defined in Idaho Code § 19-2715 is a matter of procedure and is therefore within the scope of the court's rule-making authority (with the exception of matters relating to stays, which are in the nature of remedies rather than modes of procedure). Nonetheless, it was

the court that arranged to have this legislation initiated by this office. Why were we asked to sponsor expediting legislation if the court had no intention of following it? If the premise of this question gives you any doubt, the sorry record of compliance with Idaho Code § 19-2715 and related provisions of the act appearing under other section headings speaks for itself. In the five years since this expediting act became law, not one single case has been completed within the time limits specified.

The court's whimsical attitude toward the death penalty statutes and its own rules has become so serious a problem that we need to see attention directed toward solving it rather than exacerbating the difficulty. In *State v. Thompson* (the pen register case), the court decided the controversy in a manner conflicting with a substantive statute and without any discussion of the statute. In *State v. Currington*, the court overruled what we believe to be a substantive statute denying bail on appeal to violent criminals because the court had published a rule permitting a court to use its discretion to grant bail pending appeal to *any* prisoner. In *State v. Elisondo*, the court decided the case in conflict with one of its own rules, making no mention of the rule. In *Holland v. Woodland*, the court has used a rule of doubtful validity to interfere with enforcement of the state's death penalty law. The court made no effort whatever to justify its decision by reference to principles of law. Twice, in *State v. Fetterly* and *State v. Beam*, the court has granted stays of execution prohibited by Idaho Code § 19-2715, although, now that you have told us, we realize that this was because "the Supreme Court has . . . ruled . . . that the rules regarding stays control over the statute."

Your memorandum seems to imply that all of this is perfectly acceptable. It does not appear so to me. These actions of the court are of no small consequence. A state's systematic refusal to follow its own law has due process implications under the federal Constitution. Rules purporting to authorize the court to cancel statutory procedures which were designed to expedite capital cases (which former Justice Powell suggested might be constitutionally necessary) create a considerable risk that our sentencing system may become too arbitrary to pass constitutional scrutiny in the federal courts. If this happens, it will not be the fault of the federal courts.

Because we view the present rule-making and rule-enforcement process as too arbitrary, we believe that the court should no longer be the sole arbiter of which rules and statutes will be enforced and which will not. We are inclined to favor a system like that employed in the United States Supreme Court, whose rule-making is subject to the approval of Congress. It is certain that some reform is needed in this area. We would like to hear your views on this point.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In the meantime, I adhere to my opposition to the proposed amendment to Rule 13(q) and emphasize again that the court's inconsistent application (or disregard of) statutes and rules threatens our position in federal courts.

Very truly yours,

LYNN E. THOMAS
Solicitor General

March 28, 1989

The Honorable Reed Hansen
Chairman
Health and Welfare Committee
STATEHOUSE MAIL

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

Re: Definition of Legislative Intent

Dear Reed:

Thank you for your letter of March 13, 1989, regarding the subject of legislative intent. In your letter you asked for clarification regarding the differences between "legislative intent as expressed in a letter from the legislature, a concurrent resolution, a concurrent resolution that amends an agency regulation, and as contained in a section of the code whether codified or not." The answer that I am providing to you takes into account the earlier response of March 9, 1989, by myself to Representative Allan-Hodge.

LEGISLATIVE LETTER OF INTENT

As I indicated in my response to Representative Allan-Hodge a legislative letter of intent is:

In general, a letter of intent [is] used as a mechanism to clarify what the legislature intended in adopting a particular statute. Generally, a letter of intent only comes into utilization by a court when the court is faced

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with an ambiguous statute. If there is no ambiguity and the legislature's intent is clearly stated, a letter of intent has no impact. If, however, there is ambiguity, a court may look to the letter of intent to resolve that ambiguity.

In short, this letter-type of legislative intent is frequently placed into the journal for the purpose of clarifying a proposed statute short of actually amending the bill itself.

In your discussions you mentioned another letter-type of legislative intent, that being a letter signed by the leadership of the house and sent to a state agency indicating what the officials believed the legislature intended vis-a-vis a proposed agency action implementing a set of rules and regulations. Such a letter would essentially be an expression of a point of view of the officials who endorse the letter. Depending on which legislators signed the letter, it may have some practical impact. From a legal point of view, however, such a letter would have no binding effect.

CONCURRENT RESOLUTION

The second type of legislative intent you inquired about was a concurrent resolution that expressed the view of the legislature concerning an action of an administrative agency. A concurrent resolution expressing legislative intent and as used in this context would be an advisory expression of the legislative body to an administrative agency. It would not require an agency to take action nor would it have the force and effect of law. Rather it would place the administrative agency on notice as to what the legislature's position was regarding a particular issue. Depending upon the nature of the concurrent resolution, the state agency might very well act in accordance with the concurrent resolution. However, it would be under no legal binding obligation to do so.

CONCURRENT RESOLUTION AMENDING AN AGENCY REGULATION

This expression of legislative intent is a procedure outlined in the Idaho Administrative Procedure Act, in particular Idaho Code § 67-5218. That section, in pertinent part, provides as follows:

If the committee to which any rule shall have been referred, or any member of the legislature, shall be of the opinion that such a rule is violative of the legislative intent of the statute under which such rule was made, or if any rule previously promulgated and reviewed by the legislature shall be

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deemed violative of the legislative intent of the statute under which such rule is made, a concurrent resolution may be adopted rejecting, amending or modifying the same.

This section of the code purports to grant to the legislature the ability to change administrative rules through a concurrent resolution, if the legislature finds that its original grant of authority to the agency has not been faithfully carried out by that agency.

Our office has previously provided an attorney general's opinion on this subject. See A.G. Op. 87-6, copy enclosed. Our opinion was that this procedure was an impermissible infringement upon the Idaho Constitution and, in particular, the enactment and presentment clauses which provide the opportunity for gubernatorial review of legislative action. In short, it is our view that this procedural mechanism for expressing legislative intent will not survive a court challenge.

STATUTORY LEGISLATIVE INTENT WHETHER CODIFIED OR NOT

The final category of legislative intent is that provided for in a bill itself. This form of expression constitutes the most effective method by which the legislature can insure that its policy directives will be faithfully carried out. These expressions of legislative intent, because they are a part of a bill itself, do not suffer from any of the impediments identified above. The governor has had an opportunity to exercise his prerogative and veto the bill if the expression of legislative intent was unacceptable. The state agency is required to follow these expressions of legislative intent unless determined to be unconstitutional, and any action in derogation thereof could be challenged in a court of law.

I hope that this information is helpful. I would be happy to answer any questions you so desire.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 30, 1989

Clyde G. Nelson
Prosecuting Attorney
Caribou County Courthouse
Soda Springs, ID 83276

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

Re: Public Hearings

Dear Mr. Nelson:

This letter is in response to your request dated March 17, 1989, on whether the Caribou County Planning and Zoning Commission and the Caribou County Commissioners may hold a public hearing in the L.D.S. Church in Freedom, Wyoming. I have answered your questions in the order you posed them.

I. *Whether The Board Of County Commissioners Is Required To Hold Its Meetings In The County Seat Of The County.*

Idaho law requires *regular* meetings of the board of county commissioners to be held in the county seat. Idaho Code § 31-710 ("The regular meetings of the boards of commissioners must be held at their respective county seats. . . ."). Therefore, all regular meetings of the Caribou County Commissioners must be held in Soda Springs, the county seat. The Board may not change that location. *See, Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d 1073 (1983) (County regulations and ordinances must not conflict with state statutes).

The statute does not, however, require a particular location for "[s]uch other meetings . . . as are prescribed by law or provided for by the board." *Id.* As the governing board over the Planning and Zoning Commission, the Board of County Commissioners is required to hold at least one public meeting before acting on any recommendations from the Planning and Zoning Commission.

Idaho Code § 67-6509(b). Meetings held pursuant to Idaho Code § 67-6509(b) are not "regular" meetings under Idaho Code § 31-710 and therefore are not required to be held in the county seat. Idaho Code § 67-6509 requires only that the public receive fifteen days' notice of the time and place of the hearing. The statute, unlike Idaho Code § 31-710, does not specify a place for the hearing. Accordingly, the commissioners may conduct a public hearing for Idaho Code § 67-6509 purposes outside of the county seat.

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This conclusion is also supported by the policy behind the requirement of public hearings on zoning regulations. The provision gives all interested people an opportunity to be heard, which ensures the zoning decision is based on informed opinion. This purpose would be defeated if the public hearings could not be held in the location most convenient for those affected. To effectuate the intent behind the statutory requirement of public hearings on zoning matters, those hearings should be held in the locations most accessible for the greatest number of people.

In conclusion, the answer to your first question depends on the nature of the meeting. The commissioners must hold their regular meetings in the county seat. However, with the proper notice the commissioners may hold public hearings required by Idaho Code § 67-6509 in a different location.

II. Whether The Caribou County Planning And Zoning Commission Is Required To Hold Its Meetings In The County Seat.

Unlike county commissioners, planning and zoning commissions are not required by law to meet in a particular place. See Local Planning Act of 1975, Idaho Code §§ 67-6501 through 67-6533 (Act creating and defining the duties of planning and zoning commissions). Furthermore, the law explicitly states, "As part of the planning process, a planning or zoning commission shall provide for citizen meetings, hearings, surveys, or other methods, to obtain advice on the planning process, plan, and implementation." Idaho Code § 67-6507. Idaho Code § 67-6509(a) also requires at least one public hearing before the Planning and Zoning Commission makes any recommendations regarding the adoption, amendment or repeal of any zoning plan. Clearly, the legislature intends public opinion to play an important role in any planning or zoning decision. In order to effectuate this intent, the public hearings of the Planning and Zoning Commission should be held in the location most convenient for the affected public. Furthermore, "[t]he weight of authority would seem to be that wide discretion is given administrative officials in determining matters such as the place for conducting hearings within a state." *Burri v. Campbell*, 434 P.2d 627, 629 (Ariz. 1967). Therefore, the Caribou County Planning and Zoning Commission is not required to hold its public hearings in the county seat.

III. The Procedure In Holding The Public Hearings Outside The County Seat.

The notice required for public hearings in zoning matters is outlined in Idaho Code § 67-6509(a). This procedure applies to the public hearings required by both the planning and zoning commission, Idaho Code § 67-6509(a), and the board of county commissioners, as the governing board, Idaho Code § 67-6509(b). At least fifteen (15) days before the scheduled public hearing, a notice of the time and place and a summary of the proposed plan must be pub-

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lished in the official newspaper of the jurisdiction. Similar notice must be given to all the other papers, radio and television stations serving the jurisdiction for use as a public service announcement. After the hearing, if the commission makes a material change in its recommended plan, then it must conduct another public hearing with the required notice on the amended plan. A record of the public hearings, the findings made and the actions taken must also be maintained.

IV. *Whether Public Meetings May Be Held Outside The State Of Idaho.*

There is no explicit requirement that the public hearings held pursuant to Idaho Code § 67-6509 be conducted inside the State of Idaho. As noted above, the purpose of the public hearings is to provide an opportunity for members of the public to voice their concerns. Every effort should be made to accommodate the public. In this situation, the citizens of Freedom, Idaho, will be most affected by the proposed amendments and their opinions, if at all possible, should be considered in the final decision. The best means to accomplish that goal is to conduct a public hearing in the Freedom area. If the distance or the condition of roads between Freedom, Idaho, and the county seat or another Idaho location would truly prevent Freedom citizens from attending a public hearing in Idaho and if the only location large enough to accommodate the expected number of people is across the border in Wyoming, then the hearing should be conducted in Wyoming. To find otherwise would be to thwart the clear statutory intent of encouraging public participation in the zoning process. However, I urge you to consider carefully the alternatives. Such a procedure is highly unusual and can only be rationalized by the idiosyncrasies of Idaho topography and the strong policy of public participation in the zoning process.

It must be emphasized that this conclusion is limited to the facts of your situation. I do not mean to imply that county commissioners or their appointed agencies may arbitrarily and capriciously decide to hold public meetings outside their jurisdiction. Article 18, section 7, of the Idaho Constitution states that “[a]ll actual and necessary expenses incurred by any county officer or deputy in the performance of his official duties, shall be a legal charge against the county. . . .” In the fact situation you pose, the commissioners’ trip to Freedom, Wyoming, to conduct a public hearing for the residents of Freedom, Idaho, arguably would be necessary. Under article 18, section 7, they would be reimbursed for their expenses. This contrasts with the hypothetical situation where the commissioners decide to hold a public hearing out of state in, for example, Hawaii. Such a decision would not be based on the strong policy reasons underlying your set of facts, and accordingly the constitution might preclude the reimbursement of their expenses. If an irate constituent disapproved of the commissioners’ action, the commissioners might have to defend the necessity of the Wyoming trip in court.

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Finally, and most importantly, if public meetings pursuant to Idaho Code § 67-6509 are held outside the county, the final decision **MUST** be made within the county. Under Idaho Code § 67-6521(d), an aggrieved party may seek judicial review of a final decision “under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code.” Idaho Code § 67-5215(b) grants jurisdiction to the district court of “either the county in which the hearing was had or the county in which the final decisions of the agency was made.” If the commissioners conduct a public hearing in Freedom, Wyoming, and then issue their final decision in front of their constituents in Wyoming, there would be no court with jurisdiction to review the action. Such a scenario would clearly be unconstitutional. To avoid this legal quagmire, the commissioners should be careful to issue their final decision in their county.

V. Whether The Public Hearing May Be Held In A Church.

As long as the meeting is open to all members of the public, there should be no problem with conducting the hearing in the church. All necessary steps should be taken to ensure that members of the public, especially those who are not members of the particular church, are not inhibited in voicing their opinions because of the location. The use of a church by the county government in this situation does not trigger the religion clauses of the first amendment, which prohibit the making of any *law* respecting the establishment of religion or the free exercise of religion. The Idaho constitutional provisions also would not apply. Article 1, section 4, and article 21, section 19, of the Idaho Constitution guarantee religious liberty to the citizens of Idaho; article 9, section 5, prohibits public entities appropriating money for sectarian purposes. The mere use of a building that happens to be a church, without more, should not be a problem. Clearly, members of the church would have to agree that the area of the public meeting would be unequivocally open to the public.

VI. Conclusion

In conclusion, public hearings held pursuant to Idaho Code § 67-6509 need not be held in the county seat. There is no explicit law that requires such meetings be held in Idaho, but such a practice is unusual and may create unforeseen problems. If at all possible I would urge you to conduct the Freedom meeting on the Idaho side of the border. If there is no alternative but the church in Freedom, Wyoming, then I urge you to maintain a complete record of the reasons for your decision, i.e., the lack of adequate facilities in Idaho and the difficulty for the citizens of Freedom to travel to another Idaho location. Also, the public hearing should be limited to fact-finding only, no decision should be made at the meeting. The record would be essential if an irate citizen decided to challenge the proceedings.

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Your decision to conduct one of the public hearings in the county seat is a wise one and should be effectuated. The meeting at the county seat would satisfy the statutory requirements of the Local Planning and Zoning Act. The Wyoming hearing could, therefore, be characterized as a good faith gesture of accommodating the needs of the affected public. It would be difficult to question the validity of the Wyoming hearing if it was solely for the convenience of the local Idaho residents, and not intended to satisfy any statutory requirements.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

April 11, 1989

Mr. Stan Hamilton
Department of Lands
STATEHOUSE MAIL

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

Re: Easement for Airport

Dear Stan:

You have asked for legal guidance on two issues concerning the request for an easement for the Garden Valley Airport by the Division of Aeronautics of the Idaho Department of Transportation. These questions are:

1. What are the differences between an easement, a lease, or a land sale with respect to the authority of an individual entity to utilize state land?
2. When is the use of each of the above instruments appropriate for the commitment of use of endowment lands?

The essence of your two questions is whether the Idaho Land Board may sell or grant an interest in endowment lands by easement or by direct sale to another state agency without a public auction. Because the issue before the land board involves the Garden Valley Airport, which is located on endowment lands, this response is limited in its applicability to endowment lands.

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CONCLUSION:

In Attorney General Opinion No. 82-10 we concluded that: “the Idaho Supreme Court could reasonably permit the direct sale of trust lands to state agencies or prohibit such sales. Since there is reasonable authority to allow such sales, we conclude that the Board may in its discretion choose to do so.” A logical extension of our prior opinion would be that a direct transfer of an interest in endowment land constituting less than a full sale should also be permissible. Recent case law from other land grant states, however, has required a strict construction of the state’s constitutional duties and responsibilities as a trustee of school endowment land. In light of these developments, a term easement as opposed to a permanent easement should be considered by the board in this case.

ANALYSIS:

As you know, the state acquired these lands from the federal government upon admission to the union for the benefit of certain institutions. As such, the state holds title to these “endowment lands” as a trustee for the benefit of these same institutions. Therefore two legal standards must be met before a transfer is permissible; those required by the grantor of the trust land, the federal government, and those required by the Idaho Constitution, which constitutes the terms under which the state accepted these lands. I am attaching for your review a copy of Attorney General Opinion No. 82-10. That opinion addresses both the federal law requirements contained within the Idaho Admission Bill and the public auction requirement of art. 9, § 8, of the Idaho Constitution and concludes that a direct sale of endowment land to another state institution is permissible. Obviously, if the land board could permissibly make direct sales of trust lands to state agencies consistent with the Idaho Admission Bill and art. 9, § 8, of the Idaho Constitution, the transfer of a lesser interest such as an easement for the full appraised price would also be permissible.

A. Federal Law

The federal law issue, i.e. whether an easement could be issued consistent with the Idaho Admission Bill, is answered by the case of *Lassen v. Arizona*, 385 U.S. 458, 17 L.Ed.2d 515, 87 S.Ct. 584 (1967). In that case, the United States Supreme Court held that the direct sale of an easement over trust lands to a state highway department for the full appraised value was permissible. Thus, under the federal standard it would be permissible for the land board to issue a permanent easement to the state transportation department directly and without a public auction.

B. State Law

The state law issue is more problematic. It could be argued that a direct sale or issuance of an easement, even at full appraised value, might violate the state's constitutional trust responsibilities. As indicated above, recent state court decisions have imposed a higher standard of care upon state land boards relying upon state constitutional grounds. In *Oklahoma Education Association v. Nigh*, 642 P.2d 230 (1982), the Oklahoma Supreme Court held that below market statutorily set interest rates, rental rates and uneconomical re-leasing rights of state trust lands for farmers and ranchers violated that state's constitution. The court emphasized strongly the state's trustee responsibility in managing endowment lands. Similarly in *County of Sakamania v. State*, 102 Wash. 2d 127, 685 P.2d 576 (1984), the Washington Supreme Court held that state legislation which allowed private purchasers of timber from public trust lands to cancel or extend non-profitable purchase contracts violated the state's fiduciary duty as a trustee. The court emphasized that the state land board must manage endowment lands consistent with the responsibilities of a trustee under the "prudent man" rule.

The most recent state case is *Deer Valley Unified School District v. Superior Court*, 760 P.2d 537 (Ariz. 1988), and is directly contrary to our prior opinion. In *Deer Valley*, the Arizona Supreme Court held that the Arizona Constitution imposes a stricter standard than the federal Enabling Act discussed in *Lassen, supra*. (The federal Enabling Act is the Arizona equivalent of the Idaho Admission Bill.) The court held that under the Arizona Constitution, a school district could not condemn endowment land because the Arizona Constitution mandated a public auction as the constitutionally required method to obtain the highest possible return on the land being disposed.

While the language of the Idaho Constitution is not identical to that of Arizona, it is very similar. The Arizona Constitution requires that school land not be sold, leased or otherwise disposed of except to the highest and best bidder at a duly advertised public auction. The Idaho Constitution in contrast reads that the general grants of land made by Congress to the state are "subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made. . . ." See art. 9, § 8.

This section, however, must be read in conjunction with the preceding portion of art. 9, § 8, which requires that the land board provide for the location, protection, sale or rental of trust lands "in such a manner as to secure the maximum possible amount therefor." When read together, it is likely that an Idaho court, while imposing a strict standard of responsibility upon the land board when evaluating the board's actions, would permit a direct sale to be utilized if the goal of maximizing the long term return to the endowment was realized. In short, the

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Idaho court might well reject the mechanical requirement of always requiring a public auction in favor of a more flexible approach of permitting the board to exercise its discretion to determine what method of disposition would achieve the maximum long term return to the endowment. When evaluating the board's exercise of discretion in this area, the court could reasonably conclude that the direct transfer of an easement to a state agency is also permissible.

Finally, it should be noted that two state courts have approved plans to transfer state trust lands to a state entity for the appraised value without a public sale; however, these courts have not been faced directly with a challenge to the propriety of this action. See *State v. Weiss*, 706 P.2d 681 (Alaska 1985); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981); and *Kanaly v. State*, 368 N.W. 2d 819 (S.D. 1985).

Returning to the two questions you initially raised, the following definitions are helpful. A land sale is the direct transfer of fee simple title. An easement is the right in a landowner by reason of ownership to use the land of another for a specific purpose. *Sinnott v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961). Finally, a lease is a particular kind of contract wherein a leasehold interest in realty is given in return for a promise to pay rent periodically. *Krasset v. Koester*, 99 Idaho 124, 578 P.2d 240 (1978). It is my conclusion, therefore, that federal law would not prevent the direct sale to a state agency of a permanent easement and possibly even of a fee simple interest in endowment land at the appraised value. State law, however, would probably require more, particularly if the Idaho Supreme Court were to follow the more restrictive approach articulated by the Arizona Supreme Court. Each of these methods may be used by the land board so long as the constitutional requirements discussed above have been met.

Two possible solutions to this problem could be considered by the land board. The first would be to sell a permanent easement at a public auction. This approach could, however, diminish the price the land board could expect to receive from the auction and has many technical difficulties. The land board would have to review all of the factors that a prudent trustee would consider before considering this option and be assured that the maximum long term return to the endowment fund was realized. The second solution would be to transfer a term easement for a specified period of years for fair market value. This approach would avoid many of the constitutional problems discussed above as no permanent alienation of the land would occur.

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I hope that this letter is of assistance to you. If I can provide any further guidance, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

April 12, 1989

J. Frederick Mack
Attorney at Law
Holland & Hart
P.O. Box 2527
Boise, ID 83701

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

Re: Ada County Highway District Commissioners —
Conflicts of Interest

Dear Mr. Mack:

In your letter of March 10, 1989, you pose a scenario where the Ada County Highway District intends to create a local improvement district (LID). However, two of the three district commissioners have disqualified themselves from acting on the proposal because of conflicts of interest that are not defined in your letter. Consequently, you ask:

[W]hether the remaining Commissioner can properly vote on the local improvement district proposal with said vote being a proper exercise of the powers of The District.

Idaho Code § 40-1406, which pertains to single county-wide highway districts such as Ada County, provides in pertinent part:

The Commissioners of a county-wide highway district may pass ordinances, rules, and make all regulations, not repugnant to law, as necessary, for carrying into effect or discharging all powers and duties confer-

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red to a county-wide highway district pursuant to this chapter and chapter 13 of this title. All ordinances created or passed by the commissioners of a county-wide highway district shall require the affirmative vote of two-thirds (2/3) of the members of the full county-wide highway district commission.

The statute is clear and unambiguous: *all* ordinances require the affirmative vote of at least two members of the full commission. Thus, if two members abstain from voting, no ordinance can be validly enacted.

If either of the commissioners is declaring a conflict because of ownership of property within the proposed district, that concern is misplaced. Ownership of property within or deriving a benefit from an LID does not create a conflict of interest barring a commissioner from voting on or administering the district.

The Idaho Supreme Court recently addressed this very issue in *Simmons, et al. v. City of Moscow*, 111 Idaho 14, 720 P.2d 197 (1986). The council members for the city of Moscow owned property within the boundaries of the proposed LID which was the subject of that case. Other property owners challenged the council members' participation in creation of the district on the ground that their financial interest in the district created a conflict of interest sufficient to disqualify them from voting on the matter.

The *Simmons* court held that "the ownership of property in a local improvement district does *not* disqualify a council member from participating in proceedings to form a LID or assess property levies." *Simmons v. City of Moscow*, 111 Idaho at 18 (citations omitted) (emphasis in original). The court gave three reasons for finding there is no conflict in this type of situation. First, although there is a special benefit derived from an LID, there also is a special assessment levied. Second, the council member is not the sole beneficiary, but all property owners benefit from the LID. Finally, the court reasoned that this type of disqualification would often prohibit a governing body from performing its functions because of a lack of a quorum. *Id.*

The Idaho Supreme Court's holding in *Simmons* applies to highway district commissioners, as well as to city council members. The mere fact of property ownership within the county, or district, or LID, does not serve to disqualify public officials from voting on proposals that affect their property rights in a generalized manner.

Since no request was made to evaluate whether the two commissioners have a valid basis for their declared conflicts, no further specific analysis of the conflicts issue can be made. Should the two highway district commissioners continue to

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maintain that they have a conflict and abstain from voting on the proposed LID, such an action will prevent the district from creating the LID.

You mentioned a letter written by Mike Moore about ten years ago that addressed the issue of voting abstentions on a city council. That letter is not applicable to the facts of this case because the statutes governing voting requirements for city councils are different from those governing highway commissions.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

April 12, 1989

Honorable Jo Ann Groves
Mayor, City of Wardner
649 Main Street, Wardner
Kellogg, ID 83837

Charles L.A. Cox
Attorney at Law
P.O. Box 659
Kellogg, ID 83837-0659

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

Re: Eminent Domain

Dear Madam and Sir:

The issue you have requested our office to address is whether the City of Kellogg may exercise eminent domain over territory outside its municipal boundaries to build a gondola. The City of Kellogg may not condemn property outside its boundaries unless there is explicit or necessarily implied statutory authority. The City of Kellogg has no such authority.

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Introduction

The powers of a municipality, including the right to exercise eminent domain, emanate from the legislature. “Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it.” *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517 (1980). According to the Idaho Supreme Court, “a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature. . . .” *Id.* The Idaho Constitution does not mention eminent domain in relation to municipalities. See Idaho Constitution art. 1, § 14 (right of eminent domain is “subject to the regulation and control of the state”); art. 11, § 8 (reserving right of *legislature* to condemn incorporated companies). Therefore, the resolution of the issue depends on a statutory analysis of the authority granted the municipalities by the legislature.

Idaho Code §§ 50-1030(c) and 50-303.

The legislature granted the municipalities the power of eminent domain in Idaho Code § 50-1030(c), which permits any city the power “[t]o exercise the right of eminent domain for any of the works, purposes or uses provided by this act, in like manner and to the same extent as provided in section 7-720, Idaho Code.” Idaho Code § 50-1030(c) addresses the uses for which the municipal power to condemn may be exercised; it does not address the issue of jurisdictional restraints on the municipality’s power to condemn. The statute that permits a city to maintain recreational property outside its territorial limits is saliently silent on the municipal power to condemn. Idaho Code § 50-303, which is part of the act contemplated in Idaho Code § 50-1030(c), states: “Cities are hereby empowered to create, purchase, operate and maintain recreation and cultural facilities and activities within or without the city limits and regulate the same. . . .” The power to own property outside the city limits, pursuant to the authority of Idaho Code § 50-303, however, does not necessarily imply the power to acquire that property by eminent domain under the authority of Idaho Code § 50-1030(c). See, *City of Aurora v. Commerce Group Corp.*, 694 P.2d 382, 385 (Colo. Ct. App. 1984) (authority to own property outside municipal limits does not give city power to condemn property outside its boundaries); *Sterkel v. Mansfield Board of Education*, 175 N.E.2d 64, 67 (Ohio 1961) (school district had authority to purchase or lease property either within or without the district but it had no authority to condemn property outside its territorial limits).

The issue presented is not whether the gondola is one of the “works, purposes or uses” of Idaho Code § 50-1030(c) (for purposes of this analysis, the gondola project is assumed to meet the public use criterion). Rather, the issue is whether a city has the power to condemn property outside its boundaries. On this issue, Idaho Code §§ 50-1030(c) and 7-720 are silent.

The City of Aurora faced the same issue currently before the City of Kellogg. In *Aurora*, the city attempted to condemn for public use approximately six miles of stream fishing rights, which were located 130 miles from the city limits in another county. The trial court dismissed the petition to condemn and the city appealed. The city relied on a statute that stated, *inter alia*, “Any city . . . may acquire, sell, own, exchange and operate public recreational facilities . . . either within or without the corporate limits of such city. . . .” *Id.* at 385. The Colorado Appellate Court held that “[t]he right to condemn private property, if not expressly granted by statute, can only be found through necessary implication.” *Id.* at 384. The Colorado court refused to find the necessary implication, noting that “[t]he more reasonable construction of these sections is that the General Assembly intended to permit municipalities to acquire and to operate recreational facilities within or without their boundaries, but that they may take such facilities by condemnation only *within* their borders. This construction is consistent with the compelling state interest in preserving inter-governmental harmony, jurisdiction, and integrity.” *Id.* at 385-86 (emphasis original).

The analysis used by the Colorado court also applies to the situation with the City of Kellogg. In both cases, the statutory language is similar. Idaho gives its cities the power to “create, purchase, operate and maintain recreation and cultural facilities and activities within or without the city limits”; Colorado defines the power as the right to “acquire, sell, own, exchange, and operate public recreational facilities . . . within or without the corporate limits of such city.” The difference in the choice of terms for the control of the property, *i.e.*, “create, purchase, operate and maintain” vs. “acquire, sell, own, exchange, and operate,” is not legally significant. What is significant is the complete silence on the right of eminent domain. Because the Idaho statute, like the Colorado statute, does not explicitly mention the power of eminent domain, the same rationale used by the *Aurora* court would apply to the City of Kellogg’s proposal to construct a gondola outside its boundaries. Accordingly, because the words “create, purchase, operate and maintain” do not necessarily imply the right to condemn property, Idaho Code § 50-303 does not grant the City of Kellogg the power to condemn the airspace over the City of Wardner. The City of Kellogg may of course purchase the easement, under the authority granted it by Idaho Code § 50-303, but it may not force the sale of property outside its city limits by eminent domain.

Idaho Code §§ 7-701 and 7-720.

Idaho Code § 7-720 states, in relevant part: “Any municipality at its option may exercise the right of eminent domain under the provisions of this chapter for any of the uses and purposes mentioned in §§ 50-1124 and 50-1125, in like manner and to the same extent as for any of the purposes mentioned in § 7-701.” Idaho

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Code §§ 50-1124 and 50-1125 have since been recodified as Idaho Code § 50-311, and pertain to the power of municipalities to condemn property for streets, avenues, alleys, lanes, malls or commons. Those sections are not relevant.

Idaho Code § 7-701 lists the uses for which eminent domain is authorized. The only language relevant to the current issue is: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: . . . Public buildings and grounds for the use of any county, incorporated city or school district . . . and all other public uses for the benefit of the state or of any county, incorporated city or the inhabitants thereof." This section focuses on the *purposes* required before a political subdivision may exercise eminent domain; it is silent on the jurisdictional restrictions. The silence does not, however, imply the power to exceed the territorial limits of the political subdivision. The inherent power of a state to assert eminent domain stops at its boundaries; Idaho may not condemn property within the state of Oregon. See *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 68 L.Ed. 796 (1924). Similarly, Idaho Code § 7-701 alone does not give any of the state's political subdivisions authority to condemn property outside their respective territorial boundaries.

To imply such authority would create innumerable problems. For example, if the City of Kellogg could condemn the airspace over the City of Wardner under Idaho Code §§ 7-701 and 7-720, then the statutes would also grant the city power to condemn property in Wardner for a public park. The same statutory authority relied on by the City of Kellogg would grant similar power to the City of Wardner, which could lead to a battle of condemnation suits between adjacent cities. This is clearly not the intent of the legislature in promulgating Idaho Code §§ 7-701 et seq. Rather, it is more sensible to conclude that the legislature intended the power of eminent domain be contained within the jurisdictional limits of the condemning entity.

Case Law

There is no Idaho case law directly on point. One of the most recent Idaho cases on eminent domain is *Payette Lakes Water and Sewer Dist. v. Hays*, 103 Idaho 717, 653 P.2d 438 (1982). In that case the condemning water district had explicit statutory authority to take any necessary property "both within and without the district." *Id.* at 719. This contrasts with the facts in the City of Kellogg, where there is no explicit statutory authority.

The issue, however, has been addressed in other jurisdictions. Those cases that allow eminent domain outside the condemnor's territory rely on statutory authority. *Sende Vista Water Co., Inc. v. City of Phoenix*, 617 P.2d 1158, 1162 (Ariz. App. Ct. 1980) (specific statute granting city the authority to exercise the right of

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eminent domain outside its corporate limits to acquire rights to provide utility services); *Vickery v. City of Carmel*, 424 N.E.2d 147 (Ind. 1981) (statute granting municipality eminent domain within four miles of its limits held applicable in spite of specific procedure statute stating eminent domain power applied to uses “in a municipality”); *In Re Condemnation of 203.76 Acres*, 245 A.2d 451, 452 (Pa. 1968) (statutory authority for eminent domain either “within or without municipality or municipalities”); *Root Co. v. Montgomery County Drainage District*, 584 S.W.2d 500, 501 (Tx. Civil Ct. App. 1979) (explicit statutory language granting authority to condemn property outside of the district’s jurisdictional limits).

In cases without any explicit statutory authority, the courts have implied such authority on “reasonably necessary” grounds. Significantly, in those cases the eminent domain is invariably for public utility purposes. See, e.g., *Buck v. District Court for the County of Kiowa*, 608 P.2d 350, 352 (Colo. 1980) (implied statutory authority for railroad to condemn lands outside its right-of-way); *Augusta Water District v. White*, 216 A.2d 661, 663 (Me. 1966) (eminent domain of land outside its geographical limitations is implied in the water district’s statutory grants); *Banks v. City of Ames*, 369 N.W.2d 451 (Iowa 1985) (eminent domain for sewage treatment facility outside city limits is reasonably and necessarily implied). Other cases refuse to imply statutory authority for extra-territorial condemnation. *Britt v. City of Columbus*, 309 N.E.2d 412 (Ohio 1974) (state constitution strictly construed so eminent domain is limited to the municipal boundaries); *Board of Township Trustees v. Lambrix*, 396 N.E.2d 1056 (Ohio Ct. App. 1978) (township had no statutory authority to appropriate land inside the limits of a village located within the township).

Two instructive cases in one jurisdiction illustrate the parameters of necessary implication. The Georgia appellate court in *Norton Realty and Loan Co., Inc. v. Board of Education of Hall City*, 200 S.E.2d 461 (Ga. Ct. App. 1973), held that the school board had the power to condemn property outside its district for the construction of a needed sewer. According to the court, this power was necessarily implied.

The general doctrine that a municipal corporation can only exercise its powers within its corporate limits is founded on the fact that generally no authority is given by charter to act beyond such limits; and hence, the corporate authorities are restricted in that regard by the general rule that they can exercise only such powers as are granted by express words. The general rule is, however, subject to the qualification that a municipal corporation may also do those things which are fairly or necessarily implied in or incident to the powers expressly granted.

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Id. at 464. The *Norton* court held that the power of eminent domain for sewage purposes necessarily flowed from its statutes: “It is clear that where the power of eminent domain is being utilized for the purpose of creating or improving a sewage system and the land taken is reasonably necessary to accomplish this end, the condemning authority may take land outside its territorial limits.” *Id.* at 465.

This finding of necessary implication contrasts with the same court’s decision in *Mallory v. Upson County Board of Education*, 294 S.E.2d 599 (Ga. Ct. App. 1982). In *Mallory*, the school district attempted to condemn property outside its jurisdictional limits to use as a high school athletic track. The *Mallory* court distinguished the case of *Norton Realty* on the “reasonably necessary” ground. *Id.* at 602. As the court stated, “thus, unlike the extra-territorial condemnation of a mere sewage easement to connect a county school with a municipal sanitary system, [as was the case in *Norton Realty*] there is nothing in the instant case to show that the construction and operation of an *entire* school and supporting facilities, such as an athletic track, totally outside the condemnor’s territory is an undertaking ‘reasonably necessary’ to the full and complete exercise of its express grant of authority and control over educational matters *within its jurisdiction*”. *Id.* at 602 (emphasis in original). Because the building of the athletic track outside the school district’s territory was not “reasonably necessary” to the full exercise of any authority expressly granted to the condemnor, the Georgia appellate court held that the condemning school district had exceeded its authority. *Id.* at 603.

The rationale of *Mallory*, not that of *Norton Realty*, would apply to the aerial easement for a gondola. The operation of a gondola, unlike a sewage easement, is not a necessary municipal function. Therefore, the City of Kellogg has no implied authority to condemn property in an adjacent municipality. Accordingly, the City of Kellogg should look to means other than eminent domain to accomplish its goal. The city could purchase the necessary easements pursuant to its power under Idaho Code § 50-303. If the landowners are not willing to sell, the City of Kellogg might consider investigating a joint exercise of powers agreement with the other political subdivisions pursuant to Idaho Code § 67-2328.

If our office can be of further assistance, please call.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 14, 1989

Mary Kautz
Clerk of the District Court
Washington County
P.O. Box 670
Weiser, ID 83672

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

Re: Felon With Restored Rights on Juries?

Dear Ms. Kautz:

The Attorney General has asked me to respond to your letter of March 14, 1989, wherein you asked whether a convicted felon whose rights have been restored can sit on a jury and vote in elections. You cite the apparent conflict between Idaho Code § 18-310, which restores the full rights of citizenship upon service of a felony sentence, and Idaho Code § 19-2018, which lists "conviction of felony" as one of the "general causes of challenge" to jury service.

Article 6, § 3, of the Idaho Constitution provides in its entirety that:

No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, or who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

Clearly, a person who has not completed his term of imprisonment, probation or parole upon conviction of a felony is not qualified to vote or to serve as a juror. Upon final discharge, the right to vote, as a right of citizenship, is restored. At first blush, it appears that this principle would have equal application as to service on a jury. Further research shows that this is not the case.

Idaho law is clear that "a citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status." Idaho Code § 2-203. However, the federal courts have repeatedly held that every state has the power to confine the selection of jurors to persons meeting specified qualifications of age, education and character. *Carter v. Jury Commissioner of Greene County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975); *Carmical v. Craven*, 547 F.2d 1380 (1977); *Davis v. Greer*, 675 F.2d 141 (1982).

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The Idaho Legislature has chosen to automatically disqualify only those persons who have “lost the right to vote because of a criminal conviction.” Idaho Code § 2-209. In other words, those persons who have not had their civil rights restored upon conviction of a felony are automatically rejected. This automatic rejection does not apply to persons who have been convicted of a felony but who have had their civil rights restored.

However, the restoration of civil rights does not expunge the fact of the conviction. Idaho law is full of examples where a person convicted of a felony is treated differently from the average citizen, even though that felon’s civil rights may have been restored. A witness may be impeached as a convicted felon under Idaho Rule of Evidence 609. A prior felony conviction may be taken into consideration at sentencing under Idaho Criminal Rule 32 and Idaho Code § 19-2520C, and in the setting of bail under Idaho Criminal Rule 46. A person may be prosecuted as a persistent violator if he has been previously convicted of two felonies under Idaho Code § 19-2514. As stated previously by the Attorney General, “a conviction for felony is a historical fact which does not waft away without an expungement.” Attorney General’s Opinion No. 86-16.

It has also been held that a person does not have a constitutional right to have ex-felons as part of a jury panel. *Rubio v. Superior Court of San Joaquin Cty.*, 593 P.2d 595 (Cal. 1979), *Van Arsdall v. State*, 486 At.2d 1 (Del. 1984).

In recognition of a felon’s demonstrated disrespect for the law, the legislature has provided the opportunity for a party to remove a felon from the jury for cause under Idaho Code § 19-2018. This challenge need not be interposed. If it is, the felon will be excused. If it is not, the felon will serve as a juror.

In summary, a person who has been convicted of a felony and who has had his civil rights restored may vote in an election. A person who has been convicted of a felony and has had his civil rights restored is eligible for jury service but will be removed if a challenge for cause is interposed by a party to the lawsuit.

Sincerely,

Michael Kane
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 18, 1989

Larry EchoHawk
Bannock County Prosecuting Attorney
Box Pocatello, Idaho 83201

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

Re: Meaning of the "full time" requirement, for certain prosecuting attorneys,
contained in Idaho Code § 31-3113.

Dear Mr. EchoHawk:

This letter is in response to your inquiry concerning the application of Idaho Code § 31-3113. That statute requires the prosecuting attorneys of certain counties, including Bannock, to "devote full time to the discharge of their duties." You asked about the application of this requirement to certain outside activities that you were considering. These included delivering two speeches, for which you had been offered honoraria and the payment of expenses; acting as mediator in a dispute between the Tribal Police Department and the Tribal Court System for the Shoshone-Bannock Tribes, for which you had been offered compensation; and serving as an instructor at training sessions on Indian law issues. You wished to know whether the statute would prohibit your accepting compensation for the speeches, or your acting as a mediator or instructor. You also noted that you had interpreted the statute's "full time" requirement to mean that you should not conduct any private law practice and that you should work a minimum of 40 hours per week.

The specific activities that you asked about have probably already taken place. However, our advice may assist you in deciding whether to accept or retain any compensation for your services and may help guide you in the future. Your interpretation of the statute appears to be essentially correct. The requirement that a prosecuting attorney devote "full time" to his duties does not compel him to devote all of his hours to that job, nor does it exclude all outside activities. The statute does not prohibit the acceptance of compensation for the performance of other tasks. Although not specifically set forth in the statute, it was probably the intent of the legislature to prohibit the private practice of law by full-time prosecutors; it is certainly the better practice for full-time prosecutors to restrict their practice of law to their duties as prosecutors. The activities you describe do not fall within the definition of the "practice of law." Therefore, it would be proper for you to engage in them and accept compensation, so long as they do not interfere with your ability to substantially devote full time to your duties as prosecuting attorney.

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It may be helpful to break down the questions you submitted into three issues:

- (1) Does Idaho Code § 31-3113 prohibit a full-time prosecuting attorney from engaging in any other work?
- (2) Does the statute prohibit a full-time prosecuting attorney from accepting any compensation for outside work?
- (3) Does the statute prohibit a full-time prosecuting attorney from engaging in the private practice of law?

The analysis of each of these issues is made more difficult by the vagueness of the statute. Several other states have statutes that prohibit the outside practice of law by prosecutors, or that couple such a prohibition with a “full time” requirement. *See, e.g.*, Colo. Rev. Stat. § 20-1-301; Me. Rev. Stat. Ann. tit. 30, § 454; N.Y. County Law § 700(8). Cases interpreting these statutes have generally focused on the provision prohibiting the outside practice of law. *See*, Annot., 6 A.L.R.3d 562 (1966). No cases have been found interpreting the “full time” requirements of such statutes.

For guidance in addressing the first issue identified above, it is necessary to turn to cases interpreting a “full time” requirement in employment contracts. In *Harrison v. Lustra Corporation*, 84 Idaho 320, 372 P.2d 397 (1962), the appellant was a traveling salesman who was seeking worker’s compensation for injuries received in a fall in a motel bathroom. He relied in part on a clause in his employment contract that stated that he “shall devote his full time and efforts to the sale of the products of the company.” The court affirmed the denial of compensation. In interpreting the contested clause, the court stated:

Such provision is in its nature somewhat ambiguous, however it does not require the employee to devote 24 hours a day nor every minute of his waking hours to his employment. On the other hand, it undoubtedly does require that the employee shall make that employment his business to the exclusion of the conduct of other business such as usually calls for the substantial part of one’s time or attention.

84 Idaho at 325.

Other courts have interpreted “full time” provisions in cases where it was alleged that an employee had violated the provision by engaging in outside activities. The language cited above from the *Harrison* case was drawn from the most often cited of these cases, *Johnson v. Stoughton Wagon Co.*, 95 N.W. 394 (Wis. 1903). There the court held that the plaintiff had not violated his contract

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by acting as vice president of a bank, or by taking care of his mother's investments and the finances of another company. The court observed that "[i]t would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions." 95 N.W. at 397. It went on to note that the plaintiff had "devoted more than ordinary business hours" to his employment, working nine hour days and about half of his evenings. *Id.*

Similarly, in *Long v. Forbes*, 136 P.2d 242 (Wyo. 1943), the court noted, "The cases seem to hold that full-time employment does not mean that the employee may not have some time that he may use in his personal affairs, or in other business, without breach of the employment contract." 136 P.2d at 246. And in *Trans-america Insurance v. Frost National Bank*, 501 S.W.2d 418 (Tex. Civ. App. 1973), the court approved a jury instruction which stated that "a party may substantially devote 'full time' to the performance of a given task without devoting literally all of his time to such work; but should he undertake other duties, of such a nature and to such an extent that such other duties interfere to any significant extent with such party's performance of the given task, he is no longer substantially devoting his full time to its performance." 501 S.W.2d at 423, n.1.

Applying these standards to the "full time" statutory provision, it seems reasonable to conclude that a full-time prosecutor may take on other tasks, so long as they do not interfere with the full time performance of his duties as prosecutor. Your adherence to a workweek of at least 40 hours, and avoidance of tasks that would interfere with this schedule, appears to be consistent with the statute. Certain types of tasks, such as acting as a state legislator, would impose too great a demand on a prosecutor's time and would make compliance with the "full time" requirement infeasible. See, Attorney General Opinion No. 86-6, *Annual Report* at 38. And as I am sure you know only too well, investigations and trials will sometimes require much more than 40 hours in a given week; it should not be assumed that the performance of a specified number of hours of work will always constitute compliance. A full-time prosecutor should avoid activities that would interfere with his devoting a normal workweek of approximately 40 hours to his job, or such additional hours as may be necessary to the performance of his duties.

With regard to the second issue, there appears to be no prohibition of a prosecutor's acceptance of reasonable compensation for outside activities. A helpful case in this regard is *Derting v. Walker*, 112 Idaho 1055, 739 P.2d 354 (1987). There the prosecuting attorney of Kootenai County had contracted to prosecute misdemeanors in various municipalities within his county. He had done so with the unanimous approval of the county commissioners, as required under Idaho Code § 31-3113. The issue was whether the prosecutor could retain a portion of the funds paid by the municipalities for the prosecution of misdemeanors, or whether

all such funds had to be paid over to the county. The plaintiffs, in arguing that the prosecutor could not retain any of the money, relied upon article 18, §§ 7, 8 and 9 of the Idaho Constitution, which require county officers to turn over any “fees” in excess of their salaries or expenses to the county treasurer; they also cited the “full time” requirement of Idaho Code § 31-3113. The court rejected these arguments and upheld the lower court’s decision allowing the prosecutor to retain a portion of the funds. In addressing the constitutional argument, the court noted that the funds received by the prosecuting attorney for the prosecution of misdemeanors within cities “do not constitute fees in that context, nor are the monies received for the performance of the ‘duties’ of the office of prosecuting attorney. Rather, they are personal funds received in his capacity as a private individual for the performance of contractual obligations not relating to the duties of the office of prosecuting attorney.” 112 Idaho at 1057. The court also rejected the argument that the “full time” provision of Idaho Code § 31-3113 made any monies received by a prosecutor the property of the county. 112 Idaho at 1058.

Of course, in *Derting v. Walker*, the court was addressing the issue of the disposition of funds received under a specific statutory exception to the “full time” requirement. However, the same reasoning would appear to be applicable to funds received by a prosecutor as a result of any permissible outside activity. Such funds, if received by the prosecutor for the performance of duties not relating to his office, are his personal property; the applicable constitutional and statutory provisions contain no restriction on the acceptance of such funds, nor any requirement that they be turned over to the county.

Finally, it should be noted that, although the statute contains no explicit provision prohibiting the private practice of law, it may well have been the intent of the legislature to prevent such outside practice. The court’s opinion in *Derting v. Walker*, *supra*, contained the following passage:

Until relatively recent times the office of county prosecutor has been part-time in nature. It is common knowledge, and we take judicial notice of the fact, that county prosecutors maintain private law practices in addition to their duties in prosecuting criminal offenses. When the legislature provided for “full time” prosecutors in certain counties, it made clear that in such counties the prosecutors were permitted to enter into contracts with municipalities for the prosecution of city misdemeanors.

112 Idaho at 1058.

Implicit in this language appears to be an assumption that the “full time” requirement of Idaho Code § 31-3113 ended the ability of the prosecuting attorneys in the designated counties to engage in private practice. (It is interesting to note

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that one of the dissenting justices was more explicit, stating that a full-time prosecutor “cannot enjoy the benefits of a private legal practice.” 112 Idaho at 1059. (Bistline, J., dissenting.)) The assumption may have been based upon the doctrine of “*expressio unius est exclusio alterius*” — the expression of one thing is the exclusion of others. *See*, 2A Sands, *Sutherland Statutory Construction*, § 47.23 (4th ed. 1984). The provision that a prosecuting attorney may agree to prosecute city misdemeanors with the unanimous approval of the county commissioners may be viewed as excluding entirely any other outside practice of law. Although the statute is unclear in this regard, it is the better practice for full-time prosecutors to avoid the private practice of law.

The outside activities you have asked about do not appear to fall within the definition of the practice of law. Idaho courts have defined that term as follows:

The practice of law as generally understood, is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

Idaho State Bar v. Meservy, 80 Idaho 504, 508, 335 P.2d 62 (1959); *In re Matthews*, 57 Idaho 75, 83, 62 P.2d 578 (1936).

The Idaho State Bar has defined “practice of law” as follows:

“Practice of law” means active practice of law after admission to the Bar in this or another jurisdiction as a:

- (1) Partner or associate of a private or public law firm;
- (2) Legal officer of a corporation or other business organization;
- (3) Government employee whose duties are primarily providing legal advice to the governmental agency by which he or she is employed or representing such governmental agency before the courts;
- (4) Legal officer in the Armed Services;
- (5) Judge, lawyer magistrate, administrative judge or referee, or law clerk to a judge or a court of general or appellate jurisdiction of any state or federal court in the United States; or
- (6) Full-time teacher in a law school approved by the Section on Legal Education and Admission to the Bar or the American Bar Association.

Bar Commission Rules Governing Admission to Practice and Membership in the Idaho State Bar, Rule 200(j).

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Speaking, mediation, and instruction on a part-time basis would not appear to fall within these definitions. Of course, you would be using your training and experience as a lawyer in performing these functions. However, the incidental use of legal knowledge in a service that is primarily nonlegal does not constitute the practice of law. *Auerbacher v. Wood*, 59 A.2d 863 (N.J. 1948).

In summary, a prosecuting attorney who is required to devote full time to the discharge of his duties under Idaho Code § 31-3113 may safely comply with the statute by (1) avoiding outside activities that would interfere with his working a full workweek of approximately 40 hours, and such additional hours as his duties may require, and (2) refraining from the private practice of law. Your proposed activities as speaker, instructor, and mediator would be proper so long as they do not interfere with your performance of your duties. The acceptance of reasonable compensation for these activities is not prohibited.

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

Sincerely,

Michael A. Henderson
Deputy Attorney General
Criminal Law Division

May 16, 1989

Robin Dunn
Jefferson County Prosecuting Attorney
Box 276
Rigby, Idaho 83442

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

Dear Mr. Dunn:

This letter addresses your request for an opinion regarding the Jefferson County Sheriff. Your letter states that the Sheriff is currently billing the city of Ririe for law enforcement but is not billing other cities within the county. You

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have asked for an opinion as to the duties of the sheriff pertaining to felonies, misdemeanors, juvenile cases, child protection matters, infractions and cases involving violations of ordinances in cities that have not contracted for law enforcement services as compared to cities that have so contracted.

In analyzing your question, it is appropriate to begin with the Idaho Constitution's grant of police power to public entities within the state. Article 12, § 2, states in its entirety:

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

“Thus, the Idaho Constitution authorizes a city to enact penal ordinances for the welfare of its residents so long as those ordinances do not conflict with the city's charter or the state's general laws.

Juxtaposed with article 12, § 2, is Idaho Code § 31-2227 which vests primary jurisdiction for enforcement of *state* penal laws in the county sheriff:

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

When in the judgment of the governor the *penal laws of this state* are not being enforced as written, in any county, or counties, in this state, he may direct the director of the department of law enforcement to act independently of the sheriff and prosecuting attorney in such county, or counties, to execute and enforce such penal laws. (Emphasis added.)

From this, it is clear that a sheriff has a duty to enforce state penal laws within the boundaries of a city regardless of whether that city has a police department or not. There is no requirement that the city reimburse the sheriff for enforcing state penal laws within city boundaries. Indeed, a city need not hire police officers to enforce state laws at all and may rely upon the sheriff in this area. Idaho Code § 50-209 states:

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

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In *State v. Whelan*, 103 Idaho 651, 651 P.2d 916 (1982), the Idaho Supreme Court interpreted this statute to mean that “the decision to appoint police officers is entirely discretionary with the municipality.” As stated previously in an opinion of this office:

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

1984 Attorney General Opinion No. 84-4, p. 39.

However, the fact that a county sheriff has the duty to enforce state penal statutes within a city does not mean that the sheriff has the power to enforce penal city ordinances. In *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949), the Idaho Supreme Court made it clear that counties did not have the constitutional authority to make police regulations effective within a municipality. The question was described as one of constitutional power rather than one of conflicts of law. This view was later refined by the court in *Boise City v. Blaser*, 98 Idaho 789, 572 P.2d 892 (1977). In that case, the court stated that article 12, § 2, establishes the separate sovereignty of political entities within a county as a safeguard against county/city jurisdictional conflicts of police power.

From these cases, it follows logically that a sheriff, in his role as county sheriff, cannot enforce city ordinances as he is the agent of a separate political entity. Therefore, if a city does not provide for police officers, its penal ordinances will go unenforced absent an agreement with a separate political entity to provide police protection. This is the message of the seminal case of *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902), which holds that the burden of enforcing municipal police regulations should be placed upon cities rather than the state or counties. *See also*, Idaho Code § 50-602, which states that it is the duty of the mayor of a city to see that city ordinances are enforced.

In summary, it is apparent that a county sheriff and a city’s police officers have joint jurisdiction to enforce all state penal laws within the city limits, regardless of whether they are felonies, misdemeanors or infractions. As to infractions, this is further reinforced by Idaho Code § 31-2202.12(d) which makes it the duty of the county sheriff to work concurrently with the Idaho State Police in regulating traffic on all highways and roads in the state.

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Because state penal laws apply equally to all persons, the fact that a person investigated may be a juvenile does not rob the sheriff of his authority and duty in this area, and the method of handling the juvenile in the court system under the Youth Rehabilitation Act is of no significance. Although actions under the Child Protection Act cannot properly be described as “penal,” the act itself grants power to “peace officers” to shelter children. Idaho Code §§ 16-1612 and 16-1613. The county sheriff and his deputies are clearly peace officers within the meaning of the Child Protection Act, even when acting within the confines of a city.

The county sheriff does not have authority to enforce county ordinances within a city’s limits, nor does he have the power to enforce city ordinances, absent an agreement by the city to contract for such services from the county sheriff. In Idaho, public entities are encouraged to “make the most efficient use of their powers” and are permitted to “cooperate to their mutual advantage and thereby provide services and facilities and perform functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.” Idaho Code § 67-2326. Hence, counties and cities are permitted to enter into agreements with each other in order to provide services and facilities in keeping with these principles. Idaho Code § 67-2327 through § 67-2333.

A city, in lieu of hiring its own police force, may find it more profitable to contract with the county sheriff to increase the sheriff’s manpower and provide extra protection within the city limits. Such an agreement could provide for a resident deputy, extra patrol, or enforcement of city ordinances. The governing bodies of both the city and the county must consent to such an agreement, Idaho Code § 67-2328, and the county sheriff may not benefit personally from such a contract, Idaho Code § 59-201.

In summary, it is not illegal or inappropriate for a county sheriff, with the consent of the county commissioners, to contract with a city council to provide for enforcement of city ordinances, a resident deputy, increased manpower or other services that would satisfy the city that it is being properly protected from criminal activity. This is similar in concept to the power of full-time prosecuting attorneys to contract with cities in the prosecution of city misdemeanors under Idaho Code § 31-3113.

Your letter does not provide enough facts to allow for a judgment about specific situations occurring in your county. If the sheriff is providing equal assistance to each city in accordance with his statutory duties while charging Ririe and not the other cities, this would not be appropriate.

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On the other hand, if the sheriff is providing increased law enforcement for the city of Ririe in accordance with a contract which meets the requirements of Idaho Code § 67-2327 through § 67-2333, such a practice would be entirely legal.

Sincerely,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

May 30, 1989

Gaetha Pace
Idaho Commission on the Arts
STATEHOUSE MAIL

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

Re: Conflict of Interest

Dear Gaetha:

Thank you for your letter of March 29, 1989. Your letter asks for legal guidance concerning two areas. First, you ask if it is a conflict of interest if a commissioner or a staff person's spouse applies for and receives funding from the Commission. Second, you question whether it is a conflict of interest for commissioners to continue to sit on a board of art organizations funded by the Commission.

Conclusion: Idaho's nepotism statute prohibits a spouse or any of the spouse's associates from voting to furnish compensation from public funds to any person within a second degree relationship. The Commission, as the final decision maker, could not fund any project where a spouse of any commissioner would receive a benefit. The statute does not prohibit a staff member's spouse from applying for and receiving funding from the Commission. Second, Idaho law does not prohibit commissioners from sitting on the boards of arts organizations the Commission funds.

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Analysis: To answer your first question, it is necessary to understand the method by which Commission funds are received by individual artists. The first method is through the apprenticeship-fellowship program where the work is reviewed by a panel of out-of-state artists who recommend funding allocations to the Commission. You have administratively removed the staff person from any involvement with the out-of-state panel, and the actual funding decision is made by the Commission itself. Your second program is for performing artists who arrange for a "sponsor-presenter" to perform an artist's work. The presenter, such as the Sun Valley Center, contracts with the artist for a performance and the Commission underwrites a portion of the cost of the performance.

Idaho's nepotism statute, Idaho Code § 59-701, provides:

An executive, legislative, judicial, ministerial, or other officer of this state or of any district, county, city, or other municipal subdivision of the state, including road districts, who appoints or votes for the appointment of any person related to him or to any of his associates in office by affinity or consanguinity within the second degree, to any clerkship, office position, employment, or duty, when the salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other executive, legislative, judicial, ministerial, or other public officer when such appointment is made on the agreement or promise of such other officer or any other public officer to appoint or furnish employment to anyone so related to the officer making or voting for such appointment, is guilty of a misdemeanor involving official misconduct and upon conviction thereof shall be punished by fine or not less than ten dollars (\$10.00) or more than \$1000, and such officer making such appointment shall forfeit his office and be ineligible for appointment to such office for one (1) year thereafter.

While not a paragon of clarity, the law in question has the effect of prohibiting "associates in office" from providing benefits to those individuals within prohibited relationships. Commissioners, therefore, could not fund any project where their spouses would receive public funds. This prohibition, however, would not extend to staff members who do not vote for funding a project. It would be our recommendation that you continue to prohibit any staff member from working on any project where the staff member's spouse seeks Commission funding. This policy avoids the appearance of impropriety.

Your second question concerned the dual role of commissioners simultaneously serving on the Commission and the board of an art organization funded by the Commission. Idaho Code § 59-201 states this statute is intended to prevent public

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officers from acting under the influence of their personal interests rather than the interest of the public. See *McRoberts v. Hoar*, 28 Idaho 163, 174, 152 P.2d 1046 (1915). As it is clear that commissioners are public officers, the issue is whether there exists an "interest" in the award of a contract prohibited by the statute. In an informal guideline issued on January 16, 1986, this office outlined the concept of a "remote interest." We concluded that the director of the YWCA was not precluded from serving on the Council on Domestic Violence even though the YWCA had applied for and received funds from the Council.

Your situation is similar, but less troublesome. Unlike the position of YWCA director, service on the Board of Directors of the art organization is honorary and involves no wages or salary. Thus, there is no possible personal financial benefit to the commissioner involved. Like the YWCA director, moreover, the arts organization is a non-profit corporation which has, through case and statutory law in surrounding states, been construed to constitute a "remote interest." In short, there is not present here the type of self dealing possibilities that Idaho Code § 59-201 aims to prevent.

In summary, it is permissible for spouses of staff personnel to apply to the Commission for funding and to accept the same. It is not permissible for the Commission to fund projects sponsored by spouses of commissioners. Finally, it is permissible for commissioners to continue to serve on the boards of arts organizations funded by the Commission. I hope this is helpful. Please advise if I can be of further assistance.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

June 15, 1989

Carolyn M. Jones, Secretary
Buhl Highway District
P.O. Box 386
Buhl, ID 83316-0386

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

Re: Highway District Elections

Dear Ms. Jones:

In your letter of May 23, 1989, you ask the following questions regarding a highway district override election:

1. Are we to hold the override election from 12:00 noon to 8:00 p.m., the same as for the election of commissioners (40-1305), or should we hold the election in conformity with the general laws of the state?
2. We also would like to know if a person must be a registered voter in order to vote in a highway district override election.

Idaho Code § 40-1305(2) provides as follows:

Highway commissioners have power to make regulations for the conduct of the election as are not inconsistent with any statutory provisions. At elections for highway commissioners, the polls shall be open from twelve o'clock noon to eight o'clock in the evening. Except as otherwise provided by statute, the election, and all other elections held under this chapter, shall be held in conformity with the general laws of the state.

Although this provision speaks to the time for holding "elections for highway commissioners," it is silent as to elections for other purposes such as override elections. Thus, it is necessary to look for guidance to "the general laws of the state," found in title 34, Idaho Code.

Specifically, Idaho Code § 34-1101(2) provides that:

At all other elections conducted under title 34, Idaho Code, the polls shall be opened at 12 noon and remain open until all registered electors of that

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precinct have appeared and voted or until 8:00 p.m. of the same day, whichever comes first, except that where, in the discretion of the local official charged with the responsibility of conducting the election, the polls may be open for a longer period, provided that timely notice of such time extension has been given the electorate.

Thus, the general election laws of the state provide that elections governed by title 34 of the Idaho Code will normally be held from noon to 8:00 p.m. However, local officials — in this case, the highway commissioners — may, in their discretion, open the polls at any time prior to noon as long as appropriate notice of the time extension has been given the electorate as required by § 34-1101(2).

As for your second question, § 40-1305 and the remainder of the statutes governing highway district elections are silent on the issue of registration. Again, it is necessary to review title 34 for any applicable law on this question.

Idaho Code § 34-404 mandates that:

All electors must register before being able to vote at any primary, general, special, school or *any other election governed by the provisions of title 34, Idaho Code.* (Emphasis added.)

Because of the applicability of title 34 to highway district elections, we are of the opinion that in order to vote in *any* highway district election, a voter must be registered in compliance with Idaho registration law found at chapter 4, title 34, Idaho Code. We suggest you contact the Twin Falls County Clerk to work out the details of obtaining an appropriate voter registration list for your elections.

If you have additional questions, please do not hesitate to contact me.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 12, 1989

The Honorable Thomas L. Morrison
Idaho House of Representatives
340 14th Avenue West
Box 504
Gooding, ID 83330

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

Re: Division of Professional Fees

Dear Representative Morrison:

You have requested an opinion whether physicians participating in certain preferred provider organizations (PPOs) are in violation of the Idaho Code prohibition against division of professional fees. The arrangement in question has been established by National Hearing Services (NHS). NHS has established a PPO to offer members audiological examinations, hearing aids and related services at reasonable rates. NHS contracts with a limited number of practitioners who become "preferred providers." Members of the PPO in need of hearing services select a practitioner from the list of preferred providers who participate in NHS.

The Preferred Provider Agreement used by National Hearing Services in contracting with physicians who participate in the PPO states as follows:

The Preferred Provider agrees to pay to NHS a monthly service fee equal to nine percent (9%) of the Gross Revenue (as defined below) of the Preferred Provider . . .

As used in this Agreement, the term "Gross Revenue" shall mean the actual gross revenue earned, derived or received by the Preferred Provider for each calendar month during the term of this Agreement from or in connection with services rendered and products sold to NHS Members, regardless of where rendered or sold, but excluding sales, use, service or excise taxes collected from NHS Members and paid to the appropriate taxing authority, and excluding refunds and adjustments.

One of the grounds for professional discipline of a physician in Idaho is:

(8) Division of fees or gifts or agreement to split or divide fees or gifts received for professional services with any person, institution or corporation in exchange for referral.

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Idaho Code § 54-1814(8). Thus, the question presented is whether an agreement by a physician to pay a service fee to the PPO measured by a percentage of the gross revenue received from members of a PPO constitutes division of fees in exchange for referral within the meaning of Idaho Code § 54-1814(8).

This question has been considered generally in connection with fee splitting statutes and PPOs:

A fee-splitting statute might be violated by a PPO if, when paying the preferred provider, the PPO takes part of the provider's fee as payment for services rendered to participating providers by the PPO. This risk of fee-splitting liability can be minimized if the percentage or flat fee represents the reasonable value of legitimate services rendered by the PPO to the provider.

E. Rolph, P. Ginsburg, S. Hosek, J. Rich, K. Kennan & G. Getler, *State Laws and Regulations Governing Preferred Provider Organizations*, 63 (1986) (prepared for the Department of Health and Human Services and the Federal Trade Commission). Similarly, payment of a percentage of fees collected by attorneys to lawyer referral services has been approved. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1076 (1968); Law. Man. on Prof. Conduct 801:1605 (California), 801:3910 (Kentucky), 801:4306 (Maryland) (ABA/BNA). The Kentucky opinion states that “[s]uch payments constitute a contribution to administrative expenses and not a division of legal fees.” *Id.* at 801:3910.

The NHS Hearing Plan Summary states: “Additionally, NHS is compensated for its sales, marketing, advertising, training and consulting endeavors by receiving nine percent of the Provider's monthly gross receipts generated by NHS patients.” Thus, the service fee is designed to compensate NHS for administrative expenses; the service fee is not paid in exchange for referral of patients.

A further argument supports the position that a PPO percentage payment should not be considered fee splitting:

A fee splitting claim also typically relates to a misrepresentation. An individual patient doesn't know the reason he has been sent to a specific physician, and fee splitting creates the inference that there is some kickback involved. A PPO makes no such misrepresentation; instead, it consists of a contractual arrangement without a specific referral involved.

Attorneys & Physicians Examine Preferred Provider Organizations, 20 (J. Waxman ed. 1984).

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The percentage service fee charged by NHS (9%) is relatively small and appears reasonably related to the services provided by NHS to the physician provider. Therefore, the arrangement proposed by NHS does not constitute fee splitting as prohibited by Idaho Code § 54-1814(8).

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

July 18, 1989

Mr. Skip Smyser
Connolly & Smyser, Chartered
Attorneys and Counselors at law
134 South Fifth Street
Boise, ID 83702

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

Re: Conflict of Interest

Dear Mr. Smyser:

You asked the Office of the Attorney General to address the possible conflict of interest in two cases where city councilmen were personally involved in municipal contracts. The statute on point is Idaho Code § 59-201, which states:

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.

Idaho courts have never defined "interest," but it probably requires something more than a tangential and minimal interest. See Informal Guideline, 1986 Idaho Attorney General Annual Report 110, at 111 ("reasonable limit should be placed on defining what an 'interest' is. . ."). The 1986 Informal Guideline indicated that "the kind of 'interest' referred to is probably a financial interest, either direct or indirect." Id.

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A second statute that relates to the issue is Idaho Code § 59-202, which states:

State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity.

The purpose of these two statutes is to prevent public officers from acting on behalf of their private interests to the detriment of their public duty. According to *McRoberts v. Hoar*, 28 Idaho 163, 175, 152 Pac. 1046 (1915):

It is the relation that the law condemns and not the results. It might be that in this particular case public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiple opportunities for malfeasance in office.

In *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956), taxpayers challenged the payment to the highway district commissioners for services performed pursuant to a contract between the highway district and the commissioners as private individuals. The Idaho Supreme Court stated:

The contract of employment in question interferes with the unbiased discharge of respondents' duties to the public as commissioners and places them in a dual position inconsistent with their duties as trustees for the public and all such contracts are invalid even if there be no specific statute prohibiting them. The law invalidating such a contract is based on public policy and the contention that there was no loss to the highway district is no defense.

More recently, the Office of the Attorney General stated that "the law of Idaho prohibits payment to a mayor for additional or outside services, even though unrelated to that person's official duties, even in the absence of fraud, and even where the taxpayers actually benefit thereby." Legal Guideline, 1981 Attorney General Annual report, 202, at 203.

Therefore, both case law and statutory law clearly prohibit members of a city council from contracting with the city. This principle of law would prohibit Councilman Houchins from contracting with the city of Caldwell to provide a souvenir concessionaire at the Events Center. *Nampa Highway District No. 1* is directly on point with the *Houchins* case: both cases involve individuals contracting with a public entity of which they are board members. Just as the practice was prohibited in *Nampa Highway District No. 1*, so should the contract between Houchins and the city of Caldwell be prohibited.

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The case of Councilman Jarboe is not so clear cut. It appears from your letter that the councilman is involved in a non-profit organization that does business with the city. The councilman's role and remuneration in the organization is not clear. In the informal guideline issued in 1986, *supra*, our office found that Idaho law allowed the director of the YWCA Women's Crisis Center and Rape Crisis Alliance to serve on the Idaho Council on Domestic violence. The director agreed not to participate in the decisions for grants within her health and welfare district. Our office determined that the non-profit status of the corporation, the fixed salary of the director, and the lack of private commercial interest were dispositive of the issue.

Another factor that played an important role in the opinion was the nature of the position. The Idaho statute required council members to be "interested and concerned members of the general public" with regard to domestic violence. Therefore, a too expansive reading of Idaho Code § 59-201 would "frustrate[] qualified, competent individuals from serving on the council." *Id.* at 112. It does not appear that such a policy plays a role in the Jarboe set of facts. Certainly, however, the policy behind the conflicts of interest statutes is to prevent individuals from using their public positions for private gain. That policy does not apply to the Jarboe facts, where the only personal advantage to Councilman Jarboe appears to be some intangible eleemosynary satisfaction.

Therefore, if Witco, like the YWCA Crisis Center, is non-profit, and if Councilman Jarboe, like the director of the Crisis Center, is a salaried employee with no private commercial interest in the contract, then under the reasoning of our previous informal legal guideline there is no conflict of interest. The councilman, however, should not participate in any matter before the city council concerning Witco.

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 25, 1989

J. Frederick Mack
Holland & Hart
P.O. Box 2527
Boise, ID 83701

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

Re: Debt Financing by the Ada County Highway District
for Bridge Repair and Replacement

Dear Mr. Mack:

In your letter of June 14, 1989, you question whether a highway district can issue long term bonds without voter approval in order to finance repairing or replacing numerous existing bridges. Article 8, section 3, of the Idaho Constitution requires voter approval for all debt that exceeds the district's annual income, unless the expense is "ordinary and necessary."

The most recent pronouncement on "ordinary and necessary" is *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 469 U.S. 870 (1984), where the Idaho Supreme Court held that the extraordinary sums incurred by Idaho cities to support Washington Public Power Supply System were not ordinary. *Id.* at 443 ("One could conceive of a number of words to describe this undertaking but 'ordinary' would not be one of them"). The case did not address the meaning of "necessary." *Id.* In invalidating the cities' contracts, the court specifically affirmed *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970), characterizing the latter case as being in the long line of "repairs and maintenance" cases fitting the exception of "ordinary and necessary." 105 Idaho at 442. By reading the two cases together, which one must as they both appear to express current Idaho law, one can determine the factors necessary to define an "ordinary and necessary" expense:

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.

Attorney General Opinion No. 88-3. Added to these factors is the necessity that the expense be "ordinary," and not extraordinary. *Asson, supra*, at 443.

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Under these factors, bonds used exclusively for repairs to existing bridges would probably be ordinary and necessary. The Ada County Highway District has a long standing involvement in the maintenance of the existing bridges in Ada County. Failure to repair existing bridges would certainly jeopardize the safety of the public. The potential for legal liability is clearly present. The only additional factor is the cost. Assuming that the debt does not reach the astronomical heights of *Asson*, the debt under current law would probably be characterized as “ordinary and necessary.”

There are two old cases that held that construction of new bridges requires 2/3 voter approval. *Dunbar v. Board of Commissioners*, 5 Idaho 407, 49 P. 409 (1897); *County of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896). The supreme court cited those cases to reaffirm that proposition in *Asson, supra*, at 441. Both *Bullen Bridge* and *Dunbar*, however, involved new construction, not repair, of bridges. The distinction between new construction and maintenance of already-built structures is crucial:

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 [which are not ordinary and necessary] as opposed to repair, partial replacement or reconditioning of existing facilities [which are ordinary and necessary].

Asson, 105 Idaho at 441-42. As *Asson* makes clear, the *Dunbar* and *Bullen Bridge* cases are distinguishable from your situation. Both of those earlier cases involved new construction, which would not fall within the ordinary and necessary exception; the highway district, on the other hand, intends to repair and maintain existing bridges. Therefore, your situation would fall within the “‘repair or maintenance’ line of case authority,” which was approved in *Asson, supra*, at 442.

The *Bullen Bridge* and *Dunbar* cases highlight an additional factor that was reiterated in *Asson*: cost. In determining the construction of new bridges did not fall within the ordinary and necessary exception, the *Bullen Bridge* court emphasized the extraordinary expense incurred:

We would suggest that an improvement involving an expenditure of nearly \$40,000, where the revenue of the county for the year was only about \$70,000 would not readily be classed as an “ordinary and necessary expense.” It would be difficult, we apprehend, to name an expense under such a construction that would not be “ordinary and necessary.”

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Bullen Bridge, supra, at 90. That case also emphasized the policy of article 8, § 3, of the Idaho Constitution:

The object and purpose of the constitutional provision is clearly set forth therein and in the other sections of the article. It was to maintain the credit of the state and the counties by keeping them upon a cash basis. Warned by a fearful experience, the makers of the constitution were desirous of protecting the people from the cupidity and rapacity which past experience admonished them sometimes influences those who had the management and control of state and county finances, and for the accomplishment of these ends they made what they conceived to be sufficient provisions in the constitution.

Id. Dunbar also talked in terms of “the extraordinary expense of building the bridges.” *Dunbar, supra*, at 414.

More recently, the astronomical amounts played a role in the holding of *Asson*:

We cannot conceive of an interpretation of Art. 8, Section 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.

...

It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a \$10.7 million debt for a city of 1,906 people. (Bonners Ferry, 1980 census).

Asson, supra, at 440 and n.16. The amount of the expense, an amount “unencountered in the history of these cities’ power ventures,” *Id.* at 443, played a role in the court’s determination that the *Asson* debt was not ordinary. The court, however, did not provide any guidance as to either the weight of that factor or the means to evaluate the “ordinariness” of the cost. Therefore, the Ada County Highway District should ensure that the bridge repair program be of an “ordinary” cost and that the debt be used exclusively for repairs and renovation of existing bridges.

In conclusion, the proposed bridge repair program is probably within the “ordinary and necessary” exception of article 8, section 3. Therefore, a bond election

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would probably not be required. This conclusion assumes that the costs involved are reasonable, and not extraordinary, and will be used for the repair and maintenance of the existing bridges in Ada County.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

August 3, 1989

The Honorable Stan Hawkins
State Representative
District #33
P.O. Box 367
Ucon, ID 83454

The Honorable Tim Tucker
State Representative
District #1
K V Ranch
Porthill, ID 83853

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

Re: House Bill 399

Dear Representatives Hawkins and Tucker:

In your letter of March 20, 1989, you questioned the constitutionality of the amendments to title 39, chapter 1, Idaho Code, adopted by the legislature as 89 Idaho Sess. L., ch.308, p.762, insofar as they preempt local ordinances. The purposes of these amendments as enumerated in section 1 are:

- (a) To establish a comprehensive statewide nutrient management plan.
- (b) To develop the plan on a hydrologic basin unit basis with a lake system emphasis.

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- (c) To affirm primary responsibility for nutrient management to the state to assure a consistent and effective program throughout the state.
- (d) To clearly express the legislature's intent that comprehensive basin planning is necessary to optimize management actions designed to achieve the desired water quality benefits.

The legislature delegates the authority to formulate and adopt the comprehensive plan to the director of the department of health and welfare. Idaho Code § 39-105(3)(o). This section requires state and local units of government to comply with the plan adopted by the department. The legislature established well-defined limits of the department's power. The department must develop and adopt:

a comprehensive state nutrient management plan for the surface waters of the state of Idaho in consultation with the appropriate state or federal agencies, local units of government, and with public involvement as provided for under the administrative procedure act. . . . The plan shall be developed on a hydrologic basin unit basis with a lake system emphasis. . . . Each plan shall identify nutrient sources; the dynamics of nutrient removal, use, and dispersal; and preventative or remedial actions where feasible and necessary to protect the surface waters of the state.

Id. Local government units may continue to regulate in the field, but their authority is restricted.

State and local units of government shall exercise their police powers in compliance with the comprehensive state nutrient management plan of this act. Local nutrient management programs adopted by a local unit of government prior to the completion of the state comprehensive nutrient management plan or a hydrologic basin plan shall be *consistent with* the criteria for inclusion in the comprehensive state nutrient management plan as enumerated in this subsection, as evidenced by findings of fact by the local units of government and confirmed by the division of environmental quality and the local health district board. The director shall recommend by March 1, 1990, to the board for adoption, rules and regulations for procedures to determine consistency. [Emphasis added.]

Idaho Code § 39-105(3)(o).

Thus, the department must adopt a set of statewide standards for nutrient waste management and any local ordinances adopted for the same purpose must

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thereafter comply with the plan adopted by the department. If there is any conflict between the comprehensive state nutrient management plan adopted by the department and local ordinance, the plan prevails. *State v. Barsness*, 102 Idaho 210, 628 P.2d 1044, *appeal dismissed*, 454 U.S. 959, 102 S.Ct. 495, 70 L.Ed.2d 373 (1981); *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980); and *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949). See also, *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973). Thus, it is constitutional for the state to partially or completely preempt the field of nutrient waste management.

It is our understanding that several communities in the state have adopted ordinances regulating nutrient management practices. Further, such ordinances became effective prior to the effective date of these amendments. Until such time that the department adopts the state comprehensive nutrient management plan or a hydrologic basin plan, the local ordinances will remain in effect provided they are "consistent with" the criteria for inclusion in the comprehensive state nutrient management plan.

The criteria enumerated in Idaho Code § 39-105(3)(o), as mentioned above, are that the plan identify:

- nutrient sources
- the dynamics of nutrient removal, use and dispersal, and
- preventative or remedial actions where feasible and necessary to protect the surface waters of the state.

So long as the local ordinances are "consistent with" these criteria, they will be allowed to stand until completion of the state comprehensive nutrient management plan or a hydrologic basin plan. (The statute requires that the Panhandle hydrologic basin plan be completed no later than July 1, 1992, and that the remaining basin plans be completed no later than January 1, 1995.)

By March 1, 1990, the director must recommend to the board for adoption, rules and regulations for procedures to determine "consistency." In the meantime, local government units must rely upon generally accepted definitions of consistency. Generally, the term does not mean "exactly alike" or "the same in every detail." *Roanoke Memorial Hospitals v. Kenley*, 352 S.E.2d 525, 529 (Va. App. 1987). Rather, it means "in harmony with," "compatible with," "holding to the same principles," or "in general agreement with."

The statute further requires that local government units make findings of fact that their local nutrient management programs are consistent with the criteria

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enumerated above. These findings, in turn, must be confirmed by the department's division of environmental quality and by the local health district board.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

August 28, 1989

William J. Schwartz, Esq.
Meridian City Prosecutor
P.O. Box 500
Boise, Idaho 83701-0500

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

Re: Local Ordinances and Infractions

Dear Mr. Schwartz:

I am responding to the letter sent to our office by William Nary, former Meridian City Prosecutor, requesting an opinion as to whether counties and cities can create ordinances punishable as infractions rather than misdemeanors. We also received a similar letter from D. Ray Barker, city attorney for Genesee, requesting an opinion as to whether dog-at-large and other minor offenses could be changed from misdemeanor to infraction offenses. Because the research involved in both requests was identical, I will respond to your request as well as that of Mr. Barker in this letter.

I have concluded that:

1. Under the police power delegated to cities and counties by the Idaho Constitution, cities may create ordinances punishable as infractions.
2. In the area of traffic regulation the state has specifically authorized local governments to regulate traffic and to create traffic ordinances punishable as infractions.

3. In areas other than traffic regulation, cities and counties may create ordinances under their police power. These ordinances may be punishable as infractions or misdemeanors within the penalty limitations set forth in Idaho Code § 50-302 and § 31-714.
4. State statutes which provide for suspension of the driver's license of a person who fails to appear or pay the penalty of an infraction citation are applicable only to *traffic* infractions. State law provides no effective means to collect the penalty on a citation written for an infraction which is not a traffic infraction, since a driver's license may be suspended only for failing to pay a traffic citation. Under their police power, cities and counties may wish to create a separate misdemeanor offense of failure to appear on an infraction citation to ensure that the courts have an effective tool for dealing with persons who fail to appear or pay the penalties on non-traffic infractions.

I.

**GENERAL POWER OF CITIES AND COUNTIES TO CREATE
ORDINANCES PUNISHABLE AS INFRACTIONS**

A. Introduction

The 1982 Traffic Infractions Act created a new offense known as an "infraction," a "civil public offense, not constituting a crime, which is punishable only by a penalty not exceeding one hundred dollars (\$100) and for which no period of incarceration may be imposed." Idaho Code § 18-111, § 18-113A, § 49-110-I.

The main portion of the law, now titled "Traffic Infractions," is located at Idaho Code § 49-1501 through § 49-1506 (formerly Idaho Code § 49-3401 through § 49-3411). The traffic infractions statutes authorize police officers to issue citations for traffic infractions (Idaho Code § 49-1501); set forth the procedure for processing infraction citations (Idaho Code § 49-1502); clarify that if local ordinances create a misdemeanor for an act which is an infraction under the state law, the punishment under the ordinance must also be an infraction (Idaho Code § 49-1503); set forth the appeal procedure (Idaho Code § 49-1504); provide for the suspension of the driver's license of persons who fail to pay the penalty for a traffic infraction (Idaho Code § 49-1505); and provide that these provisions shall be uniformly applied throughout the state (Idaho Code § 49-1506).

The Traffic Infractions Act was intended to improve, economize, and streamline traffic enforcement. The legislature made the following statement of purpose in its 1982 revision of the infraction laws:

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SECTION 1. By the enactment of Chapter 334, Laws of 1981, the state made a dramatic move to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice.

1982 S.L., ch. 353, p.876. The Traffic Infractions Act, denying the right to a jury trial, has been upheld by the Idaho Supreme Court. *State v. Bennion*, 112 Idaho 32, 730 P.2d 952 (1986).

B. *Local Ordinances and Infractions*

The current law specifically refers to local ordinances punishable as infractions in only two statutes. Idaho Code § 49-1503(1) states:

49-1503. Penalties for violations of statutes and ordinances. — (1) No local authority may, by ordinance, regulation or otherwise make any act a misdemeanor which, but for that ordinance or regulation, would constitute an infraction under any provision of this chapter and all such acts made a misdemeanor or for which a misdemeanor penalty has been established by any local authority through ordinance, regulation or otherwise are hereby declared to be infractions as defined in section 49-110, Idaho Code.

In other words, if a state statute and a local ordinance both make a particular act illegal, and if the state statute provides that such a violation is an infraction, then the local ordinance must also treat the violation as an infraction, not a misdemeanor. The assumption, obviously, is that local authorities, i.e., cities and counties, *can* create ordinances punishable as infractions.

Idaho Code § 49-209 states:

49-209. Local traffic-control devices. — Local authorities in their respective jurisdictions shall place and maintain traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this title, or local traffic ordinances, or to regulate, warn or guide traffic. All traffic-control devices erected shall conform to the state manual and specifications referred to in section 49-201, Idaho Code; provided, however, that any offense created hereunder shall constitute an infraction as the same is defined in section 49-3401(3), Idaho Code.

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Traffic ordinances created under this statute must be infractions. Again, the assumption is that cities and counties can enact ordinances punishable as infractions.

C. *The Police Power Under the Idaho Constitution*

Although there is no explicit authorization for cities and counties to create infraction ordinances, except for the language in Idaho Code § 49-209, none is required. Article 12, § 2, of the Idaho Constitution states:

§ 2. Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.²

This section of the constitution has been interpreted as a direct grant of police power to the cities and counties to act without necessity of further authorization from the legislature.

This authority was recognized in *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938). The Idaho Supreme Court noted that art. 12, § 2, of our constitution is identical to and was copied from art. 11, § 11, of the California constitution. The court in *Robbins* quoted from *Ex Parte Roach*, 104 Cal. 272, 37 Pac. 1044, a California case which had interpreted the parallel section of California's constitution:

The power to make these regulations is by this section conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the lawmaking power which the people through their Constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the Legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the Constitution, than if it had been conferred immediately through an act of the Legislature. The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws."

Robbins, 59 Idaho at 285.

In *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950), the Idaho Supreme Court used similar language in interpreting art. 12, § 2:

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a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulations shall not conflict with the general laws. Comprehended in the term, “general laws,” are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grant.

In *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965), the Idaho Supreme Court noted that art. 12, § 2, is a direct grant of police power to the counties and municipalities of the state, and held that “[a] county has authority to make police regulations not in conflict with the general laws, co-equal with the authority of the legislature to pass general police laws.” *Clark*, 88 Idaho at 373. *See also Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980).

Thus cities and counties are constitutionally empowered to make police regulations — such as ordinances creating traffic infractions — unless such regulations would be in conflict with the general laws.

D. Idaho Code § 50-302 and § 31-714

It is clear that the power of cities and counties to make ordinances punishable as infractions is bolstered by, and is not in conflict with, the general laws.

Idaho Code § 50-302, applicable to cities, states:

50-302. Promotion of general welfare — Prescribing penalties. — Cities shall make all such ordinances, by-laws, rules, regulation [regulations] and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine or incarceration; provided, however, that the maximum punishment of any offense shall be a fine of not more than three hundred dollars (\$300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment. Idaho Code § 31-714, applicable to counties, states:

31-714. Ordinances — Penalties. — The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as

are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein, and may enforce obedience to such ordinances with such fines or penalties as the board may deem proper; provided, that the punishment of any offense shall be by fine of not more than three hundred dollars (\$300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

These statutes have generally been interpreted as limitations placed by the legislature upon the powers granted cities and counties by art. 12, § 2, rather than as grants of power from the legislature to the cities and counties. In *Rowe, supra*, the Idaho Supreme Court said that “in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities.” *Rowe*, 70 Idaho at 348.

In his 1977 law review article, Michael C. Moore concluded that “Idaho cities have a direct grant of the police power from the people under Art. 12, § 2, of the Idaho Constitution, and are not dependent upon the state legislature for a grant of express authority while acting under the police power.” Moore, *Home Rule for Idaho Cities?*, 14 Idaho L. R. 143, 155 (1977). Moore also concluded that Idaho Code § 50-302 confers no more powers upon cities than they already possessed under the constitution and that Idaho Code § 50-302 is clearly a limitation upon the power of cities, since it restricts the type and amount of punishment which can be inflicted for violation of a city ordinance. *Id.* at 168.

Moore noted that “[a]lthough some cases have interpreted I.C. § 50-302 as a grant of authority to Idaho cities [*Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976)], the better rule, as adopted by the Idaho Supreme Court [in *Rowe, supra*,] is that this statute [I.C. § 50-302] should be viewed as a limitation upon, not a grant of, the powers of cities.” *Id.* at 168. *See also* Idaho Attorney General Opinion No. 76-3 (1976), pp.25, 26; *Benewah County Cattlemen's Association, Inc. v. Board of County Commissioners of Benewah County*, 105 Idaho 209, 212, 668 P.2d 85 (1983).

Regardless of the precise relationship between Idaho Constitution art. 12, § 2, and Idaho Code § 50-302 and § 31-714, it is clear that cities and counties are granted police power by the Idaho Constitution, that no further enabling legislation is required for cities and counties to invoke their police power, that Idaho Code § 50-302 and § 31-714 act as limitations on that police power, and that cities and counties may exercise their police power as they desire insofar as it does not conflict with other general laws of the state.

II.

INFRACTION TRAFFIC ORDINANCES

It is clear that the legislature expected local ordinances to be created under the 1982 Traffic Infractions Act and thus such ordinances are not in conflict with the general laws. Idaho Code § 49-1104 (now § 49-236) and Idaho Code § 49-3406 (now § 49-1503) both contained the following paragraph:

It is an infraction for any person to violate any county, city or other local ordinance which has been adopted as provided in section 49-582 [now 49-208], Idaho Code, or any other provisions of title 49, Idaho Code, and such infraction is punishable only by a penalty not exceeding one hundred dollars (\$100) and no imprisonment.

1982 S.L., ch.353, pp.895-896. This language was removed during the 1988 recodification of title 49. S.L. 1988, ch.265, pp.587, 756. Similar language was removed from Idaho Code § 49-582 (now § 49-208). The only remaining similar language is in the current Idaho Code § 49-209, which states that “any offense created hereunder shall constitute an infraction as the same is defined in section 49-3401(3), Idaho Code.” This reference to Idaho Code § 49-3401(3) is obviously an error, since § 49-3401 no longer exists (having been recodified in 1988 to Idaho Code § 49-1501).

Maureen Ingram, from the Idaho Legislative Council, advises that the above quoted language in Idaho Code § 49-209 should have been removed during the recodification and that its presence in the recodified title 49 was due to a computer error. Removal of this language eliminates all references to local infraction ordinances which were contained in the original 1982 law. It does not appear this amendment was intended to prevent cities and counties from enacting traffic infraction ordinances. On the contrary, it is generally recognized that the 1988 recodification was intended only as a “clean up” of the code and that no substantive changes were intended.

In sum, it is my conclusion that cities and counties have authority under Idaho Constitution art. 12, § 2, Idaho Code § 50-302 and § 31-714, respectively, and Idaho Code § 49-208 and § 49-209 to enact traffic infraction ordinances and that no further explicit legislative authority is required.

III.

NON-TRAFFIC INFRACTION ORDINANCES

There are only three infractions in the Idaho Code outside title 49. Idaho Code § 67-4237 provides that motor vehicle parking violations in a state park shall be an infraction; Idaho Code § 39-5507 in the Clean Indoor Air Act provides that any violation of that act shall be an infraction; and Idaho Code § 67-5510 further provides that smoking on a bus shall be an infraction.³ Assuming, then, that although the Idaho Code § 67-4237 parking violation law is a traffic infraction even though it is not in title 49, the two smoking laws in title 67, along with pedestrian and bicycle infractions in title 49, are the only infractions in the Idaho Code which are not *traffic* infractions.

The distinction between traffic and non-traffic infractions is important because Idaho Code § 49-1505 provides that the driver's license of a person who fails to pay a traffic infraction penalty shall be suspended for 90 days and that his license shall not be reinstated until the penalty is paid. These provisions are applicable only to traffic infractions and not to the pedestrian, bicycle or smoking infractions in title 67.

Thus, there is no method to compel the payment of infraction penalties by pedestrian, bicycle, or other non-traffic offenders. As originally enacted in 1982, Idaho Code § 19-3901 contained a provision to obtain an arrest warrant for a person who failed to appear on an infraction citation, and Idaho Code § 19-3901A contained a provision that a failure to obey an infraction citation was a separate misdemeanor offense. 1982 S.L., ch. 353, pp.878-879. These provisions were removed in 1983. In their present version, it is only the failure to appear or obey a citation on a *misdemeanor* that constitutes a separate offense.

The Idaho Infraction Rules set forth more specific guidance regarding suspension of a driver's license for failure to pay an infraction penalty, but these provisions also apply only to traffic infractions. Infraction Rule 10(e) states that "[n]othing in this rule shall limit the inherent powers of the court to enforce its judgments and orders by execution or by other means and sanctions authorized by law." Execution, however, is unlikely to be a cost-effective means of collecting infraction penalties. In short, there is no effective means of dealing with persons who fail to appear or who fail to pay the penalty on infraction citations issued for non-traffic offenses.

Since there is no effective means of dealing with persons who fail to appear or pay penalties on non-traffic infractions in the state code, I recommend that if a city or county were to create non-traffic infraction ordinances, it should also

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create a misdemeanor ordinance similar to the 1982 version of Idaho Code § 19-3901A, which provided for an offense of misdemeanor failure to appear for persons who failed to obey their infraction citations. 1982 S.L., ch. 353, pp.878-879.

Although this provision was eliminated from the state law in 1983, there is no constitutional provision or state law which prohibits such an ordinance. A local ordinance which merely goes further than a state statute in imposing additional regulation of a given conduct does not conflict with state law. *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976). Again, when exercising their police powers, cities and counties are free to act if their actions do not conflict with other laws. I conclude that an ordinance creating a misdemeanor crime of failure to appear on a city or county ordinance citation would not conflict with state law.

A. Do Idaho Code § 50-302 and § 31-714 Require that Violations of Ordinances Be Punishable as Misdemeanors?

A review of several cities' ordinances reveals that violations of nearly all city ordinances in Idaho are classified as misdemeanors. Idaho Code § 50-302 and § 31-714 do not use the word "misdemeanor" in describing a violation of a local ordinance, but merely state that the maximum penalty is a \$300 fine or six months in jail, or both. This maximum penalty is identical to the maximum penalty specified in Idaho Code § 18-113 for a misdemeanor.

A review of the history of Idaho Code § 50-302 and § 31-714 shows that these statutes were created in 1976. (1976 S.L., ch. 145, p.530.) The maximum penalty under an earlier version of Idaho Code § 50-302 was limited to a fine "not exceeding the amount permissible in probate, justice, and courts of similar jurisdiction for any one offense, or penalties of not more than thirty (30) days imprisonment in the city jail, or both. . . ." 1967 S.L., ch. 429, sect. 27, p.1259. A yet earlier statute provided for a fine not exceeding \$100 plus costs, and imprisonment and hard labor if the fine and costs were not paid. Idaho Code Ann. 1932, § 49-1109; Title 32, § 3948, Idaho Compiled Statutes, 1919, Vol. I, p.1120. None of these earlier statutes used the term "misdemeanor" for a violation of an ordinance; they simply specified the maximum penalty which could be imposed.

Cities and counties have chosen to refer to violations of their ordinances as "misdemeanors" without specific authorization under Idaho Code § 50-302 and § 31-714. Although Idaho appellate courts have apparently not specifically addressed the issue, in numerous appellate decisions the courts refer to and uphold misdemeanor convictions under city and county ordinances, without comment about the use of the term "misdemeanor." (See, for example, *State v. White*, 67 Idaho 309, 177 P.2d 472 (1947) and list of cases reviewed in Idaho Attorney General Opinion No. 76-3 at pp.29-41.)

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The appellate courts' tacit approval of the term "misdemeanor" for a violation of city and county ordinances shows that when exercising their police power, cities and counties are free to act insofar as they do not conflict with state law. Although the maximum penalty specified for a violation of an ordinance is identical to the maximum penalty for a misdemeanor, there is no suggestion that an ordinance violation must be termed a misdemeanor. The only requirement is that the maximum penalty not exceed a \$300 fine or six months' jail, or both. I believe that if a city or county may label a violation of its ordinances a "misdemeanor," it may also label such a violation an "infraction," and that such a use would conflict with no state laws.

IV.

THE AIR QUALITY ORDINANCE

Ada County, Meridian City, Boise City, and Garden City each have an air quality ordinance which requires regular inspection of motor vehicles. Ada County Code, 6-1-1, et seq.; Boise City Code, 8-13-1, et seq.; Meridian City Code, 7-601, et seq.; Garden City Code, 5-4-1, et seq. The air quality ordinances of these entities are essentially identical. They cite Idaho Code § 49-582(t), now Idaho Code § 49-208(s), experimental or temporary traffic regulations, as the authority under which they were created. A violation of these ordinances is an infraction. Boise City's ordinance makes no mention of former Idaho Code § 49-582(t) or Idaho Code § 49-208(s) and a violation of the ordinance is a misdemeanor (Boise City Code § 8-13-14).

Assuming that the regulation of air pollution and auto emissions is within the police power, Ada County and the cities within Ada County may properly create ordinances to regulate such emissions under the authority granted by the Idaho Constitution. Whether such an ordinance punishable as an infraction is a *traffic* infraction, however, is open to debate.

Violation of the following statutes under title 49 is an infraction: All statutes in chapters 6 (Rules of the Road); 7 (Pedestrians and Bicycles); 8 (Signs, Signals, and Markings); and 9 (Vehicle Equipment); 41-213(2), parking in a handicap space; 49-430, failure to register; and 49-441, vehicle registration. All of these except violations of chapter 7, of course, are traffic infractions. All of these traffic infractions involve the operation of a motor vehicle in some fashion and all (except the parking violations) are violations for which a citation would be issued by a police officer to the driver, who would be required to display his driver's license.

It is my understanding, on the other hand, that the Ada County Air Quality Board, which administers the air quality program for the entire county, treats ci-

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tations under the air quality infraction ordinances as *traffic* infractions and that if persons who receive such citations fail to appear, Ada County obtains a default judgment and takes the necessary steps for a driver's license suspension under Idaho Code § 49-1505. I do not know whether an Ada County court has ruled whether these are traffic infractions, but I am not certain an appellate court would so rule.

In *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976), the Idaho Supreme Court noted that "the mere presence of a motor vehicle among the language of an ordinance . . . does not automatically cause the measure to become a traffic ordinance." The ordinance in question prohibited being drunk or intoxicated in a private motor vehicle while the vehicle was upon a public or private road. Voyles argued that the ordinance conflicted with state statutes controlling motor vehicles. The court held that the ordinance was directed at the control of public intoxication, not at the operation of a motor vehicle and that therefore it was not a traffic ordinance.

Similarly, although these infraction air quality ordinances purport to be traffic infractions, they have little to do with the operation of a motor vehicle. It is my understanding that testing notices and violation notices are sent to vehicle owners without regard to whether the vehicle is being operated or whether it is even in operating condition. Such violations have little to do with the operation of a motor vehicle.

I express no opinion on whether violations of the air quality ordinances are traffic infractions. The entities using such infraction ordinances, however, should either satisfy themselves that violations of these ordinances are indeed traffic infractions, or they should adopt another scheme for dealing with failures to appear and failures to pay infraction penalties, other than suspending driver's licenses of offenders. As stated above, a county or city could adopt an ordinance which made failure to obey an infraction citation a separate misdemeanor offense, thus preserving the simplicity of the infraction process for most offenders and at the same time having a tool to deal with scofflaws who will not respond to the infraction citation.

V.

DOG-AT-LARGE AND OTHER ORDINANCES

Control of dogs-at-large is within the police power. *State v. White*, 67 Idaho 309, 177 P.2d 472 (1947) (rev. on other grounds). As stated above, cities and counties are free to act within their police power insofar as their acts do not con-

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flict with state law. Cities and counties could create infraction ordinances to deal with dogs-at-large and other matters within the police power, although the state laws provide no method for dealing with persons who fail to appear on or pay their non-traffic infraction citations. As stated above, a city or county which creates non-traffic infraction ordinances should also create a misdemeanor ordinance for failure to obey an infraction citation so they have a tool for dealing with offenders who fail to pay their infraction penalty.

I hope that you have found this information helpful. Should you have additional questions, please feel free to contact me.

Sincerely,

Jack B. Haycock
Deputy Attorney General
Criminal Law Division

¹The Idaho Traffic Infractions Act was originally passed in 1981. (1981 S.L., ch. 223, p.415.) This 1981 version was to become effective on July 1, 1982, but it was repealed and major changes were made in the law by the 1982 legislature. (1982 S.L., ch. 353, p.874.) The 1982 version became law on March 1, 1983. References herein to the original Traffic Infractions Act are to the 1982 version which actually went into effect, and not to the 1981 version which was repealed before it became effective.

²The reference to a "charter" in this section apparently no longer applies to any Idaho city. Boise, Bellevue, and Lewiston received charters from the territorial legislature. These charters were continued in force and effect after statehood. Moore, *Home Rule for Idaho Cities?*, 14 Idaho. L.Rev. 143, 149 (1977). Boise City's special charter was repealed in 1961 and Boise is now subject to the same limitations imposed by constitution and statute upon other Idaho municipalities. *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980). I believe that the special charters of Bellevue and Lewiston have also been repealed.

³The compiler's notes in Idaho Code § 67-7115 contain the text of an amended version of § 67-7115 which provided that a violation of winter recreational parking permit requirements was an infraction, but this amended version was not passed into law. Indeed, the 1989 legislature made a violation of Idaho Code § 67-7115 a misdemeanor, punishable by a fine of ten dollars. 1989 S.L., ch.106, p.243.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 1, 1989

Donald J. Chisholm
CHISHOLM & BRADLEY, Chtd.
P.O. Box 1118
Burley, Idaho 83318

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

Re: Constitutionality of Idaho Code § 31-1409

Dear Mr. Chisholm:

You have requested the position of this office on the constitutionality of Idaho Code § 31-1409. Section 31-1409 provides for the election of fire protection commissioners and states, in part:

Commissioners appointed and elected must be electors and freeholders resident within the district for at least one (1) year.

The issue presented is whether the statutory requirement that a fire protection commissioner be a "freeholder" or property owner is constitutional.

Article I, § 20, of the Idaho Constitution provides:

No property qualifications shall ever be required for any person to vote or hold office except in school elections, or elections creating indebtedness, or in irrigation district elections, as to which last-named elections the legislature may restrict the voters to land owners.

The election for fire district commissioners is not a school election or an irrigation district election, and it does not create indebtedness. Therefore, the § 31-1409 requirement that a fire protection commissioner be a freeholder violates art. I, § 20, of the Idaho Constitution.

Additionally, property qualifications for voting or holding office have been found to violate the Equal Protection Clause to the United States Constitution unless the purpose of the election or the office is directly linked with land ownership. *Quinn v. Millsap*, 109 S.Ct. 2324, 105 L.Ed.2d 74 (1989); *Johnson v. Lewiston Orchards Irrigation Dist.*, 99 Idaho 501, 584 P.2d 646 (1978). Residents of the fire protection district who do not own land have a considerable inter-

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est in fire protection. *See id.* at 504-505, 584 P.2d at 649-50. Thus, the § 31-1409 land ownership requirement for the position of fire protection commissioner also violates the United States Constitution.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

September 11, 1989

Ira Burton
Washington County Prosecuting Attorney
P.O. Box 367
Weiser, Idaho 83672

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

Re: Purchase and Remodeling of Road and Bridge Facility

Dear Ira:

You have requested an opinion from this office concerning whether the purchase and renovation of a building for use as a road and bridge facility by Washington County is an "ordinary and necessary expense" within the meaning of art. 8, § 3, of the Idaho Constitution.

If the purchase and renovation is an ordinary and necessary expense, prior approval by the voters is not required by the Idaho Constitution. A thorough analysis of the meaning of "ordinary and necessary expense" as interpreted by the Idaho Supreme Court is found in Att'y Gen. Op. No. 88-21, which states:

"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

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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.

Idaho courts also have considered the amount of expense in proportion to the county's yearly revenue. *Id.* at 25 (citing *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), *cert. denied*, 469 U.S. 870 (1984)).

You have provided us with the following information: the county has operated a Road and Bridge Department for over fifty years using a building to repair road equipment and store materials, and the current building is obsolete, inadequate, too small to get equipment into, and is either unsafe or likely to become unsafe in the near future. No firm cost has been established for the purchase and renovation of a building, but the county is seeking financing in the amount of \$200,000. The annual county budget exceeds four million dollars.

Applying the standards established by the Idaho courts and summarized in Att'y Gen. Op. 88-21, p.25: the county has a long-standing involvement in road and bridge work; existing facilities are obsolete and inadequate, and in the future may become unsafe; however, a debt of two hundred thousand dollars is a minute expense in relation to a yearly budget exceeding four million dollars. Clearly, Washington County's planned purchase and renovation of a building for use as a road and bridge facility is an "ordinary and necessary" expense within the meaning of art. 8, § 3, of the Idaho Constitution.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 13, 1989

Jim Kerns, President
Idaho State AFL-CIO
225 North 16th Street
Boise, Idaho 83702

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

Re: Idaho Right to Work Statutes

Dear Mr. Kerns:

Idaho Attorney General Jim Jones asked me to respond to your request of June 27, 1989. In your letter you ask whether public employers and employees are included in chapter 20, title 44 of the Idaho Code, if the public employers deny the employees' desire to be represented by a labor organization.

Chapter 20, title 44, the "Right to Work" law, requires union activity to be completely voluntary. Employment may not be conditioned on membership in a labor organization. Idaho Code § 44-2003. The most pertinent section in the Right to Work law that appears to apply to your fact situation is Idaho Code § 44-2003(1), which states:

No person shall be required, as a condition of employment or continuation of employment, (1) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization

The issue you pose is whether this section enables public employees to voluntarily join a labor organization and to have that labor organization represent the employees as the collective bargaining agent in dealings with a public employer.

The Idaho Supreme Court faced the same issue in a similar context in *Local Union 283, Int. Bro. of Elec. Workers v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967). In *Local Union 283*, the union tried to compel the certification of municipal employees pursuant to Idaho Code § 44-107. That section applied generically to relations between "employees" and "employers" in such matters as "hours of labor, wages and working conditions," etc. The Right to Work law similarly concerns relations between a "labor organization" and "employers" regarding such matters as "wages, rates of pay, hours of work" and other conditions of employment. Idaho Code § 44-2002. The court held that "[t]he use of general language in a statute is insufficient to indicate a legislative intent that the government should fall within the statutory coverage. Legislative acts are normally directed

to activities in the private sector of society and effect a modification, limitation, or extension of the private individual's rights and duties." *Id.* at 447.

After contrasting the role of the individual, who is relatively free to pursue his own self-interest, with that of the government, which must act in a disinterested manner for the public good, the court said that, "A judicial rule of statutory construction, whereby broad language in a statute is construed to govern the conduct of the state and its political subdivision, would undoubtedly result in dire consequences." *Id.* The court concluded: "[I]n order to maintain the operations of state and local government on an efficient, unimpaired basis, this court will not interpret broad language in a statute 'to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.'" [Citations omitted.] *Id.* at 447-448. Applying these general principles, the court refused to extend the collective bargaining provisions of Idaho Code § 44-107 to the public employment arena.

Local Union 283 is still valid law in Idaho. See *School Dist. No. 351 v. Oneida Education Assoc.*, 98 Idaho 486, 489, 567 P.2d 830 (1977). The Right to Work law, chapter 20, title 44, Idaho Code, does not expressly apply to the state and its political subdivisions. Thus, based upon the rule of construction contained in *Local Union 283*, we must conclude that the provisions of Idaho Code § 44-2003(1) apply only to the private sector and not to public employers. Consequently, neither the prosecuting attorney nor attorney general has jurisdiction to investigate under this chapter.

If you have any questions about this matter, please do not hesitate to call me.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 27, 1989

The Honorable Pete Cenarrusa
Secretary of State
STATEHOUSE MAIL

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

Re: Naturopathic Physicians Association

Dear Mr. Cenarrusa:

You have asked our office to address the issue of whether Idaho naturopaths should be allowed to be reinstated as an Idaho corporation under the name "Idaho Association of Naturopathic Physicians, Incorporated." We conclude the association should be reinstated.

The group first incorporated in 1936 under the name "The Idaho Naturopathic Association, Incorporated," but changed its name to the current wording in 1955. This is the first time in 30 years that the name has been challenged. Because the issue pertains to the legality of the organization's name, and not to the legality of the individual naturopath's advertising or conduct, the Medical Practice Act, the Chiropractic Practice Act, and statutes pertaining to podiatrists, optometrists, or any other similar profession, do not apply to the current analysis. Those statutes are relevant to the issue of whether the practice of an individual naturopath is lawful, not whether the naturopaths may incorporate under a particular name.

1. *The Statutory Test.*

Idaho Code § 30-1-8 prescribes the limitations that the Secretary of State must adhere to in ruling on the validity of corporate names:

§ 30-1-8. *Corporate name.* - The corporate name:

- (a) Shall contain the word "corporation," "company," "incorporated," or "limited," or shall contain an abbreviation of one of such words; provided, however, that if the word "company" or its abbreviation is used, it shall not be immediately preceded by the word "and" or by an abbreviation of or symbol representing the word "and."

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- (b) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one (1) or more of the purposes contained in its articles of incorporation.
- (c) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this act, or the name of a corporation which has in effect a registration of its corporate name as provided in this act, except that this provision shall not apply if the applicant files with the Secretary of State either of the following: (1) the written consent of such other corporation or holder of a reserved or registered name to use the same or deceptively similar name and one (1) or more words are added to make such name distinguishable from such other name, or (2) a certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of such name in this state.

In the case of the naturopaths, the requirement of subsection (a) is satisfied. Subsection (b) requires the corporate name be consistent with the purposes of incorporation. Article II of the Articles of Incorporation for the naturopathic association states in full:

That the purposes for which this corporation is formed are as follows:

1. To become the official organization of the naturopaths in the State of Idaho.
2. To act as the Idaho Branch of the National Naturopathic Association.
3. To educate and regulate the members of the association to the end that Naturopathy shall be recognized and approved as a branch of healing science.
4. To associate the naturopaths of the State of Idaho for the purposes of mutual help, that the public in general and the members of the association may benefit thereby.
5. To prescribe qualifications for schools which may in the future teach Naturopathy in the State of Idaho.

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6. To prescribe qualifications previous to professional study for those who in the future may aspire to practice Naturopathy in the State of Idaho.
7. To prescribe qualifications of professional training for those who in the future may aspire to practice Naturopathy in the State of Idaho.
8. To work with the government of the State of Idaho to the end that those who in the future shall be admitted to the practice of Naturopathy may be trained and qualified to so practice.
9. To act as a clearing house of information relative to the practice of Naturopathy in Idaho, to the end that the public health may be better served.
10. To cultivate social and professional intercourse among the members of the association, and to inculcate [sic] the principles of charity, justice, brotherly love, fidelity, and professional consciousness, and to promote the welfare and enhance the happiness and usefulness of its members.
11. To lease, purchase, hold, have, use and take possession of and enjoy in fee simple or otherwise any personal or real property necessary for the uses and purposes of the corporation, and to sell, lease, deed in trust, alien [sic] or dispose of the same at the pleasure of the corporation, and for the uses and purposes for which said corporation is formed, and to buy and sell real or personal property and to apply the proceeds of sale, including any and all income, to the uses and purposes of the corporation.

This corporation is one which does not contemplate pecuniary gain or profit to the members thereof.

The name "Idaho Association of Naturopathic Physicians, Inc." is consistent with the stated purposes of the organization. There is nothing in the name that implies anything contrary to the mandate of Article II of the Articles of Incorporation. Therefore, subsection (b) of Idaho Code § 30-1-8 is satisfied.

Subsection (c) of Idaho Code § 30-1-8 merely proscribes the use of a name that is the same as or "deceptively similar to" the name of another corporation. In other words, the intent is to prevent the public from confusing two different, but

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similarly named, corporations. In the case of the naturopaths, there is no allegation that another Idaho corporation has a similar name that would be “deceptively similar to” the “Idaho Association of Naturopathic Physicians.” Therefore, the naturopaths’ corporate name does not trigger subsection (c) of the statute.

2. *The Unlawfulness Test.*

Aside from noncompliance with the technical requirements of Idaho Code § 30-1-8, the only other valid basis for denial of a certificate of incorporation is unlawful corporate purposes. While the statutes do not expressly empower the Idaho Secretary of State to reject a filing on this basis, such authority may be inferred from Idaho Code § 30-1-3, which states that “Corporations may be organized under this act for any lawful purpose or purposes. . . .”

A similar finding was reached in *Smith v. Director, Corporation and Securities Bureau*, 261 N.W.2d 228 (Mich. 1978), where the bureau director rejected articles of incorporation of an organization that proposed to incorporate for the purpose of charging usurious interest rates, in contravention of Michigan law. The Michigan Court of Appeals held that the bureau director was authorized to reject articles of incorporation that expressly propose to engage in unlawful activities:

We agree that proposed articles of incorporation which state an unlawful corporate purpose do not substantially conform to the requirements of the BCA. We also agree that the defendant [bureau director] has no duty to accept and file such articles.

261 N.W.2d at 230.

It must be noted precisely how this “unlawfulness” test operates. The unlawfulness is measured by the purposes announced in the proposed articles of incorporation. The purposes enunciated by the Idaho Naturopathic Association, Incorporated, when the organization first incorporated in 1936 are contained in Article II of the articles of incorporation and are set forth in full above. These purposes have remained unchanged since 1936.

We have reviewed the literal statement of purposes of the corporation. Generally, they urge recognition of naturopathy, and contemplate a licensing regime that would take effect should a lobbying effort prove successful in the future. It is not unlawful to associate for these purposes. We stress that we do not read the list of purposes to include an intent presently to engage in, abet or facilitate the diagnosis and treatment of human diseases, ailments and other such conditions. Such

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conduct constitutes the “practice of medicine” under Idaho Code § 54-1803(1)(a), and, in the opinion of this Office, may be lawfully rendered only by those authorized to do so under the Idaho Medical Practice Act, chapter 18, title 54, of the Idaho Code.

We stress the limited nature of this finding. We do not find that the association has never engaged in unlawful activity. We do not find that individual naturopaths are engaged in lawful activity. We do not find that advertising by individual naturopaths is lawful and non-deceptive. We find only that the announced purposes of the association’s articles of incorporation, when literally read, are lawful and, as such, that the articles must be accepted for filing by the Secretary of State.

3. *The Public Policy Test.*

It was formerly the law in some jurisdictions that the Secretary of State, or other reviewing officer, was “at liberty to grant or deny applications based on his personal notion of what is contrary to public policy or injurious to the community.” *Association for Preservation of Freedom of Choice v. Shapiro*, 174 N.E.2d 487, 489 (N.Y. 1961). This policy was enunciated in 1925 in the case of *Matter of Daughters of Israel Orphan Aid Society*, 210 N.Y.S. 541, and remained in effect until the *Shapiro* case in 1961 when the New York Court of Appeals found it necessary to overrule the public policy approach:

We feel impelled to hold these views erroneous. In the first place the public policy of the State is not violated by purposes which are not unlawful. To hold otherwise would be a contradiction in terms. In the second place the test as to what may be injurious to the community is too vague, indefinite and elusive to serve as an objective judicial standard. Within such a scope [the Secretary of State] would be at liberty to indulge in his own personal predilections as to the purposes of a proposed corporation, and impose his own personal views as to the social, political and economic matters involved.

Shapiro, 174 N.E.2d at 489.

In 1973, the New York Court of Appeals again held that the discretion of the Secretary of State is strictly limited in reviewing proposed articles of incorporation. In *Gay Activists Alliance v. Lomenzo*, 292 N.E.2d 255, the court reiterated the standard to be applied:

The Not-For-Profit Corporation Law mandates the Secretary of State to accept for filing a certificate of incorporation which meets the formal requirements of the statute and sets forth corporate purposes that are lawful.

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292 N.E.2d at 256. The court therefore overturned the action of the Secretary of State in rejecting the articles of incorporation of a controversial organization:

the Secretary of State lacked the authority to label those purposes violative of “public policy.” (Citation omitted.) Nor does he possess the power to reject a certificate on the ground, asserted by him, that the proposed corporate name is “not appropriate”; the provision dealing with corporate names contains no such criterion or standard.

Id. It is our opinion that the Idaho Supreme Court, like the New York Court of Appeals, would rule that the Secretary of State has no authority to reject articles of incorporation, otherwise lawful, on the grounds that he finds them violative of “public purpose,” or “inappropriate,” or “injurious to the public.”

Conclusion.

We conclude that the Secretary of State must accept the articles of incorporation of the Idaho Association of Naturopathic Physicians, Incorporated, for purposes of reinstatement. The association has had this name since 1955. The name meets the statutory requirements of Idaho Code § 30-1-8: it is formally correct; it contains no wording which indicates it is organized for other than its announced corporate purposes; and it is not deceptively similar to the name of any other domestic corporation. Further, the purposes enumerated in the association’s articles of incorporation are not, on their face, unlawful. The authority of the Secretary of State to accept or reject articles of incorporation is at an end once these determinations are made. The Secretary of State has no discretion to accept or reject articles of incorporation because he deems them to be violative of public policy, inappropriate or injurious to the public.

We stress once again that this opinion concerns only the authority of the Secretary of State to accept or reject for reinstatement the articles of incorporation of this association. The Secretary of State’s acceptance of these articles of incorporation and reinstatement of this corporation carries with it no endorsement of the so-called profession of naturopathy. Nor does it endorse the practice of naturopathy by any individual. Nor does it imply state approval of any individual’s use of the term “physician” in advertising his or her practice.

Sincerely,

JOHN J. McMAHON
Chief Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 10, 1989

Betty Rudolph
Assistant Director
Idaho Commission on the Arts
STATEHOUSE MAIL

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

Dear Betty:

This is in response to your letter of June 9, 1989. I have just received in this office the documents necessary to clarify the Sixth Street Melodrama matter which I am enclosing for your review. It is my opinion that ownership of the Sixth Street Melodrama facility in Wallace resides with Sixth Street Melodrama, Inc.

In the case of the Depot Institute in Cascade, I have been in contact with Mr. Fredrick Kellogg, General Counsel for the National Endowment for the Arts. Mr. Kellogg has forwarded to me an analysis of the legislative history of funding for the National Endowment for the Arts. This analysis is of some assistance in setting forth the standards under which funds received by the NEA are to be dispensed. It does not answer, however, the more critical question, that being whether public funds may be used to cover construction costs for organizations such as the Depot.

The issue presented by this application is whether the transfer of public funds to an entity like the Depot violates the federal or state constitution. The federal standard is set forth in the case of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and is based upon the "Establishment Clause" of the United States Constitution. In its latest pronouncement on this subject, the United States Supreme Court in *County of Allegheny et al. v. ACLU*, 57 U.S.L.W. 5045 (issued July 3, 1989), summarized the federal standard as follows:

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with a religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. . . .

In *Lemon v. Kurtzman*, *supra*, the Court sought to refine these principles by focusing on three ‘tests’ for determining whether a government practice violates the Establishment Clause. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose, or it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. 403 U.S., at 612-613. *County of Alleghany v. ACLU*, 57 U.S.L.W. at 5049-50. In applying the principles of the *Lemon* case to the facts of this matter, I do not believe that granting funds to the Depot Institute would violate the federal standard. Cases where violations have been found are: permitting public school students to receive religious instruction on public school premises, *McCullum v. Board of Education*, 333 U.S. 203 (1948); allowing religious school students to receive state-sponsored education in their religious school, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); and state sponsored prayer in public schools, *Abington School District v. Schempp*, 374 U.S. 203 (1963). However, in *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973), the Supreme Court approved the expenditure of public funds for the financing and refinancing of building projects on institutions of higher education campuses, even though some of the institutions benefitting from this financing scheme were colleges operated by religious institutions. The three part test articulated in *Lemon* formed the basis of the decision rendered in *Hunt*. The factual record in *Hunt* is similar to the situation present here. It is unlikely, therefore, that granting this application would be found to violate the federal constitutional standard.

Concerning the state constitutional law issue presented, the applicable standard is found in art. 9, § 5, of the Idaho Constitution which in pertinent part provides:

Neither the legislature nor any of the county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, . . .

Two Idaho cases have construed this section of the constitution. In *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), the Idaho Supreme Court prohibited the transportation of parochial school students to and from parochial schools via public school buses. In *Board of County Comm's v. Idaho Health Facility Authority*, 96 Idaho 498, 531 P.2d 588 (1975), the court prohibited the Authority from using its funds to assist private hospitals operated by any church, sectarian or religious society. The court stated:

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The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of the United States, *Bradfield v. Roberts*, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899). But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.

See *Board of County Comm's supra*, at 509. Obviously, this decision is contrary to the results reached applying the federal standard in *Hunt*. This leads me to conclude that if the Depot is operated by a sectarian or religious organization, state public funds may not be granted to the organization. The application submitted by the Board of Directors of the Depot Institute shows that while the Depot Institute has no religious affiliation, the Institute expressly commits itself to Judeo-Christian principles.

Further, I have reviewed the Articles of Incorporation of the Depot Institute Ltd. which provide:

The purpose of this corporation is to institute and maintain a Christian ministry, along with any and all related purposes incidental to the maintenance of the ministry.

Under the Idaho Constitution, funding for this organization is not permissible. This leaves two possible courses of action. First, the application can be denied. Second, only federal, as opposed to state funds could be granted to the applicant.

I am enclosing for your reference a copy of Attorney General Opinion 89-5, which also deals with this issue. I hope this information is helpful. Please advise if I can be of further assistance.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 26, 1989

Reid G. LaBeck
315 East 4th North
St. Anthony, Idaho 83445

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

Re: Right-to-Work Complaint

Dear Mr. LaBeck:

Thank you for speaking with me on the telephone last week concerning the labor agreement between the Idaho Stud Mill and Western Council Industrial Workers No. 1117. Specifically, you have asked whether the agreement's recognition of the union as the sole collective bargaining agent for union as well as non-union employees violates Idaho's right-to-work law, Idaho Code §§ 44-2001 through 44-2011.

Generally, the field of labor relations has been preempted by federal law under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-187. Section 14(b) of the NLRA, 29 U.S.C. § 164(b), provides an exception to federal preemption by allowing states to pass "right-to-work" laws prohibiting agreements requiring union membership as a condition of employment. Unless you are subject to a labor agreement requiring you to join a union or pay equivalent membership fees as a condition of your employment at the Idaho Stud Mill, your complaint is governed by the NLRA rather than Idaho's right-to-work law.

The NLRA expressly permits a majority of employees in a bargaining unit to elect a union to serve as their collective bargaining agent. 29 U.S.C. § 159. As explained in *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138, 141 (5th Cir. 1978), a collective bargaining agent, once elected, represents *all* employees, including non-union employees, within the unit and is their exclusive bargaining agent. Because collective bargaining precludes individual employees from bargaining on their own behalf, the union has a duty to fairly represent all of the employees in the bargaining unit in negotiating and enforcing the terms of a labor agreement. *Id.*

The National Labor Relations Board possesses exclusive jurisdiction over disputes arising under the NLRA. If you feel that the union was not properly elected, or that it has not fulfilled its duties to fairly represent all the employees within the bargaining unit as required by the NLRA, you should direct your complaint to the United States Department of Labor.

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I hope I have been able to provide you with some assistance. Please feel free to contact me if you have any other questions.

Sincerely,

ERIC E. NELSON
Deputy Attorney General
Local Government and
Legislative Affairs

November 14, 1989

The Honorable Gino White
Idaho House of Representatives
P.O. Box 533
Pinehurst, ID 83850

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

Re: Use of student activity fees at Idaho's colleges and universities

Dear Representative White:

This is in response to your questions concerning the use of student activity fees at Idaho's public colleges and universities.

1. May the student government funds of Idaho's colleges and universities, that are collected through student-approved activity fees, be used by Idaho students to retain an attorney for litigation against a college or university concerning the proper collection or use of student fees by the college or university?

In answering your first question, it is important to analyze and define the nature of the activity fees which are collected and allocated to the student governments of the respective institutions. The board's policies and procedures define "activity fee" as follows:

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Activity fee is defined as the fee charged for such activities as inter-collegiate athletics, student health center, student union operations, the associated student body, financial aid, intramural and recreation and other activities which directly benefit and involve students. The activity fee shall not be charged for educational costs nor major capital improvement nor building projects. Each institution shall develop a detailed definition and allocation proposal for each activity for internal management purposes.

State Board of Education Governing Policies and Procedures, Section V,R(2).

While the activity fee is ultimately allocated to various activities, it is assessed only under authority of the Idaho State Board of Education (*see e.g.* Idaho Code § 33-3717) and allocated pursuant to the “allocation proposal” developed by each institution. Under Idaho Code § 33-107(2)-(3), the state board is given power to “hold and dispose of” real and personal property as well as general supervisory authority for “all entities of public education supported in whole or in part by state funds.” Article 9, § 10, of the Idaho Constitution states in pertinent part: “The regents shall have the general supervision of the university, and the control and direction of *all* the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.”

We are unable to find any Idaho judicial decision discussing this specific issue in the university context. However, a Washington Supreme Court decision provides persuasive authority for this point of view. In *Good v. Associated Students of the University of Washington*, 542 P.2d 762 (1975), the court held that the ASUW funds were “public in nature” and “subject to the ultimate control by the Regents.” *Id.* at 765. *See also, Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 478 (1st Cir. 1989) (discussed *infra*). The court made this finding in spite of the fact that ASUW was a separate non-profit corporation with its own articles of incorporation. The student associations here in Idaho are not currently incorporated, according to the secretary of state’s office. This would actually make the argument stronger that the student associations are under the board’s ultimate authority, since they are not separate legal entities. Additionally, existing state board policy indicates that “[e]xpenditures by or on behalf of . . . student organizations are subject to rules, policies, and procedures of the institution and the board,” *State Board of Education Governing Policies and Procedures*, Section III, P.14. *See also, id.*, Section III, P.8 (student government constitutions “must be consistent with Board Governing Policies and Procedures”).

In summary, student activity fees collected at the institutions are public funds, subject to the control of the state board of education and the board of regents.

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The related question then is; given a request to expend student activity funds for litigation against the board and/or the institutions under its governance, whether the board may deny or otherwise prohibit the use of student activity funds for litigation by student groups. While, again, there appears to be no Idaho case on point, a recent decision from the First Circuit Federal Court of Appeals answers this question in the affirmative. In *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473 (1st Cir. 1989), the court held that the university board of trustees' termination of a legal services office did not violate the students' first amendment rights, even if the termination was solely in response to suits against the university and its officers.

In 1974, the board established the Legal Services Office (LSO) within the university system. The board later authorized the LSO to assist students in various capacities, including representing students in litigation against the university. The LSO was almost exclusively funded by mandatory student activity fees. It also received indirect support from university funds by the provision of electricity, heat and office space on campus. Several years later the board rescinded authorization of the LSO to represent students against the university and its employees and later, as noted above, terminated the LSO, replacing it with the Legal Services Center, "which was prohibited from engaging in any litigation, and whose sole purpose was to provide primary legal advice to individual students and to educate students as to their legal rights." The student government filed an action against the board, claiming its order was motivated by the LSO's success in suits against the university and its officials and was intended to deter the students' ability to bring such lawsuits in the future.

The students contended that the university had created a "limited public forum," and that a trial should be held on whether the board's motive was to suppress a particular point of view, thus violating the first amendment. However, the court rejected the students' contention, stating:

The problem with the plaintiffs' syllogism is its premise. Forum analysis is inappropriate in this case because the LSO is not a forum for purposes of the first amendment. Although fora have traditionally had a physical situs, (citations omitted), the supreme court has recently extended the concept of a forum to include intangible channels of communication (citations omitted). But even under this expanded view, we fail to see how the LSO is a forum. Since fora are channels of communications, we begin our analysis by identifying the two groups of people with whom the students are communicating: first, the persons with whom they have legal disagreements; second, the LSO's attorneys.

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As regards the communication between the students and those against whom they have filed lawsuits, the channel of communication is the court system. The LSO attorneys helped the students to participate in this forum . . . The LSO merely represents an in-kind speech subsidy granted by UMass to students who use the court system.

Id., 868 F.2d at 476. The court went on to analyze the relationship between the attorneys and student clients and concluded that the U.S. Supreme Court's "subsidy" cases were controlling. As the court stated, "[T]he university has not tried to restrict first amendment rights of the students; all it has sought to do is to stop subsidizing the exercise of those rights." *Id.* at 477 (emphasis added). The students argued, in part, that the "subsidy cases" were not controlling because *student* fees were involved, not "state monies." The court rejected this argument, stating that:

Student activity fees do not "belong" to students. They are collected by UMass under authority of state law. (Citation omitted.) Payment of fees is voluntary only in the sense that one may choose not to enroll; apart from that, payment is a contractual condition of enrollment as a resident student. (Citation omitted.) Those fees are placed in the student activity trust fund. (Citation omitted.) That fund is administered by UMass officers, see id., subject to the direction of the board of trustees, who are authorized by statute to determine how the fees are to be spent.

Id. at 478 (emphasis added).

In summary, the court stated:

The basic lesson to be drawn from the Court's subsidy cases is that although the government may not place obstacles in the path of the exercise of constitutionally protected activity, it need not remove obstacles not of its own creation. (Citation omitted.) Consequently, the state does not violate an individual's first amendment rights if it refuses to subsidize those activities of that individual that are protected by the first amendment.

We now apply these principles to this case. First, UMass has refused to pay for the litigation expenses of its students, but there is no indication that UMass is penalizing any student for engaging in litigation. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty." *McCrae*, 448 U.S. at 317 n. 19, 100 S.Ct. at 2688

n. 19. Students who engage in litigation — even those who are engaged in litigation against the university — are not precluded from taking advantage of the LSC’s services, nor are such students denied any independent benefit on account of their litigation activity. . . . We note . . . that the withdrawal of the subsidy is not framed in an invidiously discriminatory manner that is designed to suppress dangerous ideas. The 1987 order applies to *all* litigation (although litigation initiated at the time of the 1986 order was grandfathered) not just litigation advocating liberal or conservative causes.

Id. at 479 (emphasis in original). The court concluded its opinion in the following terms:

The plaintiffs here are “simply being required to pay for [their litigation expenses] entirely out of their own pockets.” (Citation omitted.) Even if the 1987 order withdrawing UMass in-kind subsidy of student litigation was entered solely in response to LSO’s suits against UMass and its officers, we hold that it does not violate the first amendment because it is *non-selective, does not penalize* students who engage in litigation, and will not result in the suppression of student litigation.

Id. at 482 (emphasis added). *See also, Lyng v. International Union*, 485 U.S. 360 (1988); *Cammarano v. United States*, 358 U.S. 498 (1959). Applying a similar rationale here, if the board chooses to respond in a non-selective manner, *i.e.*, denying the use of board controlled funds for litigation by all student groups, and does not penalize students who do engage in litigation, then such action would not violate the first amendment.

2. May student government funds of Idaho’s colleges and universities, that are collected through student-approved activity fees, be used to retain professional lobbyists?

The reasoning of the *University of Massachusetts* case discussed above will also have some applicability to this question. That is, while it is clear that the board may not, consistent with the first amendment to the United States Constitution, restrict the right of students to associate, even if the association takes the form of formal lobbying, nothing in the Constitution would appear to *require* subsidization by the board or the state of such an activity.

The United States Supreme Court has never dealt with this specific issue in the university setting. The bulk of the litigation in the lower courts in this area has centered around objections by dissenting students against the expenditure of mandatory student fees for such things as student newspapers, the editorial views

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of which dissenting students found objectionable. *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D. Neb. 1973); *Larson v. Board of Regents of University of Nebraska*, 204 N.W.2d 568 (1973). Other objections have related to student association funded activities such as speaker series, films, and other miscellaneous student government expenses. See, e.g., *Lace v. University of Vermont*, 303 A.2d 475 (Vt. 1973); *Good v. Associated Students of University of Washington*, 542 P.2d 762 (1975). It should be noted that none of the cases cited have found mandatory student fees unconstitutional *per se*, and dissenting students' lawsuits have largely failed. The courts have generally exhibited a deferential approach to governing boards and institutions when it comes to student fees. The commentators who have dealt with the issue also appear to be in accord. See, e.g., E. Wells, *Mandatory Student Fees: First Amendment Concerns and University Discretion*, 55 U.Chi.L.Rev. 363 (1988); C. Steele, *Mandatory Student Fees at Public Universities: Bringing the First Amendment Within the Campus Gate*, 13 J.C.U.L. 353 (1987); Note, "*Fee Speech*": *First Amendment Limitations on Student Fee Expenditures*, 20 Cal.West.L.Rev. 279 (1984).

Two cases do deal specifically with certain aspects of the use of university collected student fees for lobbying purposes. In *Smith v. Regents of the University of California*, 248 Cal.Rptr. 263 (Cal.App. 1 Dist. 1988), dissenting students challenged the mandatory student fee collected by the University of California at Berkeley to fund certain activities of the student body organization, the Associated Students of the University California (ASUC). Among the activities challenged were certain lobbying activities. The court described the lobbying activities as follows:

The ASUC also funds certain student lobbying organizations: the UC Student Lobby works in concert with representatives of other UC campuses on student-related issues before the state legislature and state administrative agencies. By way of illustration of its lobbying activities, the UC Student Lobby opposed legislation prohibiting the use of registration fees to fund abortions, supported legislation prohibiting rent discrimination against students, opposed legislation prohibiting mandatory student fees for student activities, and supported legislation reducing budget cuts for the university. The Berkeley Annex of the UC Lobby acts on campus to publicize the positions taken by the UC Student Lobby and to encourage students to write their legislators.

The ASUC National Student Lobby lobbies Congress on student issues and encourages students to write their representatives. The issues of concern at the national level have centered on student financial aid.

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Under university regulations and ASUC guidelines, off-campus advocacy activities are permitted only when related to student affairs or business. In that context, the university has consistently viewed ASUC operations as being *university related*.

248 Cal.Rptr. at 267-68.

In upholding the use of the student fees for various student activities, including lobbying, the court focused upon the regents' determination that such activities were consistent with the "university's educational mission." *Id.*, at 272. As the court stated:

The Regents have obviously decided that the educational process extends beyond the classroom and includes extracurricular opportunities for students to be exposed to widely divergent opinions on various topics. The Regents have implicitly concluded that the use of student fees to finance student activities, including student groups that advocate positions on political and ideological matters, is necessary and related to the university's educational purposes. *The broad powers granted the university for the governance of its affairs gives the Regents wide discretion to determine the best course for the university's educational mission. We must defer to that decision. (San Francisco Labor Council v. Regents of the University of California, supra, 26 Cal.3d at p.788, 163 Cal.Rptr. 460, 608 P.2d 277).*

Id. (emphasis added). Relative to the plaintiff's specific challenge to lobbying activities, the court stated:

Plaintiff's focus on ASUC lobbying organization's engagement in political as well as educational activities misses the mark. The test is not whether the activity is political but whether it is germane to the organization's purposes.

The *Abood* Court [*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)] expressly rejected the notion that attaching the adjective "political" to an activity is determinative. The Court recognized that by its very nature a public employees' union is involved in political activities to secure approval of public authorities and to obtain necessary budgetary appropriations decisions. (Citation omitted.) While declining to draw a line between permissible and impermissible political activities, the Court held that contributions *may* be compelled as long as the ideological activities are related to the organization's duties.

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Here, the lobbying activities — confined to student and university issues — are obviously related to ASUC's function.

In conclusion, we reject plaintiff's claim that the use of student fees to fund various student groups violates plaintiff's right of free speech.

Id., at 272-73. It should be noted that this decision has been appealed to the California Supreme Court and is still pending. As to the lobbying aspect of mandatory student fees, it does appear that the courts, if the *Smith* rationale is followed, are willing to pay a great deal of deference to the determination of the board of regents as to the educational merit, or lack thereof, of student lobbying activities.

The other case which dealt in part with student lobbying is *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985). In that case, a group of students asserted that their first amendment rights were violated by the university's imposition of a mandatory, refundable fee for the specific purpose of supporting a group called the New Jersey Public Interest Research Group (PIRG). PIRG was a group that participated in state legislative matters and actively engaged in research, lobbying and advocacy for social change. Because PIRG was independent of the university, it was ineligible, under the university's rules, to receive money from general student activity fees. Accordingly, through a separate procedure, PIRG received a fee of \$3.50 from each student, which PIRG was required to refund on request. As the court stated it, the specific issue in the case was "limited to whether a state university may compel students to pay a specified sum, albeit refundable, to an *independent outside organization* that espouses and actively promotes political an ideological philosophy which they oppose and do not wish to support." 772 F.2d at 1064. The court answered the question in the negative. As to the educational merit question discussed in *Smith*, *supra*, the *Galda* court stated that:

The university has presented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the plaintiff's constitutional rights.

Id., at 1067. The "constitutional rights" with which the court was concerned were the first amendment rights of dissenting students not to associate nor to be compelled to support political views and activities with which they disagree. The court, of course, made it clear that it was making "no judgment as to a voluntary contribution program." *Id.* at 1068.

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Reading *Galda* and *Smith* together, it would appear that the Idaho State Board of Education would have the discretion to permit student activity fees to be expended for student lobbying activities *if* the board determines that lobbying would be consistent with, or an integral part of, the educational mission of the institutions of higher education within the state, and if the particular form of lobbying activity does not “trench on the [dissenting students’] constitutional rights.” On the other hand, if the board were to decide not to fund such activity, as long as the board’s decision is “content neutral,” and does not amount to “view-point discrimination,” such a decision would not be in violation of the first amendment. *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361 (8th Cir. 1981); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1982). Courts have found an encroachment upon first amendment rights when the governmental entity involved discriminates by withholding funding or a benefit otherwise available based upon a dislike or abhorrence of the content of the views espoused by a particular group.

If you have further questions, please do not hesitate to contact me.

Very truly yours,

BRADLEY H. HALL
Chief Legal Advisor,
State Board of Education
and Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

November 22, 1989

Mr. Ivan Legler
City Attorney
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205

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

Re: Runoff Elections Under Idaho Code § 50-612

Dear Mr. Legler:

Your letter to Dan Chadwick dated November 6, 1989, concerning the upcoming runoff election for mayor of Pocatello was referred to me for response. Specifically, you ask whether, under Idaho Code § 50-612 and Pocatello Municipal Code § 2.04.200, a third candidate may run as a write-in candidate in the runoff election along with the two candidates who received the highest number of votes in the recent general election.

Idaho Code § 50-612 clearly and unambiguously provides a city with authority to enact an ordinance requiring the mayor of the city to be elected by a majority of votes and providing, in the event no candidate receives a majority of votes cast at the general election, for a runoff election "between the two candidates receiving the highest number of votes cast." Both Idaho Code § 50-612 and Pocatello Municipal Ordinance § 2.04.200 leave no doubt that only those two candidates are eligible to run in the runoff election. Where the language of a statute is unambiguous, the clear expressed intent of the legislature must be given effect. *Ottesen v. Board of Commissioners of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985); *Worley Highway District v. Kootenai County*, 98 Idaho 925, 928, 576 P.2d 206, 209 (1978). Allowing a third candidate to run in the runoff election would contravene the plain language of the state statute and city ordinance.

Runoff election statutes and ordinances similar to Idaho Code § 50-612 and Pocatello Municipal Code § 2.04.200 are commonplace in other states and have been upheld as a constitutionally permissible exercise of legislative power over the election process. *See, e.g., Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985); *Procaccino v. Board of Elections of the City of New York*, 341 N.Y.S. 2d 810, 73 Misc. 2d 462 (1973). In *Procaccino*, the court rejected the contention that a New York runoff election law violates state and federal constitutional guarantees of the right to vote and equal protection:

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“Since there must be limitations and systemization in the exercise of the elective franchise in order that it may be practicable, efficient, intelligent, and honest, legislative regulations which are reasonable and not discriminatory, cannot rightfully be said to contravene any constitutional right; the courts cannot condemn restrictions for a legitimate purpose reasonably adapted to effect such purpose” (18 N.Y. Jur., Elections § 80). Here, no voter is disenfranchised or deprived of the right to vote as given under the Constitution and laws of this state. The challenged provision gives the voters entitled to vote in the primary elections the opportunity to choose between the two highest candidates for their party’s nomination for each of the enumerated offices, where no candidate for such office receives forty percent or more of the votes cast. This enactment, it is hoped, will affirmatively implement the reality of representative government by reflecting a more valid consensus of the party members.

341 N.Y.S. 2d at 818. Idaho Code § 50-612 likewise serves the legitimate purpose of allowing a city to ensure that its mayor is elected by and represents a majority of the voters in the city. The runoff election scheme narrows the election to the two candidates receiving the highest number of votes so that a majority can be achieved. If write-in candidates are allowed to run in runoff elections, the likelihood of one of the candidates receiving a majority of the votes is reduced, defeating the central and legitimate policy served by the runoff election process.

As a matter of straightforward statutory construction and as a matter of sound and permissible electoral policy, write-in candidates should not be allowed to run in runoff elections authorized under Idaho Code § 50-612.

If you have any further questions regarding this matter, please do not hesitate to call.

Sincerely,

ERIC E. NELSON
Deputy Attorney General
Intergovernmental & Legislative Affairs

FORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 12, 1989

Philip H. Robinson
Bonner County Prosecuting Attorney
P.O. Box 1486
Sandpoint, Idaho 83864

Rena Hoff
Marsing City Attorney
P.O. Box 69
Caldwell, Idaho 83606

Henry R. Boomer
Aberdeen City Attorney
P.O. Box 70
American Falls, Idaho 83211

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

Re: Responsibility and Authority of the Prosecuting Attorney and City Attorney - Relationship of Idaho Code §§ 31-2604, 50-208A and 31-2227

Dear Mr. Robinson, Ms. Hoff and Mr. Boomer:

You have requested advice on matters pertaining to the 1989 amendment to Idaho Code § 31-2604 and enactment of Idaho Code § 50-208A, which deal with the duties of the prosecuting attorney and city attorney respectively. Specifically, your inquiries pose three questions:

- a. When a citation or criminal complaint is issued by a state or county employee for a state traffic infraction, state misdemeanor or violation of a county ordinance occurring within the city limits, must the prosecution be done by the city attorney rather than the county prosecuting attorney?
- b. When a city contracts with the county sheriff for law enforcement protection, who is financially responsible for the prosecution of misdemeanor and infraction cases when the citation has been issued by the county sheriff for offenses which occurred within the city limits?
- c. Does a city attorney have authority or responsibility to file a petition under the Youth Rehabilitation Act?

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SHORT ANSWER:

- a. When the arresting officer is either a state or county employee, both the prosecuting attorney and the city attorney have authority and responsibility to prosecute violations of state traffic infractions and state misdemeanors committed within the municipal limits. County ordinances are of no effect within municipal limits.
- b. Neither Idaho Code §§ 31-2604, 50-208A(2), nor 31-2227 resolve the question of who has the financial responsibility for prosecutions which arise where there is concurrent authority and responsibility. Because of this concurrent authority and responsibility, this is an area which must be handled by negotiations between the city and the county.
- c. The city attorney has the authority to file a petition pursuant to the Youth Rehabilitation Act in the same manner in which a prosecuting attorney could where the violation is of a city ordinance or state misdemeanor committed within the municipal limits by a minor.

ANALYSIS:

A. Analysis as to the Duty and the Authority to Prosecute.

The 1989 enactment of Idaho Code § 50-208A clearly provides the city attorney with the authority and duty to prosecute all violations of “city ordinances, state traffic infractions, and state misdemeanors committed within the municipal limits.”¹ The wording of this statute — namely, that the city attorney “shall” prosecute such violations — could be read to give the city attorney sole and exclusive jurisdiction to prosecute such violations. It is our opinion that the legislature did not intend this result.

First, the statute spelling out these duties of the city attorney was part of House Bill No. 357, enacted by the 1989 legislature. The other part of the bill was an amendment to Idaho Code § 31-2604, the basic statute spelling out the “duties of the prosecuting attorney.” The two parts of the bill must be read *in pari materia*. Subsection 2 of Idaho Code § 31-2604 makes it a duty of the prosecuting attorney “to prosecute all misdemeanor or infraction actions for violation of all state laws or county ordinances when the arresting or charging officer is a state or county employee.” Thus, the county prosecutor clearly has concurrent authority, along with the city attorney, to prosecute violations of state misdemeanors and traffic infractions committed within municipal boundaries, if the arresting officer is a state or county employee.

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A more difficult question arises as to whether the prosecuting attorney has authority to prosecute violations of state laws if the arresting officer is a city employee. Again, it is the opinion of this office that the newly enacted provisions of Idaho Code § 50-208A were not intended to divest the prosecuting attorney of his long-standing authority to prosecute such violations. In 1951, the Idaho Legislature enacted Idaho Code § 31-2227, which provides:

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

Pursuant to this statute, the county prosecuting attorney has the primary duty to enforce all the penal provisions of any and all statutes of this state.²

Nothing in the legislative history of House Bill No. 357 indicates that the legislature intended to repeal the provision of Idaho Code § 31-2227 placing the primary duty on the county prosecuting attorney to prosecute all violations of state penal provisions. On the contrary, at the March 22, 1989, meeting of the Senate State Affairs Committee, Ivan Legler, City Attorney for Pocatello and the individual responsible for the initial draft of this bill, testified that because of the ambiguity of the former law, some cases had been thrown out because "the proper prosecutor was not present." The sponsors of House Bill No. 357 proposed to resolve this problem by giving "prosecuting attorneys and city attorneys more flexibility in sharing personnel for prosecution." Statement of Purpose, House Bill No. 357. Thus, it is our conclusion that the legislature clearly intended that both the prosecuting attorney and the city attorney would have authority to prosecute violations of state laws committed within municipal limits, regardless of whether the arresting or charging officer was a city, county, or state employee.

To summarize our conclusion on this question: where (1) the arresting or charging officer is a state, county or city employee, (2) the law violated is a state misdemeanor or state infraction and (3) the violation occurs within the municipal limits, pursuant to the interplay of Idaho Code § 31-2227, the 1989 amendment of Idaho Code § 31-2604 and the 1989 enactment of Idaho Code § 50-208A, the county prosecuting attorney and the city attorney *both* have the duty and the authority to prosecute.

Where (1) the arresting or charging officer is a *city employee*, (2) the law violated is a *city ordinance* and (3) the violation occurs within the municipal limits, the county prosecuting attorney has no duty to prosecute *unless* he has entered into a written contract with the city to prosecute.

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Thus, the only time concurrent authority and responsibility of the county prosecuting attorney and the city attorney for enforcement of offenses which occur within the municipality does not exist is when the law violated is either a felony or a city ordinance. If the offense is a felony, the county prosecuting attorney has sole authority to prosecute. If the offense is a violation of a city ordinance and there is no contract with the county prosecuting attorney, the city attorney has sole authority to prosecute.

B. Analysis as to Financial Responsibility for Prosecution.

Neither Idaho Code §§ 31-2604, 50-208A(2), nor 31-2227 resolves the question of who has the financial responsibility for a prosecution which arises where the county prosecuting attorney and the city attorney have concurrent authority and responsibility. Because of this concurrent authority and responsibility, this is an area which must be handled by negotiations between the city and the county. In these negotiations it should be kept in mind that Idaho Code § 31-2227 places the primary duty of enforcing *penal statutes* on the county prosecuting attorney.

When a city contracts with the county sheriff for law enforcement protection, that contract should specify who is responsible for the cost of prosecution. County law enforcement officers who are under contract with a city have dual roles as both city and county law enforcement officers when working within the limits of the municipality.

When, pursuant to Idaho Code § 31-2604(2), a written contract is entered into between the prosecuting attorney and a city, that contract should set forth the financial responsibility for the prosecution costs.

Where no contract has been entered into and there is concurrent authority and responsibility for the prosecution of the violation, it appears that the cost of prosecution should be born by the entity employing the attorney who actually prosecutes the violation.

C. Authority of the City Attorney to File a Petition Under the Youth Rehabilitation Act.

The long-standing tradition in Idaho is that prosecuting attorneys prosecute actions under the Youth Rehabilitation Act. The provisions of chapter 18, title 16, of the Idaho Code seem to envision that the prosecuting attorney fulfill this role. Further, the prosecuting attorney generally has a close working relation with the juvenile probation office, which exercises a pivotal function in such cases. Finally, Idaho Juvenile Rule 26 provides that an action commenced under the Youth Re-

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habilitation Act may, at the discretion of the court, be expanded into a Child Protection Act proceeding — which proceedings are clearly under the exclusive jurisdiction of the county prosecuting attorney. See Idaho Code § 16-1605.

Nonetheless, it is clear that the 1989 legislature, in enacting Idaho Code § 50-208A, gave the city attorney the same powers as the county prosecutor in prosecuting violations of city ordinances and state misdemeanors. It would seem to follow, as part of the greater flexibility and sharing of personnel envisioned by the sponsors of this statute, that the city attorney would have the authority to file a petition pursuant to the Youth Rehabilitation Act. It must be noted, however, that this does not authorize the city attorney to file an action when the violation would be a felony if committed by an adult.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

¹Idaho Code § 50-208A also provides authority for the city attorney to prosecute violations of “county ordinances” committed within the municipal limits. Since county ordinances have no effect within municipal limits, *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938); *Clyde Hess Distrib. Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949); *Hobbs v. Abrams*, 104 Idaho 205, 657 P.2d 1073 (1983), this provision can have no application.

²Idaho Code § 31-2227 makes it the primary duty of the prosecutor to enforce “all the *penal* provisions of any and all statutes of this state.” One might argue that state traffic infractions are not included within this jurisdiction because they are not “penal” in nature. It is our opinion that such a result is not intended. It must be remembered that Idaho Code § 31-2227 was enacted in 1951, more than three decades before the reform of Idaho’s traffic code. The reform of that code — and the transformation of most traffic offenses from misdemeanors into infractions — was not intended to oust the county prosecuting attorney from what had always been the prosecutor’s duty to enforce such statutes.

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December 19, 1989

The Honorable Mike Blackbird
State Senator, District 4
1606 Fairmont Loop
Coeur D'Alene, ID 83814

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

Re: Precinct Committeeman
A.G. Ref. No. 7989

Dear Senator Blackbird:

In your letter of November 28, 1989, you ask whether under Idaho law a state senator or representative could also hold the position of party precinct committeeman. You also ask whether this would apply to the county prosecuting attorney.

Idaho Code section 34-903(5) provides that: "No candidate's name may appear on a ballot for more than one (1) office, except that a candidate for precinct committeeman may seek one (1) additional office upon the same ballot." Thus, a state senator or representative may seek and hold the office of precinct committeeman.

A county prosecuting attorney is prohibited from holding any other county or state office. Idaho Code section 31-2601. However, the office of precinct committeeman is not a county office as provided by article 18, section 6, of the Idaho Constitution, nor is it a state office as provided by the Idaho Constitution. Rather, the position is a political party office created by Idaho Code title 34, chapter 5. Thus, the prosecuting attorney also may seek and hold the office of precinct committeeman.

If you have additional questions, please do not hesitate to contact me.

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

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 22, 1989

Mr. Steve Brown
United Steelworkers of America
P.O. Box 726
Kellogg, ID 83837

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

Re: Collective Bargaining by City Employees

Dear Mr. Brown:

Idaho Attorney General Jim Jones asked me to respond to your letter of November 17, 1989, in which you ask whether it is legal for the City of Kellogg to enter into collective bargaining with a union representative selected by a majority of the city's police department employees.

It is well settled under Idaho case law that neither federal nor state labor laws require public employers to bargain collectively with their employees. *Local Union No. 370, Int'l Union of Operating Engineers v. Detrick*, 592 F.2d 1045 (9th Cir. 1979); *School District No. 351, Oneida County v. Oneida Education Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977); *Local Union 283, Int'l Bro. of Elec. Workers v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967). Your letter raises the converse question of whether Idaho law *permits* a public employer to engage in collective bargaining with its employees.

Idaho courts have held that a municipality may exercise only those powers granted to it or necessarily implied from the powers granted. *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989). Where a general power or authority is given to municipalities, it carries with it by implication the municipalities' discretion as to the manner in which the power is to be carried out. *Veatch v. Gibson*, 29 Idaho 609, 617, 160 P. 1112 (1916); *see also, Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941) (ordinance sufficient in scope to justify city council's exercise of judgment).

Idaho statutes expressly provide collective bargaining rights for public employees only to firefighters and professional employees of school districts. *See*, Idaho Code §§ 44-1802 and 33-1271. In absence of express legislation authorizing a city to collectively bargain with other types of employees such as police department employees, such authority must be implied from the city's general power to con-

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tract, found in Idaho Code § 50-301, and from the city council's authority to prepare and approve an annual budget and annual appropriation ordinance itemizing and classifying expenditures by department, found in Idaho Code §§ 50-1002 and 50-1003.

Although no Idaho cases have dealt with the issue of whether municipalities or other political subdivisions of the state have the implied power to bargain collectively with their employees, the issue has received considerable attention by legal commentators and courts from other jurisdictions. *See, Dole, Jr., State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authority*, 54 Iowa L. Rev. 539 (1969); Annotation, *Union Organization and Activities of Public Employees*, 31 A.L.R.2d 1142 (1953).

In a very recent New Mexico Supreme Court opinion, *Local 2238 of the American Federation of State, County and Municipal Employees, AFL-CIO v. Stratton*, 108 N.M. 163, 769 P.2d 76 (1989), the court summarized case law throughout the country concerning implied collective bargaining authority. The court explained that it is the opinion in a majority of jurisdictions that, absent express statutory authority, public officials or state agencies do not have authority to enter into collective bargaining agreements with public employees. A minority of jurisdictions, however, espouse the position that in the absence of express statutory authority to bargain collectively, a general grant of power may imply the necessary means for carrying into execution the power granted. 769 P.2d at 80-81. After recognizing that collective bargaining had been allowed in the public sector in New Mexico for seventeen years without objection, the court adopted the minority viewpoint and held that New Mexico's State Personnel Act was sufficiently broad to include the authority of the State Personnel Board to promulgate regulations allowing collective bargaining by state agencies. 769 P.2d at 82.

The New Mexico opinion cited the *Robison* case in Idaho as one of the majority cases not allowing collective bargaining without express legislative authority. 769 P.2d at 80. However, *Robison* does not actually hold that a municipality is *prohibited* from collective bargaining. Rather, it holds that Idaho's labor laws do not demonstrate "a legislative intent to inaugurate a mandatory system of collective bargaining in governmental employment." 91 Idaho at 448.

As in New Mexico, several Idaho municipalities have for a number of years chosen at their own discretion to bargain collectively with public employees other than fire fighters and school district employees. It is our opinion that a city's general power to contract under Idaho Code § 50-301 and a city council's power to budget and approve appropriations to pay the expenses of a city's various departments or agencies under Idaho Code §§ 50-1002 and 50-1003 are sufficiently broad to provide a city with the implied power to bargain collectively with its employees if it so chooses.

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As Dole points out in his law review commentary, the gist of collective bargaining is negotiation of the terms and conditions of employment by management and employee representatives. 54 Iowa L. Rev. at 541. If a city chooses to engage in collective bargaining with its employees, it does not have to agree to any unacceptable contract terms, and it can make any bargaining contract terminable at will. *Id.* at 549. Furthermore, a city can limit the subjects open to negotiation by collective bargaining and provide safeguards to protect the interests of employees who do not favor exclusive recognition by a collective bargaining representative. *Id.* at 556. For instance, if a city chose to fix by ordinance the amount of compensation for a particular position of employment, that fixed compensation could not be modified through a collective bargaining agreement. *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 387, 293 P.2d 269 (1956).

For the reasons stated above, it is the conclusion of this office that under Idaho law a city has the implied authority through its express legislative, contractual and budgetary powers to engage in collective bargaining with city employees if it so chooses and in the manner it so chooses, so long as the terms agreed to through collective bargaining do not conflict with the city's own ordinances or with state law.

If you have any further questions regarding this matter, please do not hesitate to call.

Sincerely,

ERIC E. NELSON
Deputy Attorney General
Intergovernmental & Legislative Affairs

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 27, 1989

John T. Steile, III, OD, FAAO
State of Idaho
Bureau of Occupational Licenses
Board of Optometry
STATEHOUSE MAIL

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

Re: Legality of Retail Stores Selling Contact Lenses

Dear Mr. Steile:

I have been asked to respond to the Idaho State Board of Optometry's request for an opinion concerning the legality of retail stores such as pharmacies selling contact lenses.

Idaho Code § 54-1517 was amended in 1985 by adding the following provision specifically outlining when contact lenses may be sold or dispensed by retail outlets:

Contact lenses may be sold or dispensed in a retail outlet or other permanently established place of business with an optical department only when the prescription specifically states on its face that it is intended for contact lenses and includes the type and specifications of the contact lens being prescribed.

The legislative history of the 1985 amendment indicates that the language was added to ensure that retail outlets would not dispense contact lenses to consumers from a standard spectacle prescription written by an optometrist or ophthalmologist but not intended to be used for contact lenses. *See* Testimony of Bill Roden on behalf of the Optometric Association, Senate Health and Welfare Committee Minutes, March 1, 1985.

As amended, Idaho Code § 54-1517 clearly spells out that retail outlets may dispense contact lenses only if presented with a prescription specifically intended for contact lenses. Without a specific prescription, contact lenses may be dispensed only by a licensed optometrist, physician or a manufacturing, dispensing or surfacing optician.

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If you have any further questions regarding this matter, please do not hesitate to call.

Sincerely,

ERIC E. NELSON
Deputy Attorney General
Intergovernmental & Legislative Affairs

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