IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

AND

SELECTED INFORMAL GUIDELINES

FOR THE YEAR

1990

Jim Jones
Attorney General

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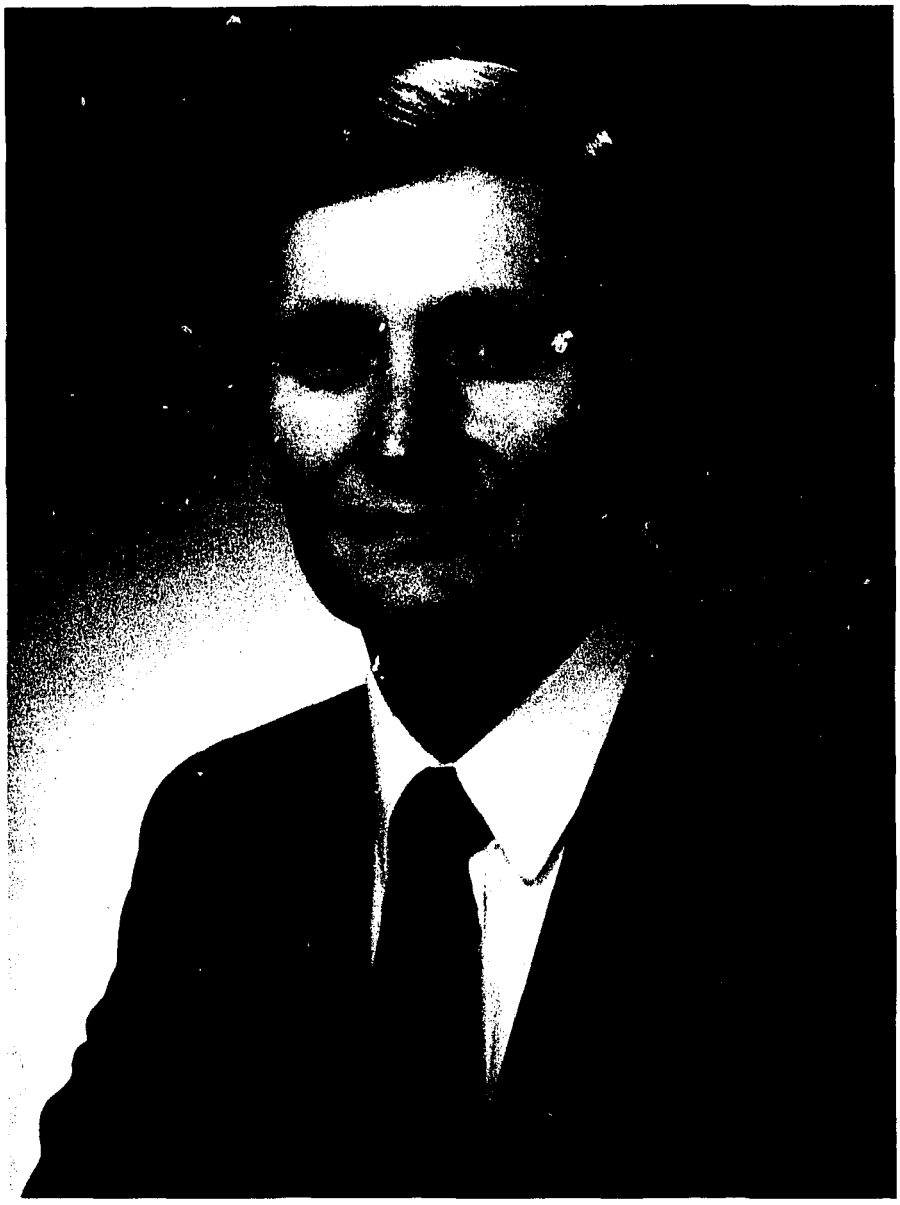

Jim Jones
Attorney General

INTRODUCTION

This is the eighth and final annual compilation of the official opinions and more significant legal guidelines issued during my tenure in office. For better or for worse, I have had a longer tenure and issued more opinion books than any other attorney general for the state.

It has been a high honor to serve the people of Idaho in this capacity. Except for the salary, it was a lawyer's dream job — a wide array of interesting legal issues to deal with, many on the cutting edge, and you could pick and choose which ones to get involved in and determine for yourself how deeply you wanted to become involved in any particular one.

What made it especially enjoyable was working with an outstanding staff. It is top flight. Hiring and promotion were based strictly on merit. During my years the average salary increased by 25-30 percent and the annual turnover rate declined from about 25 percent to less than 5 percent. Professionalism and quality of work increased significantly. I'm very proud of all of them.

Although I look forward to resumption of private practice, I will miss these dedicated coworkers and friends. I wish them and my successor, Larry EchoHawk, all of the best.

JIM JONES
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

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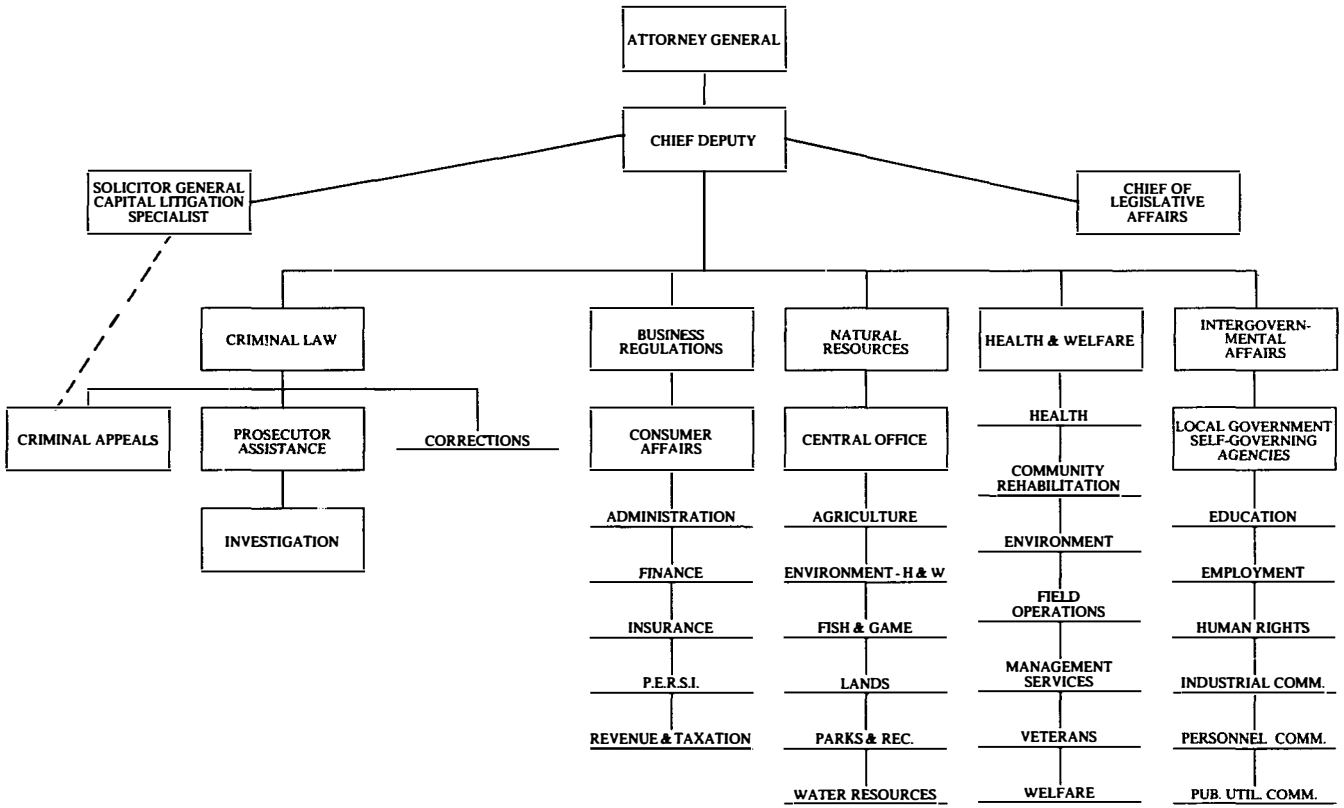

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1990

Jim Jones
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 90-1

The Honorable Lydia Justice Edwards
Idaho State Treasurer
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Are interest earnings upon license revenues in the fish and game account required to be credited to the fish and game account?

CONCLUSION:

Yes. Regulations of the U.S. Fish and Wildlife Service (50 CFR 80) were amended effective May 17, 1989, to require this result as a condition to remain eligible to receive federal aid funds (Pittman-Robertson and Dingell-Johnson Act funds). Since the state is receiving such federal aid funds, it should credit interest earnings on revenues from fish and game license fees to the fish and game account.

ANALYSIS:

Idaho Code § 67-1210 provides, in pertinent part, with respect to interest earnings on state accounts:

> The interest received on all such investments, unless otherwise specifically required by law, shall be paid into the general account of the state of Idaho. Provided, unless otherwise specifically provided by statute, funds received by the state pursuant to a federal law, regulation, or federal-state agreement which governs disposition of interest earned upon such funds shall be classified in the agency asset fund provided by section 57-811, Idaho Code. Any interest earned upon such funds shall be accounted for separately to give effect to the federal law, regulation, or federal-state agreement.

Thus, interest earnings upon balances in the various state accounts are credited to the general account unless otherwise specifically required by law, including federal laws and regulations.

Pursuant to Idaho Code §§ 36-1801 and 36-1802, the state assents to the provisions of the Pittman-Robertson and Dingell-Johnson Acts, which provide aid to the states for wildlife restoration and fish restoration projects. Those federal acts (16 U.S.C. 777 and

16 U.S.C. 669i) and the regulations implementing them (50 CFR 80) provide that revenues from license fees paid by hunters and fishermen shall not be diverted to purposes other than administration of the state fish and wildlife agency. 50 CFR 80.4(a) was amended effective May 17, 1989, to provide:

> License revenues include income from: . . . (3) Interest, dividends, or other income earned on license revenues.

Since license revenues may not be diverted and since license revenues are defined to include interest earnings thereon, the state is now required to credit the fish and game account with interest earnings upon license revenues.

We have also considered the required timing of our implementation of the requirement to credit interest earnings to the fish and game account. The effective date of the federal amendments is described in the Federal Register of April 17, 1989, page 15209, in pertinent part, as follows:

> The effective date of this revision is 30 days after publication in the Federal Register. However, it is recognized that some States may need to enact legislation to meet the requirements of this provision. Therefore, for those States a period not to exceed 3 years after the effective date of the rule will be allowed in order to enact the needed legislation. All other States will need to be in compliance, and remain in compliance, on or after the effective date.

Idaho statutes do allow crediting of interest to the fish and game account for the current fiscal year. As noted previously, Idaho Code § 67-1210 authorizes the crediting of interest as required by federal regulations. Consequently, no legislation is required to implement a change in procedures to begin crediting the fish and game account with interest earnings from the fish and game account. However, as discussed below, crediting interest to the fish and game account for interest lost during the last fiscal year would require legislation.

> Idaho Const. art. 7, § 13, provides:
>
> No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

Since appropriations are made on a fiscal year basis, it is not a violation of Idaho Const. art 7, § 13, to make necessary corrections 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.

However, the result is not the same for corrections beyond a fiscal year. Idaho Code § 67-3604 requires the state auditor to close his accounts as to all appropriations on July 1 of each year. Thus, in *State v. Adams*, 90 Idaho 195, 409 P.2d 415 (1965), the Idaho Supreme Court held that Idaho Const. art. 7, § 13, prohibited the state from refunding to a county the state's share of a court-ordered refund of taxes collected wrongfully in prior years without a legislative appropriation.

Accordingly, for the current fiscal year, necessary corrections in accounts can be made to reflect interest earnings due to the fish and game account. A legislative appropriation would be required to credit the fish and game account with interest earned in the last fiscal year.

AUTHORITIES CONSIDERED:

1. *Constitutions*

   Idaho Constitution, art. 7, § 13.

2. *Federal Statutes*

   16 U.S.C. 777.
   16 U.S.C. 669i.

3. *State Statutes*

   Idaho Code § 36-1801.
   Idaho Code § 36-1802.
   Idaho Code § 67-1210.
   Idaho Code § 67-3604.

4. *Cases*

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

5. *Other*

   Federal Register, April 17, 1989, page 15209.
   50 CFR 80 (Regulation of the U.S. Fish and Wildlife Service).

DATED this 31st day of May, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis by:

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

ATTORNEY GENERAL OPINION NO. 90-2

Merle D. Parsley, Manager
State Insurance Fund
317 Main Street
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does Idaho Code § 41-4908(7), which imposes a "transfer fee" of one cent ($.01) per gallon on the delivery or storage of all petroleum products within the State of Idaho, violate article 7, § 17, of the Idaho Constitution which requires that the proceeds of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state be used for highway purposes?

CONCLUSION:

No, the "transfer fee" established in Idaho Code § 41-4908(7) is not a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state"; therefore, section 41-4908(7) does not violate article 7, § 17, of the Idaho Constitution.

ANALYSIS:

Pursuant to the requirements of the Hazardous and Solid Waste Amendments, *see* 42 U.S.C. §§ 6991-91i, the Environmental Protection Agency developed a petroleum underground storage tank program in 1988. The EPA program requires registration of underground storage tanks, release detection and protective action, and financial responsibility for underground storage tank owners and operators. 40 C.F.R. § 280. The regulations require demonstrated financial responsibility in specific per-occurrence and aggregate amounts to cover the cost of clean up and compensation of third parties for both bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. 40 C.F.R. § 280.93. Financial responsibility requirements can be met through a state fund or state assurance program. 40 C.F.R. §§ 280.94, 280.101.

In response to the requirements of the federal government, the Idaho Legislature enacted chapter 49, title 41, Idaho Code, known as the "Idaho Petroleum Clean Water Trust Fund Act." The legislature created a liability insurance trust fund to make liability insurance available to owners and operators of underground storage tanks. The trust

fund is funded through (1) the payment by the owner or operator of an initial enrollment fee not to exceed twenty-five dollars for each underground storage tank, above ground storage tank, or farm or residential tank enrolled and not to exceed five dollars for each heating tank enrolled; and (2) the imposition of a "transfer fee" of one cent per gallon on the delivery or storage of petroleum products within the state. Idaho Code §§ 41-4908(1),(2),(3), and (8).

Article 7, § 17, of the Idaho Constitution provides in part:

> [T]he 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 . . . 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.

The question presented is whether the "transfer fee" established in Idaho Code § 41-4908(8) is a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles on the highways of the state" in violation of article 7, § 17.

In determining the constitutionality of a statute, Idaho courts have applied the following basic principles of statutory interpretation:

> (1) . . . Statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of validity. (2) When a statute is susceptible to two constructions, one of which would render it valid, the construction which sustains the statute must be adopted by the courts. (3) The burden of showing unconstitutionality of a statute is upon the party who asserts it and invalidity must be clearly shown. (4) It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction.

Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d. 542, 552 (1969); *see also Bingham Memorial Hospital v. Idaho Department of Health and Welfare*, 112 Idaho 1094, 1096, 739 P.2d 393, 395 (1987); *State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986). Therefore, the "transfer fee" must be construed to be something other than a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state" if such a construction is reasonable.

Idaho courts have addressed on several occasions the question whether a fee imposed by a governmental entity was actually a tax. *Kootenai County Property Association v.*

Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988); *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982); *Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941); *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923), *overruled on other grounds, Greater Boise Auditorium District v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984). A fee which is reasonably related to the services rendered is not a tax. *Kootenai County*, 115 Idaho at 680, 769 P.2d at 557. Further, imposing a fee on all members of the affected class, whether or not they choose to use the service, does not make the fee a tax. Id. (solid waste disposal charge on residential dwellings). Contra, a fee primarily designed to raise revenue for a state or political subdivision is a tax. *Foster's*, 63 Idaho at 218-219, 118 P.2d at 728.

The transfer fee established in Idaho Code § 41-4908(8) is reasonably related to the services provided and is not primarily designed to raise revenue for the state. The following legislative findings were adopted in support of the Petroleum Clean Water Trust Fund Act:

> (1) The legislature finds that significant quantities of petroleum and petroleum products are being stored in tanks in Idaho to meet the needs of its citizens, foster economic growth and development and the overall quality of life in the state. While most storage tanks are being operated and managed responsibly, there are occasions when leaks and other releases occur, threatening the public health and safety, and the environment. It is to the benefit of Idaho's citizens to correct any such threats to the public health and safety or environment as quickly and completely as possible. Significant financial resources must be available to investigate and remedy any release. However, reasonably affordable petroleum liability insurance coverage is unavailable to pay for such corrective and cleanup measures. Thus, creation of a fund for corrective actions for petroleum releases would be beneficial to the state. Such a fund would be created by the imposition of a "transfer fee" of one cent ($.01) per gallon on the delivery or storage of petroleum products within the State of Idaho. Such a fund would provide moneys for the immediate protection of the public health and safety and the environment, while helping avoid catastrophic losses to the owners and operators which could result in negative impacts on Idaho's economy.

Idaho Code § 41-4902(1).

Thus, the legislature determined that petroleum storage tanks pose a threat to the health and safety of the public, that an insurance trust fund was necessary to protect the public, and that the petroleum industry — distributors who deliver and store petroleum products and the owners and operators of storage tanks — should pay the costs of any clean up or damage liability incurred through their activity. At least in part, the benefit

provided is that distributors of petroleum products and owners and operators of storage tanks are allowed to continue pursuing a hazardous activity in the State of Idaho by having the means to comply with federal law in obtaining liability insurance. Further, by developing guidelines for payments from the trust fund, the state ensures swift corrective action if a release of petroleum occurs. Idaho Code § 41-4902(2).

The scheme developed in the Idaho Petroleum Clean Water Trust Fund Act demonstrates a relationship between the services provided and the transfer fee. The transfer fees collected and all interest earned thereon, minus administrative costs, are to be deposited into the clean water trust fund account and are not to be used for other public purposes. Idaho Code §§ 41-4909 and 41-4913. Collection of the transfer fee is suspended when the trust fund equals twenty million dollars and will not be reinstated until the unencumbered balance reaches ten million dollars. Idaho Code § 41-4908(10). The funds accumulated from the transfer fees are tied to the trust fund and thus are not designed to create revenue for the state. Because of the large number of storage tanks which could participate in the fund and the potential liability if even one tank is involved in a serious release of petroleum, the twenty million dollar upper limit of the fund is not unreasonable. Since the transfer fee is reasonably related to the services provided under the Idaho Petroleum Clean Water Trust Fund Act and considering the principles of statutory construction set forth previously, the transfer fee should not be construed as a tax violative of article 7, § 17, of the Idaho Constitution.

Adverse decisions from other states regarding similar state assurance programs have been examined, but they are unpersuasive due to differences in state laws. The Alabama Supreme Court held that a proposed statute levying an environmental protection fee upon motor fuels to establish and maintain a state trust fund violated the Alabama Constitution. *In re Opinion of the Justices No. 324*, 511 So.2d 505 (Ala. 1987). The Alabama Constitution, however, limited the use of "any *fee* . . . levied by the state, . . . relating to [motor] fuels" to highway purposes with limited exceptions. *Id.* at 511. The Idaho Constitution does not prohibit the use of a fee. *See* Idaho Const. art. 7, § 17. Similarly, the Arizona Attorney General opined that a proposed statute placing a license tax on vehicle fuel to provide for a state assurance fund violated the Arizona Constitution which limits the use of "*license taxes* relating . . . to fuels" to enumerated purposes primarily involving highways. Op. Ariz. Att'y Gen. I89-085 (1989). The Idaho legislature has not utilized a license tax. Differences between the Idaho Constitution and other state constitutions, as well as differences in the various statutes adopted, make decisions in other states distinguishable.

Even if the transfer fee were to be construed as a tax, the tax probably would not be construed as a tax on "gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state" within the meaning of article 7, § 17, of the Idaho Constitution. If the transfer fee were a tax, the tax would be on the acts of delivery

and storage of all petroleum products, Idaho Code § 41-4908(8), rather than on motor vehicle fuels used to propel motor vehicles on the highway. *See Diefendorf v. Gallett*, 51 Idaho 619, 10 P.2d 307 (1932) (distinction between a tax on property and a tax on the income from property). Thus, even if the transfer fee were construed to be a tax, the tax would not violate article 7, § 17.

AUTHORITIES CONSIDERED:

1. *Federal Code*

   U.S.C. §§ 6991-91i.

2. *Idaho Constitution*

   Art. 7, § 17.

3. *Idaho Code*

   §41-4902(1).
   §41-4902(2).
   §41-4908(1).
   §41-4908(2).
   §41-4908(3).
   §41-4908(7).
   §41-4908(8).
   §41-4908(10).
   §41-4909.

4. *Idaho Cases*

   Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 112 Idaho 1094, 1096, 739 P.2d 393, 395 (1987).

   Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

   Diefendorf v. Gallett, 51 Idaho 619, 10 P.2d 307 (1932).

   Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941).

   Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d. 542, 552 (1969).

   Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986).

State v. Bowman, 104 Idaho 39, 655 P.2d 933 (1982).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923), *overruled on other grounds, Greater Boise Auditorium District v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984).

5. *Other Cases*

In re Opinion of the Justices No. 324, 511 So.2d 505 (Ala.1987).

6. *Other Authorities*

C.F.R. § 280.

Op. Ariz. Att'y Gen. I89-085 (1989).

DATED this 7th day of June, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis By:

Barbara J. Reisner
Deputy Attorney General
Business Affairs and
State Finance Division

ATTORNEY GENERAL OPINION NO. 90-3

Mr. Terry Thompson
Fremont County Sheriff
Law Enforcement Building
St. Anthony, ID 83445

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

The 1990 Centennial Legislature enacted Senate Bill 1535, as twice amended. The bill dealt with the issuance of licenses to carry concealed weapons. Your question is whether this bill, now codified at Idaho Code § 18-3302 is constitutional.

CONCLUSION:

Idaho Code § 18-3302 is unconstitutional because it will force a person of common intelligence to guess as to whether or not he or she will be in violation of the law. Further, it is unconstitutional because it does not provide proper standards for the persons charged with applying the statute, in some cases forcing them to guess at its meaning, and in other cases granting them unfettered discretion as to its implementation. Where possible, in an effort to answer concerns raised regarding interpretation of the statute, an opinion will be rendered as to those portions of the law capable of being analyzed legally.

ANALYSIS:

I. The statutory scheme

Idaho Code § 18-3302, effective July 1, 1990, purports to regulate the carrying of concealed weapons. The statute sets forth a licensing scheme which is to be implemented by Idaho's county sheriffs. Assuming that a person meets the requirements of the law, a sheriff must issue a license to that person within sixty days of application. Failure to do so will subject the sheriff to injunctive relief, costs and attorneys fees. No adequate scheme is set forth for modification or revocation of the concealed weapons license.

The license issued by a sheriff will be effective throughout Idaho. No standards have been set forth for the regulation of the licenses themselves. The licenses are not limited to the carrying of firearms. Any and all deadly weapons may be concealed upon licensure, except for rifles and shotguns. The statute does not limit the class, type or number of such weapons that may be carried.

A series of exceptions are set forth that allow a sheriff to deny a "citizen's constitutional right to bear arms." The statute also exempts certain classes of persons from the application of the licensing process. Any person found guilty of carrying a concealed weapon in violation of the statute will be guilty of a misdemeanor.

II. Constitutional Law and Concealed Weapons

There is nothing in the United States or Idaho constitutions that grants a person a constitutional right to carry a concealed weapon. Indeed, art. 1, § 11, of the Idaho Constitution specifically empowers the legislature to pass "laws to govern the carrying of weapons concealed on the person. . . ." On the federal level, the United States Supreme Court has stated that concealed weapons may be regulated without violating the second amendment. *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897).

Hence, the language in Idaho Code § 18-3302(1) implying that one has a constitutional right to carry concealed weapons is without foundation in the context it is used.

III. Vagueness

The United States and Idaho Supreme Courts have both held that criminal and non-criminal statutes will be unconstitutional under the due process clause where the language used in the statute does not convey sufficiently definite warning as to proscribed conduct. In other words, where persons of common intelligence must necessarily guess at its meaning, a statute will be void for vagueness. *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *H & V Engineering v. Board of Professional Engineers*, 113 Idaho 646, 747 P.2d 55 (1987).

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, 479 (1984).

As recognized in *Roberts*, the doctrine is not only applicable to those persons who may face prosecution for a crime, or who may run afoul of the policies of a licensing board, but also to the persons who are charged with administering the law and its

policies. Hence, it has been held that a statute is too vague when it contains no explicit standards for application so that a danger of arbitrary and capricious enforcement exists, *LDS, Inc. v. Healy*, 589 P.2d 490 (Colo. 1979), and where basic policy matters have been delegated to individuals or groups without explicit standards for those who apply them, *Tuma v. Board of Nursing*, 100 Idaho 74, 593 P.2d 711 (1979); *Saxon Coffee Shop, Inc. v. Boston Licensing Board*, 407 N.E.2d 311 (Mass. 1980). *See also Chief of Fire Dept. of Worcester v. Wibley*, 507 N.E.2d 256 (Mass. 1987), and *Wheeler v. State Board of Forestry*, 192 Cal.Rptr. 693 (Cal.App. 1983).

Where the above mentioned conditions exist, those portions of a statutory scheme that violate the doctrine will be invalidated as unconstitutional.

IV. Application of the Vagueness Doctrine to Idaho Code § 18-3302

Subsection (1) of the statute mandates a sheriff to issue a concealed weapons license to a person "for the purpose of protection or while engaged in business, sport or while traveling" (sic). No guidance is given the sheriff as to whether a different license is required for each of the various activities contemplated in the statute. More important, no standards are set forth to guide the sheriff in the crucial decision as to when to issue a license in a particular case. Nothing is stated as to the quantum of proof a sheriff may require a person to produce to show a need for such a permit for protection, business or sport activities. The sheriffs are left to decide for themselves on a case by case, county by county basis, whether or not to grant a license.

The issue of proof of need for personal protection has proved to be difficult in some states. However, many of these states have articulated standards for licensing agencies to go by. For example, the District of Columbia adopted a policy requiring a showing of threats of death or bodily injury and an investigation by the chief of police as to whether the allegations are factual and of a nature that can by protected against by carrying a pistol. *See Jordan v. District of Columbia*, 362 A.2d 114 (D.C.App. 1976). Maryland requires an investigation to determine whether carrying a weapon is necessary as a reasonable precaution against apprehended danger. It has been held in that state that the issue of apprehended danger is not to be viewed from a subjective standpoint. *Snowden v. Handgun Permit Review Board*, 413 A.2d 295 (Md.App. 1980). Pennsylvania also requires a demonstration of need. See *Gardner v. Jenkins*, 541 A.2d 406 (Pa.Cmwlth. 1988).

Conversely, the Idaho citizen and the county sheriff are left in the dark about whether the legislature contemplated similar requirements. Therefore, it is entirely likely that licenses will or will not be issued based upon the vagaries of individual circumstances and whims of individual sheriffs.

Similarly, it is unclear what the legislature meant by the terms "sport" and "travel." Both the citizen and the sheriff are forced to guess at whether the sport in question is limited to those involving the use of weapons, and whether active participation is required, or whether simple attendance at a spectator sporting event will entitle a person to carry a concealed weapon. As to "travel," it is unknown whether this term contemplates leaving one's hometown, or includes a trip to the grocery store. Again, whether a license will be issued or whether a citizen will be prosecuted will be left to subjective understandings of sheriffs and prosecutors.

Subsection (1) next states that a sheriff may hold up a license application for ninety days if a person does not have a driver's license, a state identification card, or has not been a resident for the ninety day period prior to the application date. After the ninety day waiting period, the license must issue. A close reading of this portion of the statute leads one to the conclusion that Idaho residency is not required for eligibility for a license. If the legislature intended that licenses issue only to Idaho residents, it has not clearly achieved that goal by the wording of this section.

Similarly, there is no guidance within the statute as to whether a person who wishes to apply for a license must do so within his home county. Without such guidance, it appears that a person who is denied a license by his county sheriff may try again at another sheriff's office. The Washington Attorney General has interpreted similar language in that state's firearms law in such a manner. See Op.Att.Gen. 1983, No. 21. Assuming that the sheriff of the second county grants the license, it will be valid in the person's home county as well. If the legislature intended to keep this "forum shopping" from occurring, it has not achieved that goal either.

Subsection (1) then lists thirteen further subsections [(a)-(m)] where a person's "constitutional right to bear arms" may be denied. [See Part I of this opinion]. Although this language actually grants to some unnamed public entity the power to deny the right to carry a weapon under any and all circumstances as to persons meeting the criteria of one of the subsections, it is likely that the true legislative intent is that a concealed weapons permit will be denied by the sheriff only if one of the thirteen categories apply. In construing a statute, the whole act must be looked at in order to determine intent. *State v. Groseclose*, 67 Idaho 71, 171 P.2d 863 (1946).

Subsection (1)(c) states that a license may be denied when the applicant has been convicted of a crime with a penalty exceeding one year. This will exclude those persons who have had a withheld judgment for such a crime. No mention is made of the effect of the restoration of one's civil rights under Idaho Code § 19-2604, after one is discharged from probation or parole. However, as stated above, the ability to carry a concealed weapon is not a right, but a matter of grace. Therefore, it appears that the legislature intended (despite its confusing use of the phrase "right to bear arms") that anyone who

has ever been convicted of such a crime will not be eligible to receive a license. This is the analysis adopted by the federal courts in the interpretation of similar language of the federal law pertaining to sales of firearms. *Cody v. United States*, 460 F.2d 34, (8th Cir. 1972), cert. den. 409 U.S. 1010; *Decker v. Gibson Products Co.*, 679 F.2d 212 (11th Cir. 1982). See also Washington Op.Atty.Gen. 1988, No. 10.

Subsection (1)(e) allows a sheriff to deny a license where one is an "unlawful user" of a controlled substance. The county sheriffs are given no standards to determine when a person is or is not such a user. It is unknown whether a conviction is necessary, as opposed to confidential intelligence, reputation, associations etc. It is also unclear when the stigma of being an unlawful user ends. Whether such a status ends after one week, one month, or one year, or after probation or parole, is left to the policies of forty-four individual sheriffs.

Subsection (1)(f) states that a person will be denied a license when he has "been adjudicated mentally defective or has been committed to a mental institution." It is unclear what the legislature intended by using this phrase. First, there is no method to adjudicate someone mentally defective in Idaho law and, in any event, being mentally defective is not the same as being mentally ill. Rather, it is the state of being feeble-minded or slow witted. *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973). However, the statute is not limited to Idaho. If there are any courts in the United States that make such determinations, then a person so found will not be capable of legally obtaining a license. The rest of the phrase presents a more perplexing issue. What is a mental institution, and what is required to be considered to have been "committed?" Again, the statute does not resolve the question whether the stigma of being so adjudicated or committed ever ends.

A federal court interpreting identical language in the Federal Firearms Act found that a formal court proceeding was necessary in order for a person to be considered "committed." *United States v. Giardina*, 861 F.2d 1334 (5th Cir. 1988). At the same time, the Idaho Code refers to voluntary patients as having been "admitted," while involuntary patients are referred to as "committed." Idaho Code §§ 66-317(b) and (c). Therefore, it appears that the legislature intended to require a formal commitment by a court. As to the meaning of the term "mental institution," it appears likely the legislature intended the term to be the same as "facility" as defined in Idaho Code § 66-317(g): a public or private institution equipped to hold, evaluate, rehabilitate, or provide care for the mentally ill.

Subsection (1)(h) states that a license may be denied where a person has been prosecuted for a misdemeanor "crime of violence" within three years of the application. The term "violence" has been defined as strength or energy actively displayed or exerted, vehement or forcible action, or an unjust exercise of force. *State v. Riley*, 83

Idaho 346, 362 P.2d 1075 (1961). While such misdemeanors as assault and battery clearly meet this definition, it is entirely unclear whether the legislature intended to include such crimes as resisting arrest, Idaho Code § 18-705, disturbing the peace (which includes such acts as quarreling and fighting), Idaho Code § 18-6409, false imprisonment, Idaho Code § 18-2901, discharge of an aimed firearm, Idaho Code § 18-3305, injuring another by the careless use of a firearm, Idaho Code §§ 18-3312 and 18-3306, riotous conduct near an election place, Idaho Code § 18-2313, negligent vehicular manslaughter, Idaho Code § 18-4006(3)(c), or any other "non-property crime" misdemeanor.

The Washington firearms statutes include the term "crime of violence." Idaho's statute appears to be partially based on these laws. However, Washington law explicitly defines what crimes fall within the category of "violent." RCW 9.41.040. Idaho has no similar provision. Again, normally intelligent people are forced to guess at the law's application and sheriffs are left to create subjective policies on their own initiative.

Subsections (1)(i) and (m) deal with persons who are facing trial or who have received a withheld judgment "for a crime which would disqualify him from owning, possessing or receiving a firearm." Such persons may be denied a permit. No Idaho statute on its face would so disqualify a person, nor does any federal statute. However, 18 USC § 922 states that persons who are charged with or convicted of a crime exceeding one year imprisonment may be charged with a federal crime if they are found to ship, transport or receive a firearm which has been involved in interstate commerce or foreign commerce. Therefore, in a technical sense, they are "disqualified" from possessing any firearm not entirely indigenous to Idaho. However, this disability does not exist for those given a withheld judgment, because such a judgment is not a conviction under Idaho law and 18 USC § 921(a)(20) states that state law will be looked to as to the definition of the term "conviction."

Putting subsections (c), (i) and (m) together, the following can be said with some degree of certainty. If a person is convicted of a felony (a crime carrying a penalty in excess of one year), he will not be entitled to a license at any time in the future. If a person receives a withheld judgment for a felony, he may still obtain a license because no Idaho or federal law disqualifies him from owning a firearm. If a person is merely charged with a felony, he is not entitled to a license until he is acquitted or is granted a withheld judgment.

After subparts (a)-(m), subsection (1) states that a license shall be revoked immediately upon conviction "for a crime which makes the person ineligible to own, possess or receive a firearm or upon a conviction for a violation of this section." As stated above, only conviction of a felony will so disqualify such a person. A conviction for violation of "this section" appears to mean a conviction for carrying a concealed

weapon without a license. The only other mention of revocation in the entire statute is a passing reference to previous licenses having been "revoked for cause" in subsection (13)(f). No standards are set forth as to who may revoke the license, and no method is set up for keeping track of the status of the licenses.

Even though no one has a constitutional right to carry a concealed weapon, the state legislature has created a statutory right to do so, assuming one is able to convince a sheriff to issue a license. Once such a liberty interest is created, it may not be taken away without due process of law.

> This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935, 952 (1974).

Such procedural due process principles have been held to apply to the revocation of licenses. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968). The fact that a conviction is a predicate for such a revocation is of no significance. Even though an agency may immediately revoke a license in such a case, the licensee still must have the right to request a post-revocation hearing to test the propriety of the revocation. *Dixon v. Love*, 431 U.S. 105, 97 S.Ct 1723, 52 L.Ed.2d 172 (1977). Therefore, notice and an opportunity to be heard must be given before the final revocation of the concealed weapons license. Yet, none is provided for in the statute.

While it can be argued that notice and a hearing can be "read into" the statute by implication in order to make it constitutional, it remains unclear who is supposed to give the notice and afford the hearing. It is not known whether it is the issuing sheriff, the sheriff of the licensee's home county, any other sheriff, or anyone else for that matter. Nothing is stated as to what must be done to ensure that the licensee does not circumvent the revocation provision by immediately obtaining a new license from a different sheriff.

Finally, the meaning of the portion of the statute pertaining to when a person becomes "disqualified" to own a firearm is subject to varied interpretation, depending upon a close review of the federal laws. This could lead various sheriffs to varying interpretations, resulting in unequal application of what little standards exist as to revocation. The penalty of revocation cannot be imposed for violations of a standard whose meaning is dependent on surmise or conjecture or uncontrolled application by the administrator imposing the penalty. *LDS, Inc. v. Healy, supra.*

Because of the lack of standards to ensure procedural due process, the lack of guidelines for anyone attempting to revoke a license, and the lack of a system to make

the revocation effective, this portion of the statute is unconstitutionally vague and in violation of procedural due process principles.

Similarly, the portion of the statute alluding to revocation for cause is a nullity. No standards for revocation for cause are given. It is unknown whether the legislature intended revocation to occur when a license is obtained by fraud, where a license is misused, or when an event occurs which would have allowed the sheriff to deny the application in the first place. Because none of these matters is addressed, no revocation for cause may occur. A license may only be revoked for specific reasons enumerated in the statute, and an agency or board may not create new reasons, no matter how logical or reasonable. *Atlanta Attractions, Inc. v. Massell*, 463 F.2d 449 (5th Cir. 1972).

Subsection (5) allows a sheriff to issue a temporary emergency license for "good cause pending review under subsection (1)." No guidelines are given as to what would constitute good cause. Again, this subsection lends itself to widely divergent applications based upon the subjective analysis of those charged with applying the statute. Although some discretion is necessary in applying licensing statutes, where the discretion becomes so boundless as to virtually assure capricious application, the statutory scheme cannot stand. *Tuma v. Board of Nursing, supra.*

This same logic applies to subsection (11), which allows a sheriff to issue a permit to persons between the ages of eighteen and twenty one dependent upon the "judgment" of the sheriff. Apparently, a sheriff may grant such a license whenever he decides it is warranted on his own, and without any guidelines from the legislature.

Legislation that contains language so loose as to leave overly wide discretion encourages erratic administration, turns individual impressions into the yardstick of action, and bases regulation upon the beliefs of the individual administrator rather than law. Further, judicial review is rendered inoperative. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 225, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). For these reasons, subsections (5) and (11) are unconstitutionally vague.

Subsection (7) states that one may not carry a concealed weapon without a license except at home or at one's "fixed place of business." It then defines the term "concealed weapon" to include pistols or knives and "any other deadly or dangerous weapon." This apparently would include caustic chemicals, explosives, or anything else that could cause harm. However, the law goes on to state that "[t]he provisions of this section shall not apply to any shotgun or rifle." This proviso can be interpreted in two contradictory and mutually exclusive ways. The first is that a rifle or shotgun (including a sawed off shotgun) is not a concealed weapon and the entire statute does not apply to those forms of weapons; and therefore a person may conceal such weapons on his person or in his vehicle without a license. The second way is that a license may never be granted for the

carrying of a concealed rifle or shotgun; therefore anyone so concealing such a weapon will be guilty of a misdemeanor under subsection (14). It is completely unclear which of the two interpretations the legislature intended.

This, again, leaves the sheriff and prosecutor with individual impressions as a yardstick in the decision to arrest and prosecute a person. Again, a citizen is forced to guess as to the law's application, and when he does so guess, it may not be the same guess the sheriff makes. Hence, a citizen may seek to obtain a license in one county and be told that one is not required. He may then be arrested in another county by a sheriff taking an opposite view of the law. Subsection (7), as it applies to rifles and shotguns, is unconstitutionally vague.

Subsection (12)(b) exempts "employees of the adjutant general and military division of the state where military membership is a condition of employment" from the application of the statute. The question has been raised as to whether this language can be applied to such persons when they are off duty. In order to find that the exemption only applies to on-duty personnel, one would have to read language into the statute that is not there. Because the exemption is clear on its face, such an approach would be improper. Where language of a statute is clear, there is no occasion for application of principles of construction. *State v. Nab*, 112 Idaho 1139, 739 P.2d 438 (Ct.App. 1987). The only proper answer (though not necessarily the logical one) is that all employees are exempted, irrespective of whether they are on or off duty.

Subsection (12)(d) states that the following persons are exempt from the licensing scheme:

> Any person outside the limits of or confines of any city, or outside any mining, lumbering, logging or railroad camp, located outside any city, while engaged in lawful hunting, fishing, trapping or other lawful outdoor activity that involves the carrying of a weapon for personal protection.

This subpart must be read in conjunction with subsection (9), which states that no one may carry a concealed weapon without a license when in a motor vehicle. Hence, it appears that anyone who is not in a car or truck, who is outdoors, and not within city limits or one of the camps referred to, who is not hunting or fishing or trapping, must obtain a license unless they are engaged in a lawful "activity that involves carrying a weapon for personal protection." What this phrase means is not addressed by the legislature.

There are obviously innumerable activities that can be accomplished outdoors, without a car, outside a city: hiking, boating, farming, horseback riding, skiing, bicycling, gardening, camping - the list is endless. Clearly, the legislature did not intend

the exemption to apply to every activity that can be accomplished outside the limits of a city or above referenced camp. Considering the relative difference in acreage in Idaho between land outside and inside city limits, such an interpretation would virtually nullify the very purpose of the statute - the statewide regulation of concealed weapons. The persons residing in unincorporated areas of the state number in the tens of thousands. A statute will not be interpreted by a court in such a way that an absurd result ensues, if possible. *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980).

If this is true, then what can be inferred from the phrase: "activity that involves the carrying of a weapon for personal protection?" Is transporting something of value such an activity? Who decides when a particular activity will meet this test?

Yet again, a person is left to shift for himself in deciding whether his actions will be exempt from or in violation of the law. Prosecutors and police will have to guess when the law has been broken, and persons will be subject to criminal prosecution unequally and arbitrarily. Yet again, this portion of the statute is unconstitutionally vague. *H & V Engineering v. Board of Professional Engineers, supra.*

The legislature, in passing Idaho Code § 18-3302 has set up a regulatory maze using terms often lacking in objective measurement. In some cases, the subsections are extraordinarily ambiguous. In others, the vagueness is aggravated by the need to cross-reference with unidentified state and federal statutes pertaining to ownership of firearms, restoration of civil rights, mental health, fugitives, illegal aliens, military affairs etc. At the same time, the statute punishes sheriffs if they make an error in denying a license by mandating that the sheriff pay for costs and attorney fees when an injunctive action against him is successful. Idaho Code § 18-3302(6).

A statute that forbids or requires the doing of an act in terms so vague that persons must necessarily differ as to its application "violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1922). In the final analysis, the statute produces this result in such areas as who may apply for a license, who may be denied a license, who is exempt from licensure, how a license may be revoked, and whether a license may be revoked. When these vague portions of the statute are severed from the rest, what remains is a meaningless series of exceptions and subparts having no independent value.

For these reasons, it is the opinion of the Attorney General that Idaho Code § 18-3302 is unconstitutional in its entirety.

AUTHORITIES CONSIDERED:

1. *Constitutions*

   Idaho Constitution, art. 1, § 11.

2. *Federal Statutes*

   18 U.S.C. § 921(a)(20).
   18 U.S.C. § 922.

3. *State Statutes*

   Idaho Code § 18-705.
   Idaho Code § 18-2313.
   Idaho Code § 18-2901.
   Idaho Code § 18-3302.
   Idaho Code § 18-3305.
   Idaho Code § 18-3306.
   Idaho Code § 18-3312.
   Idaho Code § 18-4006.
   Idaho Code § 18-6409.
   Idaho Code § 19-2604.
   Idaho Code § 66-317.

4. *Cases*

   Atlanta Attractions, Inc. v. Massell, 463 F.2d 449 (5th Cir. 1972).

   Chief of Fire Department of Worcester v. Wibley, 507 N.E.2d 256 (Mass. 1987).

   Cody v. United States, 460 F.2d 34 (8th Cir. 1972), cert. den., 409 U.S. 1010.

   Connally v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1922).

   Decker v. Gibson Products Co., 679 F.2d 212 (11th Cir. 1982).

   Dixon v. Love, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977).

   Gardner v. Jenkins, 541 A.2d 406 (Pa.Cmwlth. 1988).

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

H & V Engineering v. Board of Professional Engineers, 113 Idaho 646, 747 P.2d 55 (1987).

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 225, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

Jordan v. District of Columbia, 362 A.2d 114 (D.C.App. 1976).

Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

LDS, Inc. v. Healy, 589 P.2d 490 (Colo. 1979).

Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462, 479 (1984).

Robertson v. Baldwin, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

Saxon Coffee Shop, Inc. v. Boston Licensing Board, 407 N.E.2d 311 (Mass. 1980).

Snowden v. Handgun Permit Review Board, 413 A.2d 295 (Md.App. 1980).

State v. Groseclose, 67 Idaho 71, 171 P.2d 863 (1946).

State v. Nab, 112 Idaho 1139, 739 P.2d 438 (Ct.App. 1987).

State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961).

Tuma v. Board of Nursing, 100 Idaho 74, 593 P.2d 711 (1979).

United States v. Giardina, 861 F.2d 1334 (5th Cir. 1988).

United States v. Hansel, 474 F.2d 1120 (8th Cir. 1973).

Wheeler v. State Board of Forestry, 192 Cal. Rptr. 693 (Cal.App. 1983).

Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935, 952 (1974).

5. *Other*

RCW 9.41.040.
Washington Op. Atty. Gen. 1988, No. 10.
Washington Op. Atty. Gen. 1983, No. 21.

DATED this 12th day of June, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Michael Kane
Deputy Attorney General
Chief, Criminal Law Division

ATTORNEY GENERAL OPINION NO. 90-4

Marvin Aslett, Chairman
Idaho Racing Commission
6133 Corporal Lane
Boise, Idaho 83704

Marilyn Shuler, Director
Idaho Human Rights Commission
450 West State Street
Boise, Idaho 87320

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

Two opinion requests have been submitted asking whether the Director of the Department of Law Enforcement is the appointing authority for administrative purposes over the Idaho Racing Commission. Specifically, Ms. Shuler asks:

> Does Title 54, Chapter 25 of the Idaho Code make the Idaho Racing Commission the "appointing authority" for either its director or for the office support staff?
>
> If the answer to the first question is "no," are the people in those positions employees of the Department of Law Enforcement?
>
> If the answer to the first question is "yes," does the Department of Law Enforcement, within which the Racing Commission exists, have any authority over or responsibility towards those two classifications?

CONCLUSION:

The Director of the Department of Law Enforcement is the ultimate appointing authority for the director and staff of the Idaho Racing Commission, since the commission is created within the department and has no specific authority to hire and fire employees. Therefore, the director is the appointing authority by operation of Idaho Code § 67-2405.

ANALYSIS:

The answer to your question requires an understanding of where the Idaho Racing Commission is situated within the overall structure of state government.

State government was reorganized effective January 1, 1975, by a 1972 amendment to the Idaho Constitution:

> Art. 4, Section 20. Departments limited. — All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two (2) years.

The implementing legislation listed 19 agencies, including the Department of Law Enforcement:

> 67-2402. Structure of the executive branch of Idaho state government. — (1) Pursuant to section 20, article IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:
>
> . . .
>
> Department of law enforcement . . . .

Key to this question is § 67-2405, which prescribes the authority of agency directors:

> **Powers and duties of department heads.** — *Unless specifically provided otherwise*, each department head shall:
>
> (1) *Supervise, direct, account for, organize, plan, administer and execute the functions vested within the department as provided by law.*
>
> . . .
>
> (8) Subject to law, and the provisions of the state's merit system, establish and *make appointments to necessary subordinate positions*, and abolish unnecessary positions.

> (9) Each department head may, subject to law, and the state merit system where applicable, transfer employees between positions, *remove persons appointed to positions*, and change the duties, titles, and compensation of employees within the department.
>
> (10) *Delegate any of the functions vested within the department head to subordinate employees, except the power to remove employees or fix their compensation.*

(Emphasis added.) Thus, the 19 department heads are empowered to establish and make appointments to positions within their respective departments unless that power is specifically given by law to another appointing authority.

This same concept is reenforced by the Personnel System law which defines "appointing authority" as "the officer, board, commission, person or group of persons *authorized by statute or lawfully delegated authority to make appointments or to employ personnel in any department.*" (Emphasis added.) Idaho Code § 67-5302(2).

Therefore, it is necessary to consider the statutory provisions that created the Idaho Racing Commission to determine whether the commission is specifically authorized to hire and fire staff.

The Department of Law Enforcement was created in 1919, and its structure is described in chapter 29, title 67, Idaho Code. Specifically, § 67-2901 empowers the director to "exercise all of the powers and duties necessary to carry out the proper administration of the department, and may delegate duties to employees and officers of the department." There is, however, a wide variety in the statutory powers of the director in relation to the various entities created within the department.

For example, the Teletype Communications Board is appointed by the governor, and is composed of county sheriffs, chiefs of police and state police. Though the board exists within the Department of Law Enforcement and the director of DLE is the executive officer of the board, the board has exclusive management control over ILETS, the state's law enforcement communications system. Idaho Code §19-5203. Similarly, the State Brand Board exists within the Department of Law Enforcement, with board members appointed by the governor. Idaho Code § 25-1102. The board, rather than the director of the department, appoints the state brand inspector, who in turn hires staff. Idaho Code §§ 25-1103, 25-1104.

The Idaho Racing Commission does not have similar hiring authority. The commission is created in the Department of Law Enforcement, with three commission members appointed by the governor. Idaho Code § 54-2503. The commission, it is true,

is authorized to "incur all such costs, charges and expenses as are reasonably necessary in carrying out the intent and purposes of this act," Idaho Code § 54-2504. However, this broad authority to incur costs, charges and expenses does not carry with it the kind of express authorization "by statute or by lawfully delegated authority to make appointments" that would be necessary for the commission to be an "appointing authority" under Idaho Code § 67-5302(2). The Idaho Legislature, as in the case of the State Brand Board, knows how to grant express hiring and appointing authority to a board within the Department of Law Enforcement. The legislature has chosen not to include such authority in the Racing Commission's enabling statute.

The remaining sections of chapter 25, title 54, authorize the commission to promulgate rules and regulations to govern race meets and the pari-mutuel system, Idaho Code § 54-2506; to determine which persons participating in race meets shall require licenses, *id.*; to license, regulate and supervise all race meets held in this state, Idaho Code § 54-2507; to determine the kind and character of race meets to be held, the number of days of races and the number of races per day, Idaho Code § 54-2508; and to exclude from races any person who violates the Idaho Racing Act, Idaho Code § 54-2509.

Nowhere in the Idaho Racing Act is there any mention of a staff or commission authority to hire staff members. It is our opinion, under the principles enunciated in this opinion, that the Racing Commission is not expressly authorized to function as the "appointing authority" for a director or staff that the commission may wish to hire. That authority resides in the Director of the Department of Law Enforcement, unless he chooses to delegate said authority to the commission.

SUMMARY:

When an entity is created within a department, the director of the department is the hiring and firing authority unless provided otherwise by statute. The Idaho Racing Commission does not have such authority, though the Director of the Department of Law Enforcement may have in fact delegated hiring and supervisory authority to the Racing Commission.

The answers to the specific questions asked by Ms. Shuler are: (1) The Racing Commissioners are not the appointing authority for the commission's director and staff. (2) Idaho Racing Commission employees are employees of the Department of Law Enforcement. The Director of the Department may in fact have delegated hiring and supervisory authority to the Racing Commission, but himself retains the ultimate appointing authority for all purposes. (3) Not applicable.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

   Art. 4, § 20.

2. *Idaho Code*

   Idaho Code § 19-5203.
   Idaho Code § 25-1102.
   Idaho Code § 25-1103.
   Idaho Code § 25-1104.
   Idaho Code § 54-2503.
   Idaho Code § 54-2504.
   Idaho Code § 54-2506.
   Idaho Code § 54-2507.
   Idaho Code § 54-2508.
   Idaho Code §§ 54-2509(2), (4).
   Idaho Code § 67-2402.
   Idaho Code § 67-2405.
   Idaho Code § 67-2705.
   Idaho Code § 67-2901.
   Idaho Code § 67-5302(2).

DATED this 22nd day of June, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis By:

Jeanne T. Goodenough
Deputy Attorney General
Idaho Personnel Commission

ATTORNEY GENERAL OPINION NO. 90-5

Blynn B. Wilcox, Chairman
Idaho Peace Officers Standards
and Training Council
109 South Main
Soda Springs, ID 83276

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Director of the Department of Law Enforcement the appointing authority for administrative purposes over the Idaho Peace Officers Standards and Training (POST) Academy?

CONCLUSION:

Yes, the Director of Law Enforcement is the appointing authority for the staff of the POST Academy, since the POST Council is created within the department and has no specific authority to hire and fire employees. Therefore, the director is the appointing authority by operation of Idaho Code § 67-2405.

ANALYSIS:

Your inquiry raises the question whether the POST Council or the Director of the Department of Law Enforcement is the appointing authority for the Executive Director of the POST Academy. The answer to your question requires an understanding of where the POST Council is situated within the overall structure of state government.

State government was reorganized effective January 1, 1975, by a 1972 amendment to the Idaho Constitution:

> Art. 4, Section 20. Departments limited. — All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state

> government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two (2) years.

The implementing legislation listed 19 agencies, including the Department of Law Enforcement:

> 67-2402. Structure of the executive branch of Idaho state government. — (1) Pursuant to section 20, article IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:
>
> . . .
>
> Department of law enforcement . . . .

Key to this question is § 67-2405, which prescribes the authority of agency directors:

> 67-2405. Powers and duties of department heads. — *Unless specifically provided otherwise,* each department head shall:
>
> (1) *Supervise, direct, account for, organize, plan, administer and execute the functions vested within the department as provided by law.*
>
> . . .
>
> (8) Subject to law, and the provisions of the state's merit system, establish and *make appointments to necessary subordinate positions,* and abolish unnecessary positions.
>
> (9) Each department head may, subject to law, and the state merit system where applicable, transfer employees between positions, *remove persons appointed to positions,* and change the duties, titles, and compensation of employees within the department.
>
> (10) *Delegate any of the functions vested within the department head to subordinate employees, except the power to remove employees or fix their compensation.*

(Emphasis added.) Thus, the 19 department heads are empowered to establish and make appointments to positions within their respective departments unless that power is specifically given by law to another appointing authority.

This same concept is reinforced by the Personnel System law which defines "appointing authority" as "the officer, board, commission, person or group of persons *authorized by statute or lawfully delegated authority to make appointments or to employ personnel in any department.*" (Emphasis added.) Idaho Code § 67-5302(2).

Therefore, it is necessary to consider the statutory provisions that created the Peace Officers Standards and Training Council to determine whether authority to hire and fire staff is included in that entity's enabling statute.

The Department of Law Enforcement was created in 1919, and its structure is described in chapter 29, title 67, Idaho Code. Specifically, § 67-2901 empowers the director to "exercise all of the powers and duties necessary to carry out the proper administration of the department, and may delegate duties to employees and officers of the department." There is, however, quite a variety in the statutory powers of the director in relation to the various entities created within the department.

For example, the Teletype Communications Board is appointed by the governor, and is composed of county sheriffs, chiefs of police and state police. Though the board exists within the Idaho Department of Law Enforcement and the director of DLE is the executive officer of the board, the board has exclusive management control over ILETS, the state's law enforcement communications system. Idaho Code § 19-5203. Similarly, the State Brand Board exists within the Department of Law Enforcement, with board members appointed by the governor. Idaho Code § 25-1102. The board, rather than the director of the department, appoints the state brand inspector, who in turn hires staff. Idaho Code §§ 25-1103, 25-1104.

The specific powers of the POST Council are more narrowly drawn:

> **Powers of the council — Standards of training, education and employment of peace officers** — Certification — Penalties. — (a) *It shall be the duty of and the council shall have the power:*
>
> (1) *To establish the requirements of minimum basic training* which peace officers shall complete in order to be eligible *for permanent employment* as peace officers, and the time within which such basic training must be completed.
>
> (2) *To establish the requirements of minimum education and training standards for employment as a peace officer in probationary, temporary, part-time, and/or emergency positions.*
>
> (3) *To establish the length of time a peace officer may serve in a probationary, temporary, and/or emergency position.*

(4) *To approve, deny approval or revoke the approval of any institution* or school established by the state or any political subdivision or any other party for the training of peace officers.

(5) *To establish the minimum requirements of courses of study,* attendance, equipment, facilities of all approved schools, and the scholastic requirement, experience and training of instructors at all approved schools.

(6) *To establish such other requirements for employment, retention and promotion of peace officers,* including minimum age, physical and mental standards, citizenship, moral character, experience and such other matters as relate to the competence and reliability of peace officers.

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

(8) *To receive and file for record copies of merit regulations or local ordinances* passed by any political subdivision.

(9) *To maintain permanent files and transcripts* for all peace officers certified by the council to include any additional courses or advance courses of instruction successfully completed by such peace officers while employed in this state.

(10) *To receive applications for financial assistance* from the state and from political subdivisions and disburse available state funds to the state and to political subdivisions for salaries and allowable living expenses or any part thereof, as authorized by the council, incurred while in attendance at approved training programs and schools. The annual reimbursements authorized by this section shall not exceed the funds available for such purpose and authorized by section 23-404, Idaho Code.

Idaho Code § 19-5109.

Thus, the POST council has no statutory authority to hire and fire employees. In addition, the statutory history of the POST Council reveals that the council has never been the appointing authority for the academy, though its predecessor organization was.

The council's predecessor was the Law Enforcement Planning Commission (LEPC), which was established in 1969 to take advantage of federal grants relating to law enforcement. The commission was authorized to "establish, and the chairman appoint,

such subcommittees or advisory councils as it deems fit, *including a peace officer standards and training subcommittee,* and provide funds for the meetings of such subcommittees or councils." (Emphasis added.) 1969 Idaho Session Laws, ch. 415, § 11, p.1154. The LEPC itself had the authority to hire staff:

> Section 13. Subject to the approval of the governor, the commission shall appoint and fix the salary of a full-time director. Other subordinate staff necessary to accomplish the commission's mission shall be covered by the provisions of chapter 53, title 67, Idaho Code [the merit system].

Id. at § 13, p.1154.

The statute was amended in 1973 to require certification by the POST Academy within one year after a peace officer becomes employed. Sections 11 and 13 of the original act were unchanged, leaving the LEPC to set the standards for peace officer training and to hire staff. 1973 Idaho Session Laws, ch. 172, § 1, p.362.

The 1974 reorganization of state government placed the LEPC in the Governor's Office, Division of Budget, Policy Planning and Coordination as a department. The LEPC was given explicit authority to hire a chief, rather than a director. 1974 Session Laws, ch. 89, § 18, p.606.

The next amendment significant to this issue occurred in 1980, when the Law Enforcement Planning Commission was moved to the office of the Director of the Department of Law Enforcement. 1980 Idaho Session Laws, ch. 144, § 1, p.309. LEPC still set the training standards and had the authority to hire staff.

The final amendment of this section left the law as it is today - the previous statute was repealed and replaced by almost identical language. 1981 Session Laws, ch. 307, p.628. The effect of the new section was that LEPC passed out of existence and was replaced by the POST Council as the standard-setting agency. Of critical importance here, the statutory authority to hire a director and staff was also eliminated.

Thus, throughout its early history, the POST council was a standard-setting body separate from the hiring authority, the LEPC, which was absorbed by the Department of Law Enforcement.

The opinion request refers to some conflict between Idaho Code and POST Council rules on this subject. The Administrative Procedure Act (APA) defines a rule as "[a]ny agency statement of general applicability that *implements or prescribes law or interprets a statute* as the statement applies to the public." Idaho Code § 67-5201(7). (Emphasis added.) The concept does not include statements concerning only the internal management of an agency. *Id.*

Section 19-5107 authorizes the council to promulgate rules under the APA "as necessary to carry out the provisions of this chapter." Since there is no statutory authority for the POST Council to hire and fire in the listed "Powers of the council," §19-5109, any rule relating to that topic would not have the force of law. A policy relating to the internal operation of the council would not be a rule that has the force of law, and would not prevail over the specific authority of agency directors in chapter 24, title 67.

Section 19-5116(a)(2) provides that "[a]ll moneys deposited to the [peace officers standards and training] account shall be expended by the peace officers standards and training counsel [sic] for the following purposes: . . . (2)Salaries, costs and expenses relating to such training. . . ." This language is tempered by the explicit powers of the POST Council. The only reference to salary in § 19-5109, governing powers of the council, is the payment of "salaries and allowable living expenses . . . incurred while in attendance at approved training programs and schools." Thus, this language relates only to the students in approved programs.

The authority "[t]o approve . . . any institution or school established by the state or any political subdivision or any other party for the training of peace officers," taken with the authority to expend money on training, indicates that if a state university, for example, provided academy-like courses for police officers, then the instructor's salary and costs could be paid from the POST account. Mere authority to approve of the existence and continuation of the academy, however, does not include hiring and firing authority.

SUMMARY:

When an entity is created within a department, the director of the department is the hiring and firing authority unless provided otherwise by statute. The POST Council has not had such statutory authority at any time during its 20-year existence, and cannot validly create a rule providing the authority to hire and discharge in the absence of statutory authority. Whether the Director of the Department of Law Enforcement has in fact delegated hiring and supervisory authority to the POST Council is not presented in your question or addressed in this opinion.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

   Art. 4, § 20.

2. *Idaho Code*

   Idaho Code § 19-5107.
   Idaho Code § 19-5109.
   Idaho Code § 19-5116(a)(2).
   Idaho Code § 19-5203.
   Idaho Code § 23-404.
   Idaho Code § 25-1102.
   Idaho Code § 25-1103.
   Idaho Code § 25-1104.
   Idaho Code § 67-2402.
   Idaho Code § 67-2405.
   Idaho Code § 67-2705.
   Idaho Code § 67-2901.
   Idaho Code § 67-5201(7).
   Idaho Code § 67-5302(2).
   1969 Idaho Session Laws, ch. 415, § 11, p.1154.
   1973 Idaho Session Laws, ch. 172, § 1, p.362.
   1974 Idaho Session Laws, ch. 89, § 1, p.1185.
   1974 Idaho Session Laws, ch. 89, § 18, p.606.
   1980 Idaho Session Laws, ch. 144, § 1, p.309.
   1981 Idaho Session Laws, ch. 307, p.628.

DATED this 28th day of June, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis By:

Jeanne T. Goodenough
Deputy Attorney General
Idaho Personnel Commission

ATTORNEY GENERAL OPINION NO. 90-6

Gary H. Gould
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the City of Boise have the authority to require the State of Idaho to obtain building permits when building or remodeling state buildings within the city?

Specifically, do the provisions of Idaho Code §§ 54-1001B (authorizing cities to assume primary responsibility for enforcement of the National Electrical Code within municipal limits) and 54-2620 (providing similar authority to cities to enforce the Uniform Plumbing Code) empower the city to require the state or its contractors to obtain electrical and plumbing permits?

CONCLUSION:

The statutory authority over state building projects granted to the Idaho Department of Administration and the Idaho Department Of Labor and Industrial Services fully occupies the field of planning and construction of state buildings and thus preempts all municipal authority over state buildings. Any other interpretation would conflict with the provisions of Idaho Code § 67-5711. Furthermore, the statutes relied upon by the City of Boise do not expressly indicate that the State of Idaho has ceded its sovereignty to municipalities in regard to state buildings. Without such a clear expression of legislative intent, the City of Boise cannot expand its authority to include inspection and enforcement of plumbing and electrical codes to state buildings.

ANALYSIS:

1. *Municipal corporations have the general authority to enact building and safety codes and to enforce these codes on buildings within city limits. However, the state has pre-empted municipal authority over a state-owned building.*

The well-established rule in Idaho is that municipal corporations are creatures of the state and possess no inherent powers other than those powers expressly or impliedly granted. *Caesar v. State,* 101 Idaho 158, 610 P.2d 517 (1980); *Sandpoint Water and*

Light Company v. City of Sandpoint, 31 Idaho 498, 173 P. 972 (1918); 6A McQuillin, Municipal Corporations §24.35 (3rd Ed.). All authority granted to a municipal corporation must be conferred either by the state constitution or by the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. *State v. Steunenberg*, 5 Idaho 1, 45 P. 462 (1896). The extent of a municipal corporation's authority in relation to the State of Idaho's sovereign power was previously analyzed in Att'y Gen. Op. No. 76-3, and in Moore, "Powers and Authority in Idaho Cities: Home Rule or Legislative Control?" 14 Idaho Law Review 143 (1977).

The authority for a municipal corporation to enact and enforce building and safety codes is derived from the police power granted to municipalities in the Idaho Constitution, art. 12, § 2. *See Caesar v. State, supra;* 7A McQuillin, Municipal Corporations § 24.505 (3rd Ed.). Given this authority, the issue is whether the state is subject to the legitimate exercise of a municipal corporation's police power.

Two previous attorney general opinions concluded that the State of Idaho is not required to obtain building permits from local authorities prior to the construction of state projects. Att'y Gen. Op. Nos. 75-77 and 77-37. Copies of these opinions are attached. Since these opinions were issued, the Idaho Supreme Court has specifically addressed the applicability of municipal building and safety codes to state projects. *Caesar v. State, supra.* The controversy in *Caesar* arose after the construction of a football stadium at Boise State University. The central issue before the court was whether the state was obligated to construct the facility in compliance with Boise City's building codes. At the outset, the supreme court discussed the limitations of the police powers granted to cities by art. 12,§ 2, of the Idaho Constitution:

> Municipal corporations which enjoy a direct grant of power from the Idaho Constitution are, however, limited in certain respects. The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Nor may it act in an area where, to do so, would conflict with the state's general laws. (Citations omitted.)

101 Idaho at 161.

In light of these limitations, the court determined that the construction of the stadium was specifically controlled by Idaho statute and beyond the scope of the city's authority:

> Taken as a whole, these statutes indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature. ID. CONST. art. 12 § 2. To recognize the authority placed in the Boise City building inspector would conflict with the authority vested in the Idaho Industrial Commission and the

> Department of Labor by I.C. § 67-2312 and is thus impermissible. ID. CONST. art. 12, 2; *State v. Musser, supra; United Tavern Owners of Philadelphia v. School Dist. of Philadelphia, supra; Boyle v. Campbell, supra.* As a result, the Boise City Building Code cannot apply to state-owned buildings.

Id. at 162.

The statute upon which the court based its decision, I.C. §67-2304, was repealed in 1974. The legislature enacted I.C. § 67-5711 in its place. 1974 Idaho Sess. Laws, Ch. 34 at 988. The state's exclusive authority over construction and maintenance of its buildings remains unchanged and the legal principles set forth in *Caesar* continue to be the binding authority on the issue. *Envirosafe Services of Idaho, Inc. v. County of Owyhee,* 112 Idaho 687, 735 P.2d 998 (1987).

Applying the *Caesar* principles to the facts of this case, we note that the Idaho State Legislature has passed legislation establishing uniform building standards throughout the state. I.C. §§ 39-4101 to 4129; I.C. § 54-1001; I.C. §54-2601; I.C. §44-2301 *et seq.* The state has not been exempted from compliance with these standards. On the contrary, Executive Order No. 87-18 directs that "State buildings being constructed or remodeled shall conform to all existing state codes. . . ."

The Idaho Department of Administration is given the authority by statute to carry out this directive:

> 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 repair of any and all buildings, improvements of public works of the state of Idaho. . . .

I.C. § 67-5711.

The Idaho Department of Labor and Industrial Services is charged with the duty of state-wide inspection and enforcement of all uniform building and safety codes. I.C. §39-4104; I.C. §44-103; I.C. §44-2303; I.C. §54-1005; I.C. §54-2607. In light of the promulgation of uniform building and safety codes by the legislature, the authority granted to the department of administration and the department of labor and industrial services, and the directive by the governor that such codes will apply to state projects, the state's authority over its projects is complete. There is simply no basis for local infringement.

> Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of municipalities, a municipal ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state. *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia,* 441 Pa. 274, 272, A.2d 868, 870 (1971); *see Boyle v. Campbell,* 450 S.W.2d 265, 267, (Ky.1970).

Caesar v. State, 101 Idaho at 161.

2. *The state has not ceded its sovereignty to municipalities in regard to the enforcement and inspection of electrical and plumbing standards.*

The City of Boise argues that the language of I.C. §§ 54-1001B and 54-2620 grants municipal corporations exclusive authority over the enforcement of electrical and plumbing work performed within the respective cities. The city argues further that since the state has delegated its authority to its cities, the preemption analysis enunciated above is not applicable.

I.C. § 54-1001B provides:

> The provisions of this act relating to state inspection, except as provided in section 54-1001C, shall not apply within the corporate limits of incorporated cities and villages which, by ordinance or building code, prescribe the manner in which wires or equipment to convey current and apparatus to be operated by such current shall be installed, provided that the provisions of the National Electrical Code are used as the minimum standard in the preparation of such ordinances or building codes and provided that actual inspections are made.

Idaho Code § 54-2620 similarly provides:

> It shall be unlawful for any person, firm, copartnership, association or corporation to do, or cause or permit to be done, after the adoption of this act, whether acting as principal, agent or employee, any construction, installation, improvement, extension or alteration of any plumbing system in any building, residence or structure, or service lines thereto, in the state of Idaho without first procuring a permit from the department of labor and industrial services authorizing such work to be done, except:
>
> (a) Within the boundaries of incorporated cities, including those specially chartered, where such work is regulated and enforced by an ordinance or code equivalent to this act; . . .

At first glance, the city's argument appears to have merit. However, when the

appropriate principles of statutory construction are applied it becomes clear that the state's sovereignty over its buildings has not been delegated to its municipalities.

The often cited rule of statutory construction against derogation of sovereignty is set forth in 82 C.J.S. *Statutes* § 391:

> Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed.

See also City of Jackson v. Mississippi State Building Commission, 350 So.2d 63 (Miss. 1977). A review of Idaho Code §§ 54-1001 B and 54-2620 indicates that there is simply no expression of legislative intent delegating the state's sovereign control over state building projects to local municipal authorities.

The Supreme Court of Kentucky addressed a nearly identical issue in *City of Bowling Green v. T & E Electrical Contractors,* 602 S.W.2d 434 (Ky. 1980). In that case, the City of Bowling Green claimed the authority to inspect electrical work being performed upon state buildings. The city also demanded inspection fees of $2,895.00 for one state project. The statute on which the City of Bowling Green was relying directed the city to "provide for safe construction, inspection and repair of *all private and public buildings in the city.*" KRS 84.240(2) (emphasis added). The City of Bowling Green argued that all public buildings included state buildings within its municipal limits.

The Kentucky Supreme Court rejected this argument and interpreted "public buildings" to mean buildings in which the general public congregated such as theaters, churches, etc. The court would not stretch the term to include state-owned buildings. After quoting the general rule found in *Corpus Juris Secundum* the court stated:

> If the legislature desired to cede its power to regulate buildings owned by the Commonwealth, it would have said so expressly in words such as "all private and public buildings, including those owned by the Commonwealth or its subdivisions." It did not choose to do so. Consequently, the City of Bowling Green as a city of the second class has not been granted the power to inspect this building for electrical code compliance and it, certainly, can not require the state to pay for an inspection made gratuitously. *See Board of Regents v. City of Tempe,* 88 Ariz. 299, 356 P.2d 399 (1960); *Paulus v. City of St. Louis, Mo.,* 446 S.W.2d 144 (1969); 7 McQuillin, *Municipal Corporations* sec. 24.519; 13 Am.Jur.2d *Buildings* sec. 7.

602 S.W.2d at 436, *see also City of Jackson v. Mississippi State Building Commission, supra; Kentucky Institution for Education of the Blind v. City of Louisville,* 123 Ky. 767 97 S.W. 402 (1906).

The principles enunciated by the Kentucky Supreme Court are applicable to the present matter. The statutes relied upon by the City of Boise should not be construed so as to delegate the state's sovereign authority over its buildings to municipalities when no such legislative intent has been expressed. The doctrine of preemption does apply this instance. Therefore, the City of Boise has no authority over the electrical and plumbing work being performed upon state buildings within the Boise City limits.

AUTHORITIES CONSIDERED:

1. *Constitutions*

   Idaho Constitution art. 12, § 2.

2. *Statutes*

   Idaho Code §§ 39-4101 through 39-4129.
   Idaho Code § 44-103.
   Idaho Code § 44-2301.
   Idaho Code § 44-2303.
   Idaho Code § 54-1001.
   Idaho Code § 54-1001B.
   Idaho Code § 54-1005.
   Idaho Code § 54-2601.
   Idaho Code § 54-2607.
   Idaho Code § 54-2620.
   Idaho Code § 67-5711.

   1974 Idaho Sess. Laws, Ch. 34 at 988.

3. *Cases*

   Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

   City of Bowling Green v. T & E Electrical Contractors, 602 S.W.2d 434 (Ky. 1980).

   City of Jackson v. Mississippi State Building Commission, 350 So.2d 63 (Miss. 1977).

Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

Kentucky Institution for Education of the Blind v. City of Louisville, 123 Ky. 767 97 S.W. 402 (1906).

Sandpoint Water and Light Company v. City of Sandpoint, 31 Idaho 498, 173 P. 972 (1918).

State v. Steunenberg, 5 Idaho 1, 45 P. 462 (1896).

4. *Other*

Attorney General Opinion 75-77.
Attorney General Opinion 76-3.
Attorney General Opinion 77-37.

82 C.J.S. *Statutes* § 391.

6A McQuillin, Municipal Corporations § 24.35 (3rd Ed.).

7A McQuillin, Municipal Corporations § 24.505 (3rd Ed.).

Moore, "Powers and Authority in Idaho Cities: Home Rule or Legislative Control?" 14 Law Review 143 (1977).

DATED this 13th day of August, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis By:

Francis P. Walker
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 90-7

The Honorable C. L. "Butch" Otter
Lt. Governor of Idaho
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Idaho Lieutenant Governor authorized to cast the tie-breaking vote in the Idaho Senate when the senate is evenly divided on organizational matters such as the election of the Idaho Senate President Pro Tem?

CONCLUSION:

The lieutenant governor is expressly authorized by art. 4, § 13, of the Idaho Constitution, to cast a vote when the senate is equally divided. This express power does not violate the separation of powers provisions of art. 2, § 1 of the Idaho Constitution; nor is there any other legal basis to limit the lieutenant governor's vote-casting authority.

BACKGROUND:

The general election of 1990 has resulted in an equal number of Democrats and Republicans being elected to the Idaho Senate. This is the first time in Idaho's history that the Idaho Senate has been evenly divided along party lines. With this equal division, the role of the Idaho Lieutenant Governor takes on a new perspective since he is empowered to cast a tie-breaking vote when the senate is equally divided. Art. 4, § 13, Idaho Constitution. The lieutenant governor's power to cast a tie-breaking vote in regard to legislative matters is not questioned. The scope of this Attorney General opinion is the lieutenant governor's ability to cast a tie-breaking vote in relation to organizational matters, specifically, the election of the president pro tem.

ANALYSIS:

1. *Is This Matter Justiciable?*

The suggestion has been made that if the Idaho Senate fails to resolve this issue internally and cannot organize itself without resorting to the lieutenant governor's "casting vote," the Idaho Supreme Court will abstain from ruling on the issue because the matter is non-justiciable or because it presents a political question. However, our research indicates that the judiciary does have the power to define the powers of the lieutenant governor as president of the senate.

As a general rule, it is true the judiciary will not intervene in the internal affairs of the legislature. *In Beitelspacher v. Risch,* 105 Idaho 605, 671 P.2d 1068 (1983), the Idaho Supreme Court was petitioned to review procedural questions from the Idaho Senate stemming from the adoption of a concurrent resolution. In a plurality opinion written by Justice Bakes, the court refused to interfere with or interpret senate rules governing parliamentary procedure:

> Art. 3, § 9, of our Constitution gives each house of the legislature the power to determine its own rules of proceeding. Thus, this power is specifically reserved to the legislative branch by the Constitution, and we cannot interfere with that power. The interpretation of internal procedural rules of the Senate is for the Senate. Its leadership has spoken, and the Senate as a whole has not overruled it.

105 Idaho at 606. The present matter is distinguishable from *Beitelspacher v. Risch* on two scores. First, the matter is not purely internal to the Idaho Legislature. The issue involves the constitutional authority of the lieutenant governor to preside over the senate and the extent of this constitutional authority in organizing the senate. Second, the tie vote creates a deadlock, destroying the formation of senate "leadership" and preventing "the Senate as a whole" from functioning at all.

The justiciability of the lieutenant governor's constitutional authority within the legislature has been addressed in other jurisdictions. In *State ex rel. Palmer v. Perpich,* 182 N.W.2d 182 (1971), the Minnesota Supreme Court was called upon to determine the ability of the Minnesota lieutenant governor to cast a tie-breaking vote in the context of seating members and organizing the senate. Before reaching the ultimate issue, the Minnesota Supreme Court defined its role:

> The first question posed is the most difficult of solution. In the separation of powers between the three branches of government the thread that separates judicial power from legislative prerogative is an exceedingly thin one. Our Constitution provides that each house of the legislature shall have the responsibility of judging the eligibility of its own members. It frequently requires much judicial restraint to refrain from treading on this legislative prerogative. However, when a question arises such as we now have before us, who is to decide whether a constitutional officer is attempting to usurp power not granted to him if we do not do so?
>
> * * *
>
> Clearly, under this provision [the Minnesota quo warranto statute] we have power to determine whether a constitutional officer is attempting to usurp

power which is not granted to him by the Constitution or by the laws of this state. It has been held that quo warranto is a proper proceeding to determine whether a branch of the legislature has been organized according to the Constitution. *State ex rel. Werts v. Rogers,* 56 N.J.L. 480, 28 A. 726, 29 A. 173, 23 L.R.A. 354.

While there seems to be little authority on the subject, we find the following in 81 C.J.S. States § 30:

> As between two bodies claiming to be the lawfully constituted senate or house of representatives, the courts have jurisdiction to decide which is the constitutionally organized body. Further, the courts have power to determine whether the organization of a branch of the legislature has been made in violation of the constitution.

182 N.W. 2d at 184, 185. The court then ruled that unlike the lieutenant governors of most other states, including Idaho, and the United States Vice-President, the Minnesota lieutenant governor was not authorized to cast a vote when the senate was equally divided either in its organization or on any other issue.

In *Dye v. State ex rel. Hale,* 507 S.2d 332 (1987), the Supreme Court of Mississippi was called upon to review the lieutenant governor's authority to assign senators to committee positions and refer bills to committee. The issue of justiciability — on the ground that the matter was "internal" to the senate — was squarely presented and squarely answered:

> Without doubt we will as a general rule decline adjudication of controversies arising within the Legislative Department of government where those controversies relate solely to the internal affairs of that department. *Barnes v. Ladner,* 241 Miss. 606, 616, 131 So.2d 458, 461 (1961). On the other hand, legislators nor the bodies in which they serve are above the law, and in those rare instances where a claim is presented that the actions of a legislative body contravene rights secured by the constitutions of the United States or of this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that our final judgment may have practical political consequences. [Citations omitted.] Where, as here, it is alleged that one arguably a member of the Executive Department of government is exercising powers properly belonging to the Legislative Department, we are of necessity called upon to decide whether the encroachment exists in fact and, if so, whether it contravenes the mandate of Sections 1 and 2 of our Constitution that the powers of government be separate. *See Alexander v. State Ex Rel. Allain,* 441 So.2d 1329, 1333 (Miss. 1983). We have authority to adjudicate the claims tendered this day.

> Moreover, it is within our actual and judicial knowledge that the role, responsibility and authority of the office of the Lieutenant Governor have become matters of great public interest and no little controversy. There is a public need that the legal issues tendered be authoritatively resolved. Not only do we have the authority to decide today's questions; we have a public responsibility to do so.

507 So.2d at 338-339. The Mississippi Supreme Court likewise held that the issue was justiciable despite claims that it involved a "political question":

> And with regard to the claim that today's case involves a political question in which the judiciary should not become enmeshed, it is much too late to reclaim our virginity. That great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by this Court as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties.

Id. at 339.

Thus, it appears likely that the Idaho Supreme Court will resolve this controversy if called upon to do so. *See also, State v. Cason,* 507 S.W.2d 405 (Mo. 1973); *Opinion of the Justices,* 225 A.2d 481 (Del. 1966); *State v. Highway Patrol Board,* 372 P.2d 930 (Mont. 1962).

2. *Separation of Powers.*

The Idaho Lieutenant Governor's authority to cast a tie-breaking vote in the organizational session will be challenged as contrary to the separation of powers clause of art. 2, § 1, of the Idaho Constitution, which states:

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

This strict separation of powers provision must be read along with art. 4, § 13, of the Idaho Constitution, which states in relevant part:

> The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.

Thus, while the lieutenant governor is a member of the executive branch of government, the Idaho Constitution *expressly* authorizes the lieutenant governor to function within the legislative branch. The office of the lieutenant governor has no major executive duties or powers beyond acting as governor when the governor is absent or incapable of performing his official duties. Art. 4, § 12, Idaho Constitution. The lieutenant governor's primary duty is to preside over the state senate.

The Mississippi Supreme Court addressed the separation of powers clause of the Mississippi Constitution in relation to the powers of the lieutenant governor in *Dye v. State ex rel. Hale, supra.* Pursuant to the Mississippi Constitution, the Mississippi lieutenant governor is the presiding officer over the state senate. Pursuant to senate rules, the Mississippi lieutenant governor has been granted extensive additional powers. These powers were challenged by certain members of the state senate as being contrary to the separation of powers clause of the state constitution. The court held that the powers were not inherent to the office but that the senate had the authority to delegate these legislative functions and that the lieutenant governor was an "eligible receiver" of these delegated powers. At the core of this conclusion was the court's analysis of the separation of powers clause.

> The Circuit Court held that the Lieutenant Governor is a member of the Executive Department and that, by virtue of the separation of powers doctrine, he is ineligible to receive the powers so delegated nor to exercise them if delegated. The point loses force when we recognize that there is no natural law of separation of powers. Rather, the powers of government are separate only insofar as the Constitution makes them separate. The Lieutenant Governor is unusual in that he is made an officer of — and given powers in — two branches of government.
>
> * * *
>
> By virtue of his being President of the Senate, the Lieutenant Governor is enough of a member of the Senate that he is eligible to have conferred upon him the legislative powers granted by the rules here at issue. The Lieutenant Governor does not possess these powers by reason of any authority inherent in the office of President of the Senate. *His office merely serves to place him in the Senate, on the Senate side of the separation of powers barrier.* As such Lt. Gov. Dye enjoys the powers at issue by virtue of the Senate's action taken in accordance with its inherent delegatory authority.

507 So.2d at 346-47. (emphasis added.) Thus, the lieutenant governor does not violate the separation of powers clause of the Idaho Constitution by presiding over the Idaho Senate, or, in the case of a deadlock in the senate, casting the deciding vote.

3. *The "Casting Vote."*

The history and concept of a lieutenant governor's "casting vote" is set forth at length by the Montana Supreme Court in *State v. Highway Patrol Board,* 372 P.2d 930 (1962). Its origin is found in the New York Constitution of 1777, which provided that the lieutenant governor would, by virtue of this office:

> be president of the senate, and, upon an equal division, have a casting voice in their decisions, but not vote on any other question.

This provision for a casting vote was incorporated into art. I, § 3 of the United States Constitution a decade later:

> The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

In essence, then, a "casting vote" is one that is cast only to break a tie. It cannot be cast to create a tie. Nor can it be cast to create a quorum of the body. *See Opinion of the Justices,* 225 A.2d 481, 483 (1966).

The policy reason for the existence of the casting vote in the senior branch of the legislature is set forth by the Michigan Supreme Court:

> it is generally an unfortunate thing from the standpoint of the people watching the legislative process to find the legislature deadlock on an issue by an absolutely even vote, and that it is desirable from the standpoint of having the people feel that the legislative process does and can move forward at all times to have it possible for a tie vote to be broken.

Advisory Opinion on Constitutionality of 1978 PA 426, 272 N.W. 2d 495-99 (Mich. 1978).

A. *Idaho Law.*

No legal authority has been found by this office that would preclude the lieutenant governor from using his casting vote to select senate officers in the event of an equally divided vote of the senators in attendance. The election of the officers occurs during the first regular session of the legislature or during an organizational session, as provided by Idaho Code § 67-404(c). The lieutenant governor as president of the senate presides over these sessions. *Rules of the Senate,* Rule 1.

The procedure in organizing the senate is described in Barton, *Idaho Legislative Manual* 6-7 (1984):

> Members-elect of the Legislature (both Senators and Representatives) meet on the first Thursday of December following each general election for a maximum of three days to elect officers, appoint committees and organize for the First Regular Session. Prior to undertaking major tasks, the members-elect of the Legislature must be certified and sworn in. For this purpose, the Senate and House are called to order by their presiding officers — the Lieutenant Governor and the Speaker from the preceding session. Following the call to order, the Secretary of the Senate and the Chief Clerk of the House of Representatives, both from the preceding session, read the Certificate of Election prepared by the Secretary of State to certify the names of those persons elected to the Legislature in the last general election. The Certificate of Election may be read by the newly-appointed Secretary and Chief Clerk, if those from the preceding session are not present. After the members-elect are certified, the roll is called and the members-elect are administered the oath of office as outlined in Article III, Section 25 of the State Constitution. Beyond certification and swearing in, organizational procedures in the Senate and the House of Representatives differ somewhat.
>
> In the Senate, the swearing in ceremony is followed by a prayer that is offered by the Chaplain. The Senate then moves to elect its President Pro Tempore, since the Lieutenant Governor is by constitutional mandate the President of the Senate. A candidate that has previously been agreed upon in the majority party caucus is nominated and a motion is made to close the nominations. After both motions are seconded by a member from the minority party, a vote is taken, the results are tabulated, and the President Pro Tempore is declared to be elected. The Lieutenant Governor administers the oath of office to the President Pro Tempore.
>
> Having installed the President Pro Tempore, the Senate, by a two-thirds vote of its membership, adopts the temporary rules of the Senate as the rules of the Organizational Session. The Senate then moves to inform the Governor and the House of Representatives that the Senate has been organized and to install the attaches of the upcoming regular session.

In short, the organizational session is a formal legislative session over which the lieutenant governor officially presides. Thus, there is no sound basis to deny the lieutenant governor the authority to cast his constitutionally authorized tie-breaking vote during the organizational session.

Furthermore, Rule 48 of the *Rules of the Senate* provides that the "general rules of parliamentary practice and procedure as set forth in *Mason's Manual of Legislative Procedure* shall govern the proceedings of the senate." Section 514 of *Mason's Manual of Legislative Procedure,* in relation to the lieutenant governor's power to cast a tie-breaking vote, states:

> *A casting vote is in order only when there is a tie vote as when the votes are equally divided between two candidates* or when there is an equal number for and against a proposition. (Emphasis added.)

Finally, the Idaho Constitution is almost identical to the United States Constitution in regard to the president of the senate's ability to cast a tie-breaking vote. Art. 1, § 3 of the United States Constitution expressly authorizes the Vice-President of the United States to cast a vote when the Senate is equally divided. In the past, the Vice-President of the United States has cast a tie-breaking vote on organizational matters. It is reported in § 5976, Vol. V of *Hinds' Precedents* (1907): "the Vice-President votes on all questions wherein the Senate is equally divided, even on a question relating to the right of a Senator to his seat." The right of a senator to a seat is obviously an organizational matter.

B. *Case Law From Other Jurisdictions.*

Research conducted by this office has not found any case where the precise issue presented here has ever been adjudicated. Case law regarding the general powers of the lieutenant governor as president of a state senate is scant. The Montana Supreme Court in *State v. Highway Patrol Board,* 372 P.2d 930 (1962), discussed the power of the lieutenant governor to cast a tie-breaking vote on legislation generally:

> The question of law involved in this appeal is whether or not the Lieutenant Governor of the State of Montana, while presiding as President of the Senate, possessed the requisite power to enable or entitle him to cast the deciding vote on the third reading of House Bill No. 342, as amended, at a time when the Senators, then present and voting, were equally divided.
>
> The people of Montana have specifically supplied the answer to the above question in their Constitution wherein they have *"expressly directed or permitted"* and conferred various *special powers* on the Lieutenant Governor, not the least of which, is the *power,* right and high privilege of presiding over the sessions and meetings of the State Senate as its President with the *express direction* that, while so presiding, he *"shall vote only when the senate is equally divided."* Section 15, Article VII, Constitution of Montana.
>
> "This is a wise recognition of the parliamentary principle which allows a presiding officer the authority of holding a balance of power between equally divided votes of a deliberative body, in order to facilitate, but not to block, legislation; or * * * for breaking, but not for making, a tie vote." *Brown v. Foster* (1895), 88 Me. 49, at p. 54, 33 A. 662, at p. 664, 31 L.R.A. 116, at p. 118.

342 P.2d at 935. The Montana Supreme court listed Idaho as a state where the lieutenant governor has similar powers. *Id.* at 937.

The Supreme Court of Delaware in *Opinion of the Justices,* 225 A.2d 481 (1966), confronted an apparent conflict in provisions of the Delaware Constitution. Pursuant to the Delaware Constitution, certain legislative functions required a "majority of all of the members elected" to the state senate. The question before the Delaware Supreme Court was whether the lieutenant governor was excluded from casting a tie-breaking vote (as provided by art. 3, § 19, of the Delaware Constitution) since he was not an "elected member" of the state senate.

The Delaware Supreme Court concluded that the lieutenant governor was not a "member" of the Delaware Senate for purposes of establishing a quorum. However, the court held that the lieutenant governor possessed an express constitutional grant of authority to cast a tie-breaking vote in all matters considered.

> It is more reasonable to assume, in our opinion, that *the casting vote of the Lieutenant Governor was intended to break ties in the more important matters before the Senate, as well as the less important ones.* It is in the public interest that there be a proper method to break deadlocks and to avoid impasse in the Senate. This was the rationale for vesting in the Vice President the casting vote in the United States Senate: "to secure at all times the possibility of a definitive resolution of the body." The Federalist Papers, No. 68: Hamilton. *The more important the matter pending for decision, the more essential such tie-breaking device is to the public welfare.*
>
> By application of the rules of constitutional interpretation hereinabove set forth, we conclude that the casting vote provision of Art. 3, § 19 has not been modified, restricted or limited by the constitutional provisions which require action by a majority of the members of the Senate. That which is implied is as much a part of the Constitution as that which is expressed. *Implicit in Art. 3, § 19, we think, is the unqualified power of the Lieutenant Governor to vote on any question — large or small — whenever the Senate is equally divided.*

225 A.2d at 485.

Attention has been called to unpublished peremptory writs of quo warranto and mandamus issued by the Supreme Court of New Mexico (1987), file No. 16842. These writs nullified the votes cast by the New Mexico Lieutenant Governor in the senate's election of its president pro tem and the adoption of the rules of procedure for the New Mexico Senate. Unfortunately, the writs establish no precedent. The writs do not specifically state the constitutional basis for the supreme court's action; nor do they provide any legal analysis to the facts presented.

Any precedential value of the New Mexico decision is further weakened by the fact that the lieutenant governor there voted to make two members of the senate presidents pro tem. Such an outcome clearly violated constitutional, statutory and regulatory provisions in New Mexico law which impliedly required a single occupant of the office of president pro tem.

CONCLUSION:

The lieutenant governor of Idaho was given the casting vote to secure an orderly resolution of the senate's business. This power is expressly granted in the Idaho Constitution and has no apparent limitation. Based upon this express authority and the lack of any articulated limitations placed thereon, it is the conclusion of this office that the lieutenant governor may cast the tie-breaking vote during the organizational session of the Idaho Senate if the members present are equally divided in their choice of a president pro tem.

AUTHORITIES CONSIDERED:

1. *Constitutions*

   Idaho Constitution, art. 2, § 1.
   Idaho Constitution, art. 3, § 9.
   Idaho Constitution, art. 4, § 12.
   Idaho Constitution, art. 4, § 13.

2. *Cases*

   Advisory Opinion on Constitutionality of 1978 PA 426, 272 N.W.2d 495 (Mich. 1978).

   Dye v. State ex rel. Hale, 507 S.2d 332 (1987).

   Opinion of the Justices, 225 A.2d 481, 483 (1966).

   State ex rel. Palmer v. Perpich, 182 N.W.2d 182 (1971).

   State v. Highway Patrol Board, 372 P.2d 930 (1962).

3. *Other Authorities*

   Barton, Idaho Legislative Manual (1984).
   Rules of the Senate, Rule 1.
   Rules of the Senate, Rule 48.

DATED this 27th day of November, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis by:

Francis P. Walker
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 90-8

The Honorable Jerry L. Evans
State Superintendent of Public Instruction
Department of Education
STATEHOUSE MAIL

Norman N. Hallett, Ed.D.
Superintendent
Joint School District No. 2
911 Meridian Street
Meridian, ID 83642

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

The Meridian School District currently has the opportunity to issue refunding bonds to refund its outstanding bonded indebtedness at more favorable interest rates. However, because other funds are not available to fund the refunding escrow account, it is necessary to sell the refunding bonds at a premium to adequately fund the refunding escrow account, as permitted by Idaho Code § 57-504(2). This would be accomplished by setting interest rates on the refunding bonds above current market interest rates, but below interest rates on the bonds being refunded. Is the sale of the refunding bonds at a premium consistent with Idaho Constitution, art. 8, § 3?

CONCLUSION:

Idaho Constitution, art. 8, § 3, requires an election to increase the indebtedness of a district. The section is not violated by issuance of refunding bonds which result in a net present value savings to a district without increasing the outstanding indebtedness of the district. The outstanding indebtedness of the district is not increased by selling the refunding bonds at a premium (i.e., selling the refunding bonds above par) provided the premium is used for refunding purposes.

BACKGROUND:

We understand the question you raise arises out of a refunding bond issue planned by Meridian School District. In 1985, the Meridian School District issued bonds which were approved by the requisite two-thirds majority of the voters. Those bonds are currently outstanding in the amount of $7,215,000 and bear interest rates from 8.9% to 11% per annum. Most of the bonds would fall due in 1999, 2000, and 2001 but are redeemable prior to maturity on September 1, 1995, at 102% of the principal amount of the bonds.

The district wishes to undertake an advance refunding of the 1985 bonds pursuant to Idaho Code § 57-504. Under the plan, refunding bonds would be issued and the proceeds used to buy U.S. Government securities. The securities would be held in trust until the 1985 bonds become callable at which time the 1985 bonds would be redeemed. The district expects to receive a net present value savings of over $200,000 after all expenses resulting from lower interest rates on the refunding bonds than on the 1985 bonds.[1]

To finance the escrow account of the refunding bonds it is necessary to generate a premium above the par value of the outstanding 1985 bonds. This can be accomplished by setting the interest rates on the refunding bonds higher than current market interest rates. Investors will pay more than par for the bonds to receive the higher interest rates. The premium would be generated in this case by the use of interest coupons designated as "B" coupons by industry convention, which are additional interest obligations.[2] However, as noted above, the average interest rates on the refunding bonds would still be set lower than the average interest rates on the 1985 bonds resulting in a net present value savings to the district.

As discussed below, such a refunding plan does not increase the indebtedness of the district within the meaning of Idaho Constitution, art. 8, § 3. Rather, it has the legal effect of exchanging new obligations for the prior obligations providing a material benefit to the district. Where the premium generated from sale of the refunding bonds is used for the refunding plan, Idaho Constitution, art. 8, § 3, is not violated.

ANALYSIS:

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

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same . . . .

Thus, an election would be necessary prior to issuance of refunding bonds by a school district if the bonds were deemed to be an added "indebtedness, or liability" of the district.

The Idaho Supreme Court has considered on several occasions whether refunding

bonds constitute such an "indebtedness, or liability." In the early case of *Veatch v. City of Moscow,* 18 Idaho 313, 109 Pac. 722 (1910), the Idaho Supreme Court considered whether the issuance of refunding bonds by the City of Moscow without an election would be contrary to art. 8, § 3, Idaho Constitution. The court concluded as follows:

> We therefore conclude that the issue of a refunding bond by a municipality does not increase or create a debt, and that the issue of such bonds for the purpose of funding an existing legal indebtedness is not required to be submitted to a vote of the qualified electors, but that *the city council or village trustees by ordinance may authorize the issue of such refunding bonds when it can be done to the profit and benefit of the municipality and without incurring any additional liability.*

18 Idaho at 319-20 (emphasis added).

In *Sebern v. Cobb,* 41 Idaho 386, 238 Pac. 1023 (1925), the court upheld the issuance of refunding bonds by a drainage district:

> *The issue of a refunding bond does not generally create a new indebtedness, and it is so held by the great weight of authority, but it simply changes the form of the indebtedness and usually reduces the rate of interest. There is no presumption that the officers of a municipality will not make proper application of the funds procured from the sale of refunding bonds. Veatch v. City of Moscow,* 18 Idaho 313, 21 Ann. Cas. 1332, 109 Pac. 722.
>
> *We have not been cited to nor have we found any constitutional or statutory inhibitions,* such as construed in those cases which hold to the contrary, against making the provision for the issuance and sale of refunding bonds, as contemplated by chapter 21, *even though, during a period between the sale of the refunding bonds and receipt of the money and the ultimate call and redemption of the outstanding issue, there exists a double lien upon the property of the land owners. Bearing in mind that the proceeds of the refunding sale are especially applicable to the redemption of the outstanding issue, around which, of course, all due safeguards should be and are thrown, . . .*

41 Idaho at 400-01 (emphasis added).

This case is important in clarifying that although refunding bonds may result in a temporary increase in the amount of bonds outstanding, it must be presumed that the funds will be properly applied. Therefore, the refunding bonds change the form of indebtedness but do not create new indebtedness. Also, the court points out that the refunding bonds are to be applied to the redemption of the outstanding issue, and that all due safeguards should be established to ensure this result.

In *Lloyd Corp. v. Bannock County,* 53 Idaho 478, 25 P.2d 217 (1933), the court held that the issuance of refunding bonds by Bannock County for the purpose of retiring warrant indebtedness did not create an indebtedness or liability prohibited by art. 8, § 3, Idaho Constitution.

Marsing v. Gem Irrigation Dist., 56 Idaho 29, 48 P.2d 1099 (1935), held that extending the due date of refunding bonds for 40 years (beyond the then 20-year provision in art. 8, § 3, Idaho Constitution), did not amount to the incurring of indebtedness within the meaning of art. 8, § 3. The court stated:

> It is not every indebtedness that must be retired within twenty years, only that which increases the debt of the organizations mentioned, and refunding bonds do not increase the debt but merely continue the obligations theretofore issued.

56 Idaho 32.

The Idaho cases thus make it clear that refunding bonds can involve significant restructuring of indebtedness without resulting in an increased indebtedness within the meaning of Idaho Constitution, art. 8, § 3. However, the casesset forth several principles which must be kept in mind in designing refunding plans.

Veatch, supra, held that a district may authorize refunding bonds "when it can be done to the profit and benefit of the municipality and without incurring any additional liability." 18 Idaho at 319-320. In our opinion, a substantial net present value savings to a taxing district, such as the savings involved in the Meridian refunding, satisfies the requirement that refunding "be done to the profit and benefit" of the district. We would note that other benefits have also been found to satisfy the requirement that the refunding benefit the district. For example, retiring warrant indebtedness was upheld in *Lloyd Corp., supra,* and extension of the maturity date of a bond issue was upheld in *Marsing, supra.*

Sebern, supra, pointed out that where "the proceeds of the refunding sale are especially applicable to the redemption of the outstanding issue" the refunding did not increase the district's indebtedness within the meaning of Idaho Constitution, art. 8, §3. Rather, it simply changed the form of the indebtedness. The language of *Sebern* quoted above requiring application of refunding proceeds to redemption of the outstanding bonds is aimed at ensuring that there will not be a diversion of refunding proceeds resulting in a failure to redeem the outstanding bonds. However, the requirement that refunding proceeds be used for refunding purposes is also significant in relation to refunding plans generating a premium, as is apparent from the following example.

Assume a district held an election authorizing general obligation bonds in the amount of $10,000,000 to build school buildings. If a district could set artificially high interest

rates on the bonds such that investors would pay $15,000,000 for the bonds, the electors would have been greatly deceived. $15,000,000 would be available for building projects and repayment obligations would equate to a $15,000,000 bond issue. Such a result would almost certainly be held to violate Idaho Constitution, art. 8, § 3. In our opinion, the constitution would be equally offended by a refunding bond which accomplished the same result.

Dickson v. County of Elliot, 357 S.W.2d 852 (Ky. App. 1962), provides an example of the above problem. In that case, bonds were sold at interest rates which generated a premium used for project construction purposes. This effectively provided more money for the building project than the voters had authorized and the court treated the premium as additional principal. The *Dickson* case points out the importance of the Idaho Supreme Court's statement in *Sebern* that "the proceeds of the refunding sale are especially applicable to the redemption of the outstanding issue."

The planned refunding by the Meridian School District would use all proceeds of the refunding bonds (including the premium) for refunding purposes consistent with *Sebern, supra.* It would provide a net present value savings of over $200,000 for the Meridian School District. This is consistent with *Veatch, supra,* which concluded that a city council could authorize the issue of refunding bonds "when it can be done to the profit and benefit of the municipality." The planned Meridian refunding bonds would not create a new indebtedness, but would "simply change the form of the indebtedness" as discussed in *Sebern* and *Veatch, supra.*

In summary, Idaho Constitution, art. 8, § 3, is not violated by issuance of refunding bonds which result in a net present value savings to a district without increasing the outstanding indebtedness of the district. The outstanding indebtedness is not increased by selling refunding bonds at a premium provided the premium is used for refunding purposes.

AUTHORITIES CONSIDERED:

1. *Constitutions*

   Idaho Constitution, art. 8, § 3.

2. *Statutes*

   Idaho Code § 57-504.

3. *Cases*

Dickson v. County of Elliot, 357 S.W.2d 852 (Ky. App. 1962).

Lloyd Corp. v. Bannock County, 53 Idaho 478, 25 P.2d 217 (1933).

Marsing v. Gem Irrigation Dist., 56 Idaho 29, 48 P.2d 1099 (1935).

Sebern v. Cobb, 41 Idaho 386, 238 Pac. 1023 (1925).

Veatch v. City of Moscow, 18 Idaho 313, 109 Pac. 722 (1910).

4. *Other*

Internal Revenue Code § 149(d)(4).

DATED this 4th day of December, 1990.

JIM JONES
Attorney General
State of Idaho

Analysis By:

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

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[1]Prior to redemption of the 1985 bonds, the district would not benefit from lower interest rates since Internal Revenue Code §149(d)(4) and corresponding regulations deny tax exempt status to state and local government advance refunding bonds which are designed to obtain a material financial advantage based upon arbitrage, apart from savings attributable to lower interest rates. Thus, Meridian School District may not earn a greater yield on the federal securities than is paid on the refunding bonds. However, substantial interest benefits would be received by the district from lower interest rates following the call of the 1985 bonds.

[2]Bonds normally involve both a principal obligation and an interest obligation. The interest obligation may be evidenced by coupons which may be redeemed at various

interest payment dates. We understand such coupons are designated "A" coupons by industry convention. However, for marketing purposes bonds are sometimes issued with two sets of coupons designated by convention "A" coupons and "B" coupons. For example, a bond maturing in 10 years might have a 6 percent "A coupon" for the entire 10 years and also a 3 percent "B coupon" payable only during the last 5 years of the bond. The "B" coupons frequently are sold separately from the bonds to investors whose investment needs differ from the bondholder buying only the "A" coupons. In this case, at the time the bonds become either callable or when due all "B" coupons will have been paid. Such "B" coupons represent an additional rate of interest for a portion of the bond period.

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1990

Jim Jones
Attorney General
State of Idaho

January 3, 1990

Board of Bannock County Commissioners
P.O. Box 4016
Pocatello, Idaho 83205-4016

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

Re: Mandatory Foreign Student Health Insurance

Dear Bannock County Commissioners:

You recently asked our office the question, "whether or not the colleges and universities in the state of Idaho could, without violating any laws, compel all foreign students to maintain health insurance on themselves and their families while they attend school?"

As you may be aware, none of the institutions of higher education under the jurisdiction of the State Board of Education currently imposes different requirements for foreign students than for other students with respect to student health insurance. Each institution is permitted to contract with individual health insurance carriers and the respective insurance policies have varying requirements. None of the institutions has absolutely mandatory health insurance for all students. The University of Idaho and Lewis-Clark State College have health insurance which is completely optional, but do require accident insurance for all students. Boise State University and Idaho State collect a fee for health insurance from all students upon registration, but students may thereafter cancel the insurance and receive a refund. There is no mandatory accident insurance.

The policy you have suggested singles out foreign students and does raise the issue whether such a policy would be consistent with the Equal Protection Clause of the fourteenth amendment to the United States Constitution. In analyzing state legislation or regulations under the Equal Protection Clause, the first and most obvious step is determining "whether the regulations in fact discriminate" against a particular class. *Watkins v. U.S. Army,* 875 F.2d 699, 712 (9th Cir. 1989). In this case, the suggested policy no doubt discriminates against foreign students and their dependents.

The next, and often the most critical step in the analysis, is determining which level of judicial scrutiny will be applied to the policy. The United States Supreme Court has recognized three levels of scrutiny, depending upon the nature of the classifications and the interests involved. At the upper or "stricter" end of the spectrum is the "strict judicial scrutiny" test, and at the other end is the "rational basis" test.

"In order to withstand strict judicial scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter,* 467 U.S. 216, 219 (1984). A law or regulation which is subject to "strict scrutiny" is seldom sustained. As has been noted, "strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Id.,* 467 U.S. at 219, n. 6 *citing* Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv.L.Rev. 1, 8 (1972). Generally, "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny." *Bernal, supra,* 467 U.S. at 219; *see also, Nyquist v. Mauclet,* 432 U.S. 1, 7 (1977); *Graham v. Richardson,* 403 U.S. 365, 372 (1971) (state classifications based upon alienage are "inherently suspect and subject to close judicial scrutiny"). A class consisting of "all foreign students" would certainly be a suspect class, and the suggested policy would be subject to this most exacting test.

The U.S. Supreme Court has also derived an "intermediate" test, *Plyler v. Doe,* 454 U.S. 223 (1982), for examining discrimination against "quasi-suspect" classes. Nowak, Rotunda & Young, *Constitutional Law,* Ch. 16, § 1, at 593 (2d ed. 1983). Under this test, the classification must be substantially related to an important government interest. This test has been applied to groups not otherwise protected by the strict scrutiny standard, where a "history of past discrimination" against such groups is demonstrated. *Watkins, supra,* 875 F.2d at 712, n. 4. For example, the Supreme Court scrutinized under this standard a Texas statute which withheld from local school districts state funds for the education of children of undocumented aliens. *Plyler v. Doe,* 457 U.S. 203 (1982). The Court found that the statute did not further a substantial state interest, and therefore struck it down.

If neither of the "heightened scrutiny" tests referred to above is applicable, the state policy in question must only meet the "rational basis" test. The test here is simply whether "the classification is rationally related to a legitimate government interest." *Watkins, supra,* 875 F.2d at 712.

In determining which level of scrutiny would apply to the suggested policy, we have attempted to find judicial precedents involving a similar mandatory foreign student health insurance rule. Only one case, from another jurisdiction, deals directly with this issue.

In *Ahmed v. University of Toledo,* 664 F.Supp. at 282 (N.D. Ohio 1986), *appeal dismissed,* 882 F.2d 26 (5th Cir. 1987), the district court had occasion to review the following policy of the Board of Trustees of the University of Toledo:

> [A]ll entering foreign students of the University of Toledo [are required] to carry health insurance equal to the Blue Cross-Blue Shield plan offered University students or a comparable health insurance policy. . . The Office of

> the Foreign Student Advisor shall be charged with enforcing this regulation even to the extent that it may cancel a student's registration after due notice.

Id., 664 F. Supp. at 282. Significantly, the court pointed out that, "[i]n implementing the policy . . . the University defines the terms *'foreign student'* and *'international student'* synonymously and to *include only students who are in the country on nonimmigrant student visas,* such as F-1s." *Id.* (Emphasis added.) The limitation of the class to nonimmigrant students resulted in the following conclusions by the court:

> The policy . . . is not in conflict with the Equal Protection Clause. Resident aliens are not subject to the policy. Therefore, the University's classification is not based upon "alienage" or other suspect classification.
>
> International students (nonimmigrant alien students) are not a suspect classification. See *Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). In cases in which the Supreme Court has applied the strict scrutiny standard of review to a state classification affecting aliens, the challenged statute or practice discriminated against *permanent resident aliens.* [Citations omitted.] *The Supreme Court has not suggested that nonimmigrant aliens are within the class protected under the suspect classification doctrine.*

Id., 664 F.Supp. at 286-87 (emphasis added).

As to the appropriate test to be applied and its analysis under that test, the court stated that:

> The University's health policy must be judged by the rational basis test. Under that test, it is the plaintiff's burden to demonstrate that the University's health insurance policy is wholly unrelated to a legitimate end . . . The rationale for the policy is the protection of foreign [nonresident alien students] in the face of medical needs which, absent insurance, could be a potential medical crisis. International students do not have a constitutional right to attend American universities without complying with the institutions' reasonable regulations.

Id., at 287. The case was appealed to the Sixth Circuit Court of Appeals but dismissed as moot. Accordingly, we have no appellate review of the substantive issues decided by the lower court, and it is not possible to guarantee that the courts of this state, the federal district court, or the Ninth Circuit Court of Appeals will follow the *Ahmed* ruling. Even if they did, the policy suggested for Idaho universities, being addressed to "all foreign students," would be based upon "alienage" and subject to strict scrutiny. *Ahmed, supra,* 664 F.Supp. at 286. Of course, if the classification were more narrowly limited to nonresident [nonimmigrant] alien students, as described above, the policy would stand a greater chance of being sustained. However, it is still not clear that the courts of this jurisdiction would completely agree with the *Ahmed* court's reasoning.

The Ninth Circuit Court of Appeals, in particular, has indicated in *dicta* in at least one decision that it might not accept the distinction between resident aliens and nonresident aliens suggested by the district court in *Ahmed*. In *United States v. Verdugo-Urquidez,* 856 F.2d 1214 (9th Cir. 1988), the court stated:

> The Supreme Court has extended significant constitutional benefits to aliens within the United States, *without distinguishing between those who are here legally or illegally, or between residents and visitors. See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed.2d 220 (1886) ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States].") . . . From these cases, we learn that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments.

Id., at 1222. *See also, Olagues v. Russoniello,* 797 F.2d 1511, 1520-21 (9th Cir. 1986) (*citing Bernal v. Fainter, supra,* and *Graham v. Richardson, supra,* for proposition that immutability of characteristics is not "sole determining factor" in decision to find suspect class and that "the Supreme Court has held that aliens form a suspect class").

On the other hand, the Ninth Circuit has indicated greater tolerance for state classifications consistent with federal classifications or policies. In *Sudomir v. McMahon,* 767 F.2d 1456 (9th Cir. 1985), the court upheld California's denial of AFDC benefits to aliens whose presence was illegal and whose only claim of entitlement was their filing of applications for political asylum. The court found that because the state had employed "both a federal classification and a uniform federal policy regarding the appropriate treatment of a particular subclass of aliens," *id.* at 1466, the district court "correctly applied the relaxed scrutiny standard." *Id. See also, Mow Sun Wong v. Campbell,* 626 F.2d 739, 744 n. 10 (9th Cir. 1980), cert. den. 450 U.S. 959 ("Recent Supreme Court cases have treated classifications by a *state* based on alienage to be 'inherently suspect and subject to close judicial scrutiny.' (Citations omitted.) In comparison, the Court has applied a more relaxed scrutiny in cases involving *federal* classifications based on alienage." (emphasis in original).

In distinguishing *Plyler v. Doe, supra,* the court stated:

> Had there been an articulated federal policy [in *Plyler*], the Court makes clear the situation would have been different:
>
> > With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary power to determine who has sufficiently

> manifested his allegiance to become a citizen of the Nation. No state may independently exercise a like power. *But if the Federal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the states may, of course, follow the federal direction.*

Sudomir v. McMahon, supra, 767 F.2d at 1466, *quoting Plyler v. Doe, supra,* 457 U.S. at 219 n. 19 (emphasis by Ninth Circuit).

It may be possible to discern a "federal direction" consistent with a policy, such as that described in *Ahmed,* which mandates health insurance for nonimmigrant student aliens. 8 C.F.R. § 214.2(f)(1) (A) requires such student applicants for visas to submit "documentary evidence of the student's *financial ability* required by [Form I-20A-B]." It can be argued, and it was implicit in the *Ahmed* court's rationale, that an insurance requirement would be entirely consistent with federal policy in this regard. However, it might also be asked why the federal government, by "uniform rule," in the Code of Federal Regulations or on the I-20A-B form itself, does not explicitly mandate insurance as one of the "appropriate standards for the treatment of an alien subclass." Indeed, given the deferential standard applied to *federal* classifications based upon alienage for purposes of the immigration laws, *(Mow Sun Wong v. Campbell, supra; Mathews v. Diaz,* 426 U.S. 67 (1976)), the better approach here might be to ask the federal government, rather than a state agency, to adopt a mandatory health insurance rule.

In summary, a requirement that "all foreign students" be required to maintain health insurance would be judged by the strict judicial scrutiny standard and would probably be found in violation of the Equal Protection clause of the fourteenth amendment. If the requirement applied only to nonimmigrant alien students, as suggested in the *Ahmed* decision, it is more likely the requirement would be analyzed under the rational basis test and meet with judicial approval. However, it is not entirely clear that the Ninth Circuit would follow the *Ahmed* court's approach to this issue. Given the pervasive role of the federal government in immigration and naturalization matters, and considering the judicial deference to federal classifications based upon alienage noted previously, the federal government may be in a better position to address your concern than the State Board of Education.

Sincerely,

BRADLEY H. HALL
Chief Legal Officer,
State Board of Education and
Deputy Attorney General

January 9, 1990

Major General James S. Brooks
P.O. Box 141
Garden Valley, ID 83622

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

Re: Constitutionality of Landowner Restrictions on Right to Petition for Creation of Fire Protection District Under Idaho Code §§ 31-1402 and 31-1403

Dear Major General Brooks:

In your letter to me you have asked about the constitutionality of landowner restrictions on the right to petition for the creation of a fire protection district under Idaho Code §§ 31-1402 and 31-1403. Under those sections, the formation of a fire protection district begins only if twenty-five "holders of title" of a certain amount or value of land in the proposed district sign and present a petition to the Board of County Commissioners in the county where the proposed district is situated.

Presentation of the petition is the first of a three step petition-hearing-election process necessary to create a fire protection district under Idaho Code title 31, chapter 14. Although the election allows all those who are electors and residents within the proposed district to vote in favor of or against the district's formation, the landowners have, through their petitioning rights, the exclusive power to determine whether the district formation and election process can begin.

On September 1, 1989, the Attorney General's Office issued a legal guideline concluding that a similar landowner restriction under Idaho Code § 31-1409 is unconstitutional. Section 31-1409 requires commissioners appointed and elected to the fire protection board in each district to be "freeholders." The guideline concluded that the freeholder qualification for commissioners violates article 1, § 20, of the Idaho Constitution, which provides, with certain exceptions, that "[n]o property qualifications shall ever be required for any person to vote or hold office."

The guideline further concluded that the freeholder qualification violates the Equal Protection Clause of the United States Constitution, which has been interpreted in United States and Idaho Supreme Court decisions to prohibit election restrictions based upon property ownership unless the purpose of the election is directly linked with land ownership. *Quinn v. Millsap,* _____ U.S. _____, 109 S. Ct. 2324, 105 L.Ed. 2d 74 (1989); *Johnson v. Lewiston Orchards Irrigation District,* 99 Idaho 501, 584 P.2d 646

(1978). The guideline reasoned that residents who do not own land have a considerable interest in fire protection districts and cannot be constitutionally excluded from holding the office of fire protection district commissioner.

The constitutional limitations on property qualifications restricting the right to vote have been held to apply to petitioning rights in cases where the decision affected by the petition is a matter finally decided by an election. In *City of Seattle v. State,* 103 Wash. 2d 663, 694 P.2d 641 (1985), the Washington Supreme Court held unconstitutional on equal protection grounds a statute that allowed property owners to block a city annexation election by filing a petition opposing the annexation. The court summarized annexation cases from other jurisdictions that have similarly struck down statutes giving landowners unequal influence over the elective process:

> In cases in which the final decision on annexation was made in an election, the courts have not approved statutes which grant additional influence over the outcome to property owners. . . . In *Hayward v. Clay,* 573 F.2d 187 (4th Cir. 1978), the Fourth Circuit found invalid a statute which allowed rejection of annexation by the vote of property owners to override approval by the vote of all residents. Comparing the procedure to the dual election box procedure invalidated in *Hill v. Stone, supra,* the court focused on the effect of the statute, stating that:
>
> > the statutes of both states create property-based classifications of voters in an election of general interest and empower those with property to override the votes of those without. It is this restriction of the *effective franchise* to a property owning class — not the mechanics of accomplishing the restrictions — that offends the equal protection clause.
>
> (Italics ours.) *Hayward,* at 190.

We find particularly persuasive the reasoning in *Curtis v. Board of Supervisors,* 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972). In *Curtis,* the California Supreme Court held invalid a statute very similar to RCW 35.13.165. The California statute allowed fifty-one percent of property owners to block an election on the incorporation of a new city by filing a petition opposing incorporation. The California court stated at 955, 104 Cal. Rptr. 297, 501 P.2d 537:

> We conclude that a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to "touch upon" and to "burden" the right to vote, and therefore must be examined under the strict equal protection standards.

> (Footnote omitted.) We likewise are persuaded that RCW 35.13.165 restricts the effective franchise and burdens the right to vote.

694 P.2d at 646-47.

The fire protection district petitioning scheme under Idaho Code §§ 31-1402 and 31-1403 similarly gives landowners the power to block an election to form a district by choosing not to sign a petition for the district's formation. One law review comment specifically discusses why such restrictions on the right to sign initiating petitions are unconstitutional:

> Some petition systems used in annexation do, however, discriminate against an independently identifiable group of voters. Commonly, eligible signers of the initiating petition are limited to persons from a single area, such as the area to be annexed, who thereby gain the power to block an annexation. When the election to come requires only single-majority approval, the effect of allowing only one area to initiate the election is to give that area a veto that the other lacks. While no annexation will be approved that a majority of those affected oppose, it is clearly possible that some annexations which are supported by a majority of those affected will never even be voted on. Such an increase in the power of residents of a single area would seem unconstitutional, given the Court's general prohibition of any weighting of the franchise which is not justified by a significant state interest.

Comment, The Right to Vote in Municipal Annexations, 88 Harv. L. Rev. 1571, 1606 (1975).

CONCLUSION:

Idaho Code §§ 13-1402 and 13-1403 provide landowners the power to prevent an election for the creation of a fire protection district. Therefore, the landowner restriction touches upon and burdens the fundamental right to vote on a matter in which all resident electors have a substantial interest. Accordingly, under the strict scrutiny standard mandated by the equal protection clause, the restriction must be "necessary to promote a compelling state interest" in order to survive constitutional attack. *Johnson v. Lewiston Orchards*, 584 P.2d at 648. As explained in City of Seattle v. State, it is well settled that a state does not have a compelling state interest in granting greater voting rights on the basis of property ownership, even if the results of the election will affect property taxes. 694 P.2d at 647. No other justification appears for granting landowners in the proposed district greater power over the decision to form a fire protection district. Thus, the landowner restriction on the right to petition for creation of a fire protection district under Idaho Code §§ 31-1402 and 31-1403 is unconstitutional.

If you have any further questions regarding this matter, please do not hesitate to call.

Sincerely,
Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

January 11, 1990

Honorable Stan Hawkins
State Representative, District 33
House of Representatives
STATEHOUSE MAIL

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

Re: Revenue Measure Origination
Idaho Constitution, Article 3, Section 14

Dear Representative Hawkins:

In your letter of December 5, 1989, you ask whether county finance measures enacted by the Legislature must originate in the House of Representatives. Idaho Constitution, article 3, section 14, provides as follows:

> Bills may originate in either house, but may be amended or rejected in the other, *except that bills for raising revenue shall originate in the house of representatives.* [Emphasis added.]

Few cases in Idaho have considered this provision and its meaning. In *Dumas v. Bryan,* 35 Idaho 557, 207 Pac. 720 (1922), the Idaho Supreme Court considered the issue of whether levying a direct tax on all the property of the state for the purpose of providing funds for the construction of buildings at Albion Normal School constituted a revenue bill for purposes of this section. The court found that the bill, which originated in the Senate, was a revenue bill because it provided for the direct tax against all property of the state for general governmental purposes:

> It will not do to say that this tax represents a mere incident to the main purpose of the bill, for this would be a mere evasion. Most revenue bills could in the same manner be made incidental. The amount of the tax levied is immaterial, for the constitution requires that all bills for raising revenue shall originate in the house. This is as truly a tax levied for governmental purposes as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of art. 3, sec. 14, of the constitution.

Id., 35 Idaho at 566.

In *State ex rel. Parsons v. Workmen's Compensation Exchange,* 59 Idaho 256, 81 P.2d 1101 (1938), the supreme court found that the requirement that employers pay to the state the sum of $1000.00 on the death of an employee where no dependents existed did not constitute revenue for the purposes of this section. Rather, the court found this payment to be "compensation" as opposed to a license fee, excise tax, or any other tax. 59 Idaho at 260. Thus, the bill creating this provision properly was initiated in the Senate.

Finally, in *Worthen v. State,* 96 Idaho 175, 525 P.2d 957 (1974), the supreme court held that article 3, section 14, does not prohibit the Senate from amending a revenue measure properly started in the House of Representatives. However, the Idaho courts have never addressed the question of whether a bill granting counties or any other local governments the authority to tax local property or citizens for the support of local government is a revenue bill requiring initiation in the House of Representatives.

Other jurisdictions which have addressed this question have unanimously held that such bills are not revenue bills and thus may be initiated in either body. For example, in *Evers v. Hudson,* 92 Pac. 462 (Mont. 1907), the Montana Supreme Court upheld the enactment of a bill initiated in the Montana Senate which provided for a local property tax for the support of a local high school. The court stated:

> In any event, the tax is only upon the property of the county, and the funds to be raised belong exclusively to the particular school for which they are raised. No part of the funds can by any possible means find its way into the state treasury, and the provisions of this section of the Constitution clearly refer to revenues of the state.

92 Pac. at 466. The court cited favorably from *Rankin v. City of Henderson,* 7 S.W. 174 (Ky. 1888), where the Kentucky courts specifically found that this type of constitutional provision does not apply to situations which delegate taxing authority to local government merely for the maintenance of that local government. See also *Fletcher v.*

Oliver, 25 Ark. 289 (1868), and Annot., "Application of Constitutional Requirement that Bills for Raising Revenue Originate in Lower House," 4 A.L.R. 2d 973 (1948).

In *Dickey v. State,* 217 Pac. 145 (Okla. 1923), the Oklahoma Supreme Court stated:

> In our opinion, the constitutional provision referred to has reference to bills for raising revenue to meet the expense of the state government and has no reference to bills which authorize a municipal subdivision of the state to raise revenue for defraying the expense of such municipality. While the bill authorizes the municipal subdivision of the state to levy tax for a particular purpose, yet it does not raise revenue, and the revenue is not raised until the municipality exercises authority granted by the bill, hence the constitutional provision referred to has no application.

217 Pac. at 146.

Based on the foregoing decisions, it is our opinion that legislative measures granting taxing authority to local government entities, such as counties, cities and school districts, are not revenue measures that come within the purview of article 3, section 14, and thus, may be initiated in either the Senate or House of Representatives. See 1986 Attorney General's Opinions and Annual Report 145-149.

If you have additional questions, please do not hesitate to contact me.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

January 18, 1990

W. H. Fawcett
Boise City Attorney
P.O. Box 500
Boise, ID 83701

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

Re: Seizure of Vehicle Registration Cards and License Plates

Dear Mr. Fawcett:

You have presented the following questions:

> Do officers have the duty to seize and immediately surrender to the Idaho Transportation Department the registration cards and the license plates of vehicles operated without liability insurance and does the Idaho Transportation Department have the duty to accept, such registration cards and license plates from the officers?

It is my understanding that Boise police officers have been seizing and immediately surrendering vehicle registration cards and license plates to the Idaho Department of Transportation based on Idaho Code §§ 49-1230 and 1232. The Idaho Department of Transportation has refused to accept the confiscated vehicle registration cards and license plates, based on its opinion that the statutes do not authorize seizure or confiscation. Finally, you represent that the practice of seizing vehicle registration cards and license plates effectively guarantees that uninsured vehicles are not driven after the driver is cited for no insurance.

The statutes in question are not ambiguous. Idaho Code § 49-1229 requires the owner of a motor vehicle registered and operated in Idaho to maintain liability insurance. A person must certify the existence of the required liability insurance before registering the motor vehicle. Idaho Code § 49-1230. Idaho Code § 49-1230 further provides in part:

> *An owner* of a motor vehicle who ceases to maintain the insurance required in accordance with this chapter *shall immediately surrender the registration card and license plates for the vehicle to the department* and may not operate or permit operation of the vehicle in Idaho until insurance has again been

> furnished as required in accordance with this chapter and the vehicle is again registered and licensed. (Emphasis added.)

Finally, the operator of every motor vehicle must have in his or her possession a certificate or proof of liability insurance which must be provided for inspection to any peace officer upon request. Idaho Code § 49-1232. However, no person may be convicted of a violation of Idaho Code § 49-1232 if he or she produces the required certificate or proof of liability insurance at any time prior to conviction.

In the absence of any ambiguity, the words of a statute must be given their plain, usual and ordinary meaning. *Walker v. Hensley Trucking,* 107 Idaho 572, 691 P.2d 1187 (1984). Where a statute is clear and unambiguous, the expressed legislative intent must be given effect. *Intermountain Health Care, Inc. v. Board of County Commissioners of Madison County,* 109 Idaho 685, 710 P.2d 595 (1985). Additionally, criminal statutes are strictly construed in both their substantive elements and in their sanctions. *State v. McKaughen,* 108 Idaho 471, 700 P.2d 93 (Ct. App. 1985). The statutes in question are clear and unambiguous; therefore, the statutes' expressed intent must be given effect.

Neither Idaho Code § 49-1230 nor § 49-1232 supports the seizure of a vehicle's registration card and license plates by a peace officer. Idaho Code § 49-1230 requires a motor vehicle owner who ceases to maintain the required liability insurance to "immediately surrender the registration card and license plates for the vehicle to the Department. . . ." The clear intent of the statute is that a motor vehicle owner has the duty to yield the possession of the vehicle registration card and license plates to the Idaho Department of Transportation if and when the owner ceases to maintain the required liability insurance. Idaho Code § 49-1230 does not authorize seizure or confiscation of registration cards or license plates, and clearly does not impose a duty on or authorize peace officers to take any such action. The motor vehicle owner, not the police officer, is the one directed to surrender the registration card and license plate.

Idaho Code § 49-1232 likewise provides no authority to seize or confiscate registration cards and license plates. That statute prevents conviction if proof of insurance is provided *at any time* prior to conviction. Thus, the statute expressly envisions situations in which a driver lacking proof of insurance at the time of the stop may nonetheless be insured, and provides a mechanism for curing the defect of failing to carry the certificate.

Based on Idaho Code §§ 49-1230 and 49-1232, the answer to each of your questions is "No." The adoption of a policy of seizing motor vehicle registration cards and license plates of uninsured vehicles would require a statutory change. A model for such change can be found in Idaho Code § 49-1222, which specifically authorizes a peace officer to

secure a person's operator's or chauffeur's license at the direction of the Idaho Department of Transportation, when the license has been suspended. The fact that no similar express authority to confiscate registration cards and license plates is found in Idaho Code §§ 49-1230 or 49-1232 is a clear indication that the legislature has not yet chosen to adopt such a policy.

Sincerely,

W. Dallas Burkhalter
Deputy Attorney General

January 19, 1990

Dr. John Martin
Director of Admissions/Registrar
College of Southern Idaho
P.O. Box 1238
Twin Falls, Idaho 83303-1238

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

Re: Use of Optical/Laser Disk Technology for Archive Purposes

Dear Dr. Martin:

You have asked whether it is legal for a public institution such as the College of Southern Idaho to use optical/laser disk technology for purposes of storing records. The information which accompanied your request indicates your primary concern is whether the courts of this state will accept records stored and retrieved using the optical/laser method as admissible evidence. Assuming that foundational requirements including relevancy and authentication are met in a given case, based upon our reading of Idaho law, it appears there is no inherent reason that information stored by this method would not be admissible as evidence.

Idaho has adopted the Uniform Photographic Copies of Business Records as Evidence Act, Idaho Code §§ 9-419 to 419. Section 9-417 states:

> If any business, institution, or member of a profession or calling, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, *or other process which accurately reproduces or forms a durable medium for so reproducing the original,* the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. *Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself* in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (Emphasis added.)

Article X of The Idaho Rules of Evidence permits the admission into evidence of "duplicates." A "duplicate" is defined as:

> A counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces [sic] the original.

I.R.E. 1001(4). Assuming the optical/laser method you have described "accurately reproduce[s] the original" record, then the "duplicates" which are retrieved would normally be admissible. *See also,* I.R.E. 1005 (public records).

The Idaho Rules of Evidence, patterned after the Federal Rules of Evidence, also appear to address the admissibility of hearsay evidence recorded by the method you have described. Rule 803 sets forth various exceptions to the hearsay rule. Among the types of evidence *not* excluded, even though technically hearsay, are certain "public records and reports":

> Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, *records, reports, statements, or data compilations in any form of a public office or agency* setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority

> granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

I.R.E. 803(8); *see also,* 803(6).

In a leading case in which the admission of certain bank "computer records" was challenged, the Fifth Circuit Court of Appeals held that under F.R.E. 803(6) (a corollary to I.R.E. 803(6) cited above), "*computer data compilations* may be business records themselves, and *should be treated as any other record of regularly conducted activity.*" *Rosenberg v. Collins,* 624 F.2d 659, 665 (5th Cir. 1980). The court found that computer business records are admissible if three conditions are met:

> (1) The records must be kept pursuant to some routine procedure designed to assure their accuracy, (2) they must be created for motives that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and (3) they must not themselves be mere accumulations of hearsay or uninformed opinion. (Emphasis in original.)

Id., citing United States v. Fendby, 522 F.2d 181, 184 (5th Cir. 1975).

Based upon the description of the optical storage system you have described, and assuming the conditions noted above are met, it would appear likely that the courts of this state would admit records stored and retrieved by this method.

Very truly yours,

Bradley H. Hall
Chief Legal Officer,
State Board of Education, and
Deputy Attorney General

January 24, 1990

Senator Ralph E. Lacy
Idaho State Senate
Statehouse Mail

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

Re: Revenue Measure Origination
Idaho Constitution, Article 3, Section 14

Dear Senator Lacy:

You have asked (1) whether a bill reducing existing sales or income tax rates may constitutionally originate in the Idaho State Senate; and (2) whether, in the event such legislation were declared unconstitutional, prior state tax rates would remain in effect.

The Idaho Constitution, article 3, section 14, provides:

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

Few cases in Idaho have considered this provision and its meaning. In *Dumas v. Bryan,* 35 Idaho 557, 207 Pac. 720 (1922), the Idaho Supreme Court considered the issue of whether levying a direct tax on all the property of the state for the purpose of providing funds for the construction of buildings at Albion Normal School constituted a revenue bill for purposes of this section. The court found that the bill, which originated in the Senate, was a revenue bill because it provided for the direct tax against all property of the state for general governmental purposes:

> It will not do to say that this tax represents a mere incident to the main purpose of the bill, for this would be a mere evasion. Most revenue bills could in the same manner be made incidental. *The amount of the tax levied is immaterial, for the constitution requires that all bills for raising revenue shall originate in the house.* This is as truly a tax levied for governmental purposes as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of art. 3, sec. 14, of the constitution.

Id. 35 Idaho at 566 (emphasis added).

In general, "revenue bills" refer to bills that generate revenue to meet the general expenses of government. The issue of a revenue bill which effectively *decreases* taxes has not been specifically addressed by the Idaho courts. The majority of other courts addressing the issue have, however, construed "raising revenue" in similar constitutional provisions to include those bills that have the effect of reducing revenue. In *Weisinger v. Boswell,* 330 F.Supp. 615 (M.D.Ala. 1971), for example, the federal district court construed language of the Alabama Constitution virtually identical to that of the Idaho Constitution. The court concluded:

> In Alabama, any bill whose chief purpose is to create revenue *or to increase or decrease revenue* is one to "raise revenue" and must originate in the House of Representatives. Opinion of the Justices, 238 Ala. 289, 290, 190 So. 832 (1939).

330 F.Supp. at 624 (emphasis added).

While there is authority to the contrary, it is likely that the Idaho court would adopt the same construction of the Idaho Constitution because the language is so similar to the Alabama constitutional provision. We conclude that a bill which imposes a sales or income tax, albeit at a rate reduced from existing law, does fall within the restriction of article 3, section 14 of the Idaho Constitution and, therefore, must be introduced in the House of Representatives.

The general rule regarding the effect of declaring a state statute unconstitutional has been stated as follows: "The elementary rule of statutory construction is without exception that a void act cannot operate to repeal a valid existing statute, and the law remains in full force and operation as if
the repeal had never been attempted." *Conlon v. Adamski,* 77 F. 2d 397, 399 (D.C.Cir. 1935).

Thus, if a bill to change the income or sales tax rates is introduced in the Senate and later declared unconstitutional because it did not originate in the House of Representatives, the effect would be to reinstate the prior state statute on the same subject which had been replaced. Therefore, prior state tax rates would remain in effect.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

January 26, 1990

Honorable Pamela I. Bengson
House of Representatives
STATEHOUSE MAIL

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

Re: Citizen Advisory Vote; Abortion

Dear Representative Bengson:

You have asked the following questions:

1. May the legislature authorize a referendum consistent with the provisions of the Idaho Constitution and the Idaho Code;

2. If so, may the referendum be nonbinding; and

3. May it provide for alternate choices by the voters?

For the sake of clarity, a definition of terms is in order. "Referendum" in Idaho means the power of the electorate to approve or reject any act of the legislature. As distinguished specifically from "initiative," it is the power of the people to approve or set aside a measure which *has actually been passed* into law by the legislature. An "initiative" permits direct enactment of laws by the people. "Initiative" and "referendum" are specifically defined and authorized by article 3, section 1, of the Idaho Constitution, which provides in pertinent part:

> The people reserve to themselves the power to approve or reject at the polls *any act or measure passed by the legislature.* This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
>
> The people reserve to themselves the *power to propose laws,* and *enact the same* at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection. (Emphasis added.)

Chapter 18 of title 34 is the enabling legislation for the constitutional provision. There, too, "initiative" and "referendum" are specifically defined in reference to the passage of law.

Notably, only two issues have been subject to referendum in the history of our state: sales tax in 1935 and again in 1965 and the right to work in 1982.

Close reading of your questions suggests that your proposal contemplates an advisory vote of the people, as opposed to a "referendum" per se. The only specific provision in Idaho law for an advisory vote is found at Idaho Code § 34-2217, which authorizes submitting the question of ratification of amendments to the United States Constitution to the Idaho electorate on an advisory basis. This section, entitled "Referendum on United States constitutional amendment - Advisory nature" adds to the confusion regarding the nature of a referendum. "Referendum" as used in this title is not the "referendum" authorized in article 3, section 1, of the Idaho Constitution. This provision simply authorizes an advisory vote of the people.

While the measure you propose is not a "referendum" or "initiative" subject to the provisions of article 3, section 1, of the Idaho Constitution or of Idaho Code §§ 34-1801 et seq., advisory votes are neither authorized nor prohibited by the Idaho Constitution. In the absence of a specific prohibition, the legislature may place such an advisory question on the ballot. Because such a vote is outside the scope of article 3, section 1, of the Idaho Constitution, however, it will have no binding effect.

If you have any questions, please let me know.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

February 2, 1990

The Honorable Pete T. Cenarrusa
Secretary of State
STATEHOUSE MAIL

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

Re: Requirements for Candidacy for the United States Senate and House of Representatives

Dear Mr. Cenarrusa:

You have inquired regarding the constitutionality of Idaho Code sections 34-604, 34-605, and 34-1904, pertaining to requirements for candidacy for the United States Senate and House of Representatives. Specifically, § 34-604 requires that a United States Senate candidate be an Idaho resident for a minimum of two years; § 34-605 requires the same of candidates for the House of Representatives, and § 34-1904 requires that a candidate for the United States House of Representatives be a resident of the congressional district he desires to represent.

As you have noted, the United States Constitution imposes restrictions on those persons who may be members of Congress. Article I, section 2, clause 2 provides:

> No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Article I, section 3, clause 3 provides:

> No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

An "inhabitant of that state," as used in these constitutional provisions, has been taken to mean "resident."

E.S. Corwin, *The Constitution and What it Means Today* 10 (14th Ed. 1978).

It is a fundamental principle of American law that the Constitution of the United States is the supreme law of the land, and all legislative, executive, and judicial officers of

the United States and of the several states and all the people in the land are bound thereby. *Dodge v. Woolsey,* 18 How. 331, 15 L.Ed. 401 (1855).

The Idaho statutes in question operate to limit the rights of Idaho residents to run for the U.S. House and Senate more stringently than the standards set forth in the United States Constitution. The United States Supreme Court held in *Powell v. McCormack,* 395 U.S. 486 (1969), that the United States House of Representatives had *no* power to exclude from its membership any person who was duly elected by his or her constituents and who met the age, citizenship, and residence requirements specified in the United States Constitution. Under the Supremacy Clause of the United States Constitution, the states may not impose additional restrictions or limitations. So long as a candidate for the Senate or House meets the requirements set forth in the U.S. Constitution, he or she is qualified to run for federal office.

With respect to the two-year residency requirement set forth in §§ 34-604, the courts would likely rule as they have with respect to similar residency requirements for voting in federal elections. The federal judiciary has consistently ruled that lengthy residency requirements for voting purposes are unconstitutional. *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 92 S.Ct. 995 (1972); Annot., 31 L.Ed.2d 861. Responding to these cases, the states have adopted fairly nominal residency requirements. Thus, Idaho Code § 34-402 sets a 30-day residency requirement for voting purposes.

With respect to Idaho Code § 34-1904, a similar result would obtain. Article I, section 2, clause 2 requires only that a person running for representative be an "inhabitant" of the state in question. A state requirement that the person also be a resident of the congressional district in question goes beyond the U.S. constitutional provision and would be held unenforceable. The question was addressed in *Chavez v. Evans,* 79 NM 578, 446 P.2d 445 (1968), by the Supreme Court of New Mexico. The court struck down a New Mexico statute which read as follows:

> Each candidate for the office of representative in Congress shall be a resident and qualified elector of the district in which he seeks office.

In doing so the court stated:

> The constitutional qualifications for membership in the lower house of Congress exclude all other qualifications, and state law can neither add to nor subtract from them. . . .The state may provide such qualifications and restrictions as it deems proper for offices created by the state; but for offices created by the United States Constitution, we must look to the creating authority for all qualifications and restrictions.

> Clearly, [the above-quoted statute], by requiring that each candidate for representative in Congress be a resident of and a qualified elector of the district in which he seeks office, adds additional qualifications to becoming a candidate for that office. Accordingly, we must hold the provisions of the Federal Constitution prevail and that this statute unconstitutionally adds additional qualifications.

446 P.2d at 448.

Similarly, Idaho Code § 34-1904, by imposing additional restrictions, would be held unconstitutional. *See also, Joyner v. Mofford,* 706 F.2d 1523 (9th Cir. 1983), rev'd on other grnds.

In summary it is clear that the residency restrictions you have inquired about would be held in contravention of the less restrictive standards of the United States Constitution. The state could not enforce the two year residency requirement set forth in Idaho Code §§ 34-604 and 34-605 with respect to candidates for the U.S. Senate or House, nor could it require, as set forth in Idaho Code § 34-1904, that candidates for the United States House of Representatives be residents of the district in which they seek election. With regard to the latter section, so long as any candidate has residency in the state in question, he or she would be qualified to run for the U.S. House, provided that he or she was 25 years of age and a resident of the United States for seven years.

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

February 6, 1990

The Honorable Pamela I. Bengson
Chairman, House State Affairs Committee
House of Representatives
STATEHOUSE MAIL

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

Re: Interest on Fish and Game Account

Dear Representative Bengson:

This is in response to your question whether interest earned upon license revenues in the fish and game account should be credited to the fish and game account. Regulations of the U.S. Fish and Wildlife service (50 CFR 80) were amended effective May 17, 1989, to require this result as a condition to remain eligible to receive federal aid funds (Pittman-Robertson and Dingell-Johnson Act funds). Since the state is receiving such federal aid funds, it should credit interest earnings on revenues from fish and game license fees to the fish and game account.

Idaho Code § 67-1210 provides, in pertinent part, with respect to interest earnings on state accounts:

> The interest received on all such investments, unless otherwise specifically required by law, shall be paid into the general account of the state of Idaho. Provided, unless otherwise specifically provided by statute, funds received by the state pursuant to a federal law, regulation, or federal-state agreement which governs disposition of interest earned upon such funds shall be classified in the agency asset fund provided by section 57-811, Idaho Code. Any interest earned upon such funds shall be accounted for separately to give effect to the federal law, regulation, or federal-state agreement.

Thus, interest earnings upon balances in the various state accounts are credited to the general account unless otherwise specifically required by law, including federal laws and regulations.

Pursuant to Idaho Code §§ 36-1801 and 36-1802, the state assents to the provisions of the Pittman-Robertson and Dingell-Johnson Acts which provide aid to the states for wildlife restoration and fish restoration projects. Those federal acts (16 U.S.C. 777 and 16 U.S.C. 669i) and the regulations implementing them (50 CFR 80) provide that

revenues from license fees paid by hunters and fishermen shall not be diverted to purposes other than administration of the state fish and wildlife agency. 50 CFR 80.4(a) was amended effective May 17, 1989, to provide:

> License revenues include income from: . . . (3) Interest, dividends, or other income earned on license revenues.

Consequently, the state is now required to credit the fish and game account with interest earnings upon license revenues. The effective date of the amendments is described in the Federal Register of April 17, 1989, page 15209, in pertinent part, as follows:

> The effective date of these revisions is 30 days after publication in the Federal Register. However, it is recognized that some States may need to enact legislation to meet the requirements of this provision. Therefore, for those States a period not to exceed 3 years after the effective date of the rule will be allowed in order to enact the needed legislation. All other States will need to be in compliance, and remain in compliance, on or after the effective date.

As noted previously, Idaho Code § 67-1210 authorizes the crediting of interest as required by federal regulations. Consequently, no legislation is required to implement a change in procedures to begin crediting the fish and game account with interest earnings from the fish and game account. However, as discussed below, crediting interest to the fish and game account for interest lost during the last fiscal year can only be accomplished by means of an appropriation.

Idaho Const. art. 7, § 13, provides:

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

Since appropriations are made on a fiscal year basis, it is not a violation of Idaho Const. art. 7, § 13, to make necessary corrections 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.

However, the result is not the same for corrections beyond a fiscal year. Idaho Code § 67-3604 requires the state auditor to close his accounts as to all appropriations on July 1 of each year. Thus, in State v. Adams, 90 Idaho 195, 409 P.2d 415 (1965), the Idaho Supreme Court held that Idaho Const. art. 7, § 13, prohibited the state from refunding to a county the state's pro-rata share of a court ordered refund of taxes collected wrongfully in prior years without a legislative appropriation.

Accordingly, an appropriation should be made to the fish and game account for interest earnings from May 17, 1989, through June 30, 1989, assuming the state wants to avoid jeopardizing its eligibility for Pittman-Robertson and Dingell-Johnson Act funds. For the current fiscal year, necessary corrections in accounts can be made to reflect interest earnings due to the fish and game account, provided information can be compiled as to the daily balances in the account.

Sincerely,

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

February 7, 1990

The Honorable Ann Rydalch
Idaho State Senate
STATEHOUSE MAIL

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

Re: Constitutionality of a State Economic Development Fund

Dear Senator Rydalch:

This is in response to your request that we review the proposal submitted by Allan Isen to establish a state economic development fund which would loan money to new businesses which are unable to obtain loans from banks.

In *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960), the Idaho Supreme Court considered the constitutionality of a state statute authorizing municipalities to issue industrial revenue bonds. The court found the statute to be unconstitutional as a violation of several specific sections in the Idaho Constitution. The court also held the statute to be invalid on grounds that any incidental or indirect benefits to the public derived from such bonds could not "transform a private industrial

enterprise into a public one, or imbue it with a public purpose." 82 Idaho at 346. The court went on to quote with approval from the language of a Florida case, *State v. Town of North Miami, Fla.*, 59 S.2d 7'. 9, as follows:

> Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.

Thus, the court appeared to agree that the financing of private enterprises by means of public funds is a concept foreign to our constitutional system. Subsequently, the Idaho Constitution was amended by the addition of art. 8, § 5, providing for industrial revenue bonding. However, that amendment is not broad enough to cover the type of proposal submitted to us. Consequently, the language of the *Moyie Springs* case should still be considered.

In *Nelson v. Marshall,* 94 Idaho 726, 497 P.2d 47 (1972), the Idaho Supreme Court considered the constitutionality of a statute allowing the water resource board to make loans to individuals in special cases approved by the board for the purpose of financing irrigation projects. The court considered whether the statute violated Idaho Constitution art. 8, § 2, which provides:

> The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation, provided, that the state itself may control and promote the development of the unused water power within this state.

The court held that the loaning of credit clause prohibits only the loaning of credit and does not prohibit the loaning of state funds. The court went on to quote with approval the case of *Engelking v. Investment Bd.,* 93 Idaho 217, 458 P.2d 213 (1969), in pertinent part, as follows:

> The credit clause of Idaho Const. art. 8, § 2, is intended to preclude only State action which principally aims to aid various private schemes. As the parties have noted, the loaning of funds by the State is always presumably of some

> benefit to the recipient of the funds. *However, where such a benefit is merely an incidental consequence of efforts to effectuate a broad public purpose, then it cannot be said to violate the credit clause of Idaho Const. art. 8, § 2.*

(Emphasis in original.)

The court then held:

> Since the credit clause does not prohibit the loaning of state funds, the loan challenged here does not offend that provision. Furthermore, this loan constitutes an effort to effectuate a broad public purpose; and, hence, for that reason also, it cannot be said to violate the credit clause.

The *Nelson* case indicates the court may have relaxed its attitude toward loans to private persons. However, the court continues to point out that the credit clause is intended to preclude state action which principally aims to aid various private schemes. Thus, it is quite possible the court would find that the proposed economic development fund is unconstitutional in furthering principally private as opposed to public purposes.

Consequently, if it is possible to do so, we would recommend that a proposal such as that submitted to us be proposed as a constitutional amendment rather than as a statute.

Sincerely,

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

February 13, 1990

Honorable Lee Barnes
State Representative, District 23C
House of Representatives
Statehouse Mail

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

Re: RS23576
Amendments to Idaho Code § 34-1805

Dear Representative Barnes:

In your letter of January 25, 1990, you ask whether the amendments to Idaho Code § 34-1805 which you propose are constitutional. As I read the amendment, it is your intention to require that not more than 20% of the minimum number of signatures for an initiative or referendum petition can come from any one county.

Article 3, section 1, of the Idaho Constitution provides that the power of initiative and referendum are reserved to the people. This section further provides that for both initiative and referendum, the procedure shall be "under such conditions and in such manner as may be provided by acts of the legislature...." This constitutional provision is not self-enacting, but requires legislation to provide for its utilization. *Idaho Water Resources Board v. Kramer,* 97 Idaho 535, 566, 548 P.2d 35 (1976); and *Johnson v. Diefendorf,* 56 Idaho 620, 636, 57 P.2d 1068 (1936).

Requiring a certain number of signatures in order to give effect to the process is a condition precedent and is an acceptable form of legislative enactment. *Idaho Water Resources Board v. Kramer,* 97 Idaho at 567; 42 Am. Jur. 2d *Initiative and Referendum* § 27 (1969). While there is no case law specifically on point, your proposal to limit the number of signatures from any one county appears to fall within the scope of legislative enactment permitted by article 3, section 1, and likely would be constitutional.

If you have additional questions, please do not hesitate to contact me.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

February 22, 1990

The Honorable Darwin Olberding
State House of Representatives
STATEHOUSE MAIL

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

Re: Payments in Lieu of Taxes by Department of Fish and Game

Dear Representative Olberding:

This is in response to your request for our review of RSMHSO52. The proposal would provide that the department of fish and game shall pay the state department of education payments in lieu of taxes upon the lands owned or controlled by the fish and game department. The amount of the payment would be determined based upon the value of such lands and the tax rate which would otherwise be applicable in the county.

Idaho Constitution art. 7, § 4, provides that the property of the state shall be exempt from taxation. In *Robb v. Nielson,* 71 Idaho 222, 229 P.2d 981 (1951), the Idaho Supreme Court considered this section in relation to a statute providing for payment of taxes on land held by the fish and game department in lieu of tax assessments based on valuation. The court held the statute to be unconstitutional, finding that the legislature was attempting to do indirectly that which it could not do directly. The required payment in lieu of taxes was found to violate the constitutional section.

It should be noted that the structure of your bill is somewhat different than the payments in lieu of taxes discussed in the *Robb* case, supra. It could be viewed as a mere transfer of funds from one state account to another state account. However, if the legislature desires to make any such transfers, it should not denominate them as payments in lieu of taxes. Furthermore, it is important to recognize that the amount which could be transferred is limited by federal law as discussed below.

Currently, the state receives federal aid funds for fish and wildlife programs pursuant to the Pittman-Robertson and Dingell-Johnson Acts. Pursuant to Idaho Code §§ 36-1801 and 36-1802, the state assents to the provisions of those Acts. Those Acts provide at 16 U.S.C. 777 and 16 U.S.C. 669(i) that revenues from license fees paid by hunters and fishermen shall not be diverted to purposes other than administration of the state fish and wildlife agency. Thus, those funds are not generally available for transfer to any other state program. The federal regulations implementing those restrictions (50 C.F.R. 80) would permit some state administrative overhead costs to be charged to the

department of fish and game. However, the extent of such permissible charges is quite limited under the regulations. 50 C.F.R. 80.15(d) provides:

> Allowable costs are limited to those which are necessary and reasonable for accomplishment of approved project purposes, and are in accordance with the cost principles of OMB Circular A-87.
>
> . . .
>
> Administrative costs in the form of overhead or indirect costs for state central services outside of the State Fish and Wildlife Agency must be in accord with an approved cost allocation plan and shall not exceed in any one fiscal year three percentum of the annual apportionment.

In other words, any charges made against the fish and game account must be consistent with OMB Circular A-87 and could not exceed a 3% overhead charge. I have enclosed a copy of the OMB Circular for your convenience.

In summary, the state may not impose charges in lieu of taxes upon lands of the department of fish and game. Any other charges made to the fish and game account are restricted by the federal law and regulations discussed above. If you have any questions regarding this letter, please contact me.

Sincerely,

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

February 22, 1990

The Honorable Jerry Evans
State Superintendent of
Public Instruction
LBJ Building
STATEHOUSE MAIL

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

Re: RS24069 - Amendment of Idaho Constitution art. 9, § 8

Dear Mr. Evans:

This is in response to your question whether R.S.24069, which proposes a constitutional amendment to Idaho Const. art. 9, § 8, would be contrary to the provisions of the federal land grants the state received from the United States Government.

Currently, art. 9, § 8, requires the state board of land commissioners to make its decisions with respect to endowment lands "as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted." The proposed amendment would add the language "or as will secure the greatest public benefit therefore." In other words, the amendment would permit the land board to make decisions based upon the "greatest public benefit" rather than upon the basis of the maximum financial return for the intended recipient of land grant benefits.

The Idaho Admission Bill provides various grants of lands to the state for various purposes. For example, § 4 provides that two sections in every township or equivalent lands are "hereby granted to said state for the support of common schools. . . ." The proposed constitutional amendment would attempt to permit the state to substitute the "greatest public benefit" formula for the land grant requirement that the lands be used for the support of common schools. The same problem would occur with respect to the other land grants made to the state by the Idaho Admission Bill.

When the state receives grants from the federal government, it is bound by the terms of those grants. Consequently, to accomplish the purpose intended by the proposed amendment, it would be necessary both for the state to amend the constitution and for Congress to amend the Idaho Admission Bill. If the legislature desires to propose the constitutional amendment, it would make sense to make the effective date of the amendment the date upon which the Idaho Admission Bill is amended to permit the result intended.

Sincerely,

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

February 27, 1990

Nancy Michael
Public Works Contractors
State License Board
STATEHOUSE MAIL

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

Re: Competitive Bid Requirements, Subcontractor for State Public Works Projects

Dear Ms. Michael:

You have asked several questions concerning Idaho Code §§ 67-2310 and 54-1902 and the requirements that subcontractors for state public works projects be named and licensed. For purposes of this discussion, "general contractor" refers to the person who directly bids or contracts the state project. "Subcontractor" refers to the persons who contract directly with the general contractor.

1. Does failure to *list* an appropriate state license number for a subcontractor required to be named pursuant to the provisions of Idaho Code § 67-2310 make the submitted bid unresponsive and void?

Idaho Code § 67-2310 requires only that the subcontractor be *named,* not that the state license number be listed. Idaho Code § 54-1902 specifically provides, however, "nor shall a public works contractor *accept* a bid from any person who *at the time* does not possess the appropriate license for the project involved." [Emphasis added.] Therefore, while the *naming* statute does not require listing the license number, it is unlawful to accept bids from persons who do not have the requisite license. Since it is

unlawful to *accept* a bid from unlicensed persons, it is apparent that the subcontractor must possess the appropriate license by the time the contractor accepts the bid. Failure by a general contractor to name a properly licensed subcontractor, however, renders the bid unresponsive and void. Further, Idaho Code § 54-1914(i) provides that the public works contractors licensing board may take disciplinary action against any contractor who is guilty of:

> [k]nowingly accepting a bid from, or entering into a contract with another contractor for a portion of a public works project if at that time such contractor does not possess the appropriate license to do that work as provided in this Act.

2. Does the licensing requirement exception for projects financed by federal aid funds found in Idaho Code § 54-1902 apply to subcontractors as well as to general contractors?

Idaho Code § 54-1902 reads, in pertinent part:

> Provided, however, that no *contractor* shall be required to have a license under this act in order to submit a bid or proposal for contracts for public works financed in whole or in part by federal aid funds, but at or *prior to the award and execution of any such contract by the State of Idaho,* or any other contracting authority mentioned in this act, *the successful bidder* shall secure a license as provided in this act. [Emphasis added.]

Reference in the act to "contractor" also means "public works contractor," which is defined as synonymous with "subcontractor" pursuant to Idaho Code § 54-1901(b). This reference is confusing because while the first clause of § 19-5402 refers to "contractor," which is apparently inclusive of "subcontractor" under the definitions of the act, the last clause clearly refers only to the successful bidder in the contract with the State of Idaho. The clause clearly does not address subcontractors, since their contract is not with the state, but with the general contractor. Read together, Idaho Code §§ 67-2310 and 54-1902 do indeed provide that while a contractor bidding on a state project for public works financed in whole or in part by federal aid funds is not required to have a state license until the bid is accepted, that same contractor must name in his bid licensed subcontractors or the bid will be rendered unresponsive and void. This interpretation is consistent with the purpose of the naming statute, which is "to invite effective competition, prevent fraud, and to secure subcontractors who were capable of satisfactorily performing the work and furnishing supplies at the lowest overall cost." *Neilsen & Co. v. Cassia and Twin Falls County Joint Class A School District,* 96 Idaho 763, 766, 536 P.2d 1113 (1975).

3. Is it permissible to use subcontractors different from those listed on the bid?

Because the Idaho Code provides that it is unlawful for the general contractor to *accept* a bid from a subcontractor who does not possess the appropriate license *at the time of the bid,* failure of that same named but unlicensed subcontractor to obtain a license subsequent to the state of Idaho's award of the contract to the general contractor renders the original bid unresponsive and void under the provisions of Idaho Code § 67-2310.

4. Under what circumstances might a general contractor use a subcontractor other than the one he names pursuant to Idaho Code § 67-2310?

Again, the purpose of the naming law was to stop bid-shopping. To allow general contractors to name any subcontractor at will would defeat the legislative intent in passing this law. The code is silent on this specific issue.

Arguably, substitution of another licensed mechanical subcontractor in a situation which did not present the issue of "bid-shopping" and the attendant evils the law was designed to avoid would not violate the intent of the naming statute. Such a substitution, however, would likely cause the bid to be ruled unresponsive and void if the originally named subcontractor were still able to perform the contract and challenged the action in the courts. This is not to suggest, however, that the subcontractor has acquired any contract rights by virtue of being named in the bid. The Idaho Supreme Court has expressly held that the naming law is designed to benefit not the subcontractor, but the public. No contractual status is conferred on the subcontractor named. *Mitchell v. Siqueiros,* 99 Idaho 396, 401, 582 P.2d 1074 (1978).

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

February 27, 1990

Mr. Colin W. Luke
Bingham County Prosecuting Attorney
501 North Maple
Blackfoot, ID 83221

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

Re: The Authority of the County Hospital Board to Borrow Money and to Incur Debt

Dear Mr. Luke:

You have inquired regarding the authority of the county hospital board to borrow money and to incur debt. Specifically, you have asked whether the hospital is considered a "political subdivision" and whether the board has the authority to obligate the county or to pledge revenue of the county.

1. The county hospital is not a political subdivision of the state. In analyzing what entities are subject to the debt limitation provisions of article 8, section 3, of the Idaho Constitution, the Idaho Supreme Court has determined that such "subdivisions" are those with the power to *levy* or *collect* taxes. *Lloyd v. Twin Falls Housing Authority,* 62 Idaho 592, 113 P.2d 1102 (1941); *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 496, 531 P.2d 588 (1975); *BRA v. Yick Kong,* 94 Idaho 876, 499 P.2d 575 (1972). While the county hospital board is empowered to issue tax anticipation notes or warrants, it is not empowered to levy or collect the taxes upon which such notes or warrants are based and is, therefore, not an entity with the power to tax.

2. While the county hospital board is not a political subdivision of the state subject to the constitutional debt limitation, it is subject to an express statutory debt limitation. Pursuant to Idaho Code § 31-3608:

> The county hospital board shall not have power to create any indebtedness in excess of the amount of its annual budget as approved by the Board of County Commissioners.

Thus, the county hospital board is constrained by law to operate within its annual budget and is, therefore, not authorized to create long term debt.

3. The county hospital board is not authorized to obligate the county or to pledge county revenues for indebtedness. The board is the creature of the county commission by authority of the Idaho Code statutory provisions and its powers and duties are defined by the law. The statute does not provide any authority to obligate the county and, as noted above, its power to create debt is narrowly circumscribed.

4. If the county were to incur debt on the hospital's behalf, such action *would* be subject to the debt limitation provision of the Idaho Constitution.

Article 8, § 3, of the Idaho Constitution provides:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .

In essence, this section means that no local government entity may issue any indebtedness which will exceed its revenues in any given year without a vote of the people. The only exceptions are those obligations which are found to be "ordinary and necessary" expenses and those which are specifically enumerated in this provision. The purpose of the constitutional debt limitation is to prevent current office holders from encumbering future generations with massive liability. Therefore, any indebtedness or liability incurred in excess of revenues for a particular year is void under article 8, § 3, unless approved by the voters or unless it falls within the "ordinary and necessary expenses" provision. Contracts incurred in violation of this provision are not enforceable. Enclosed is a copy of Attorney General Opinion No. 88-3, which discusses the issue of "ordinary and necessary expenses" in detail.

In *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 558 (1975), the Idaho court found county expenditures made to improve the structure of a hospital to comply with state safety standards to be "ordinary and necessary" in light of the state public needs at the time:

> It is certainly an ordinary and necessary undertaking to keep existing hospitals operational and in good repair. If the county commissioners of Twin Falls

> County believe that it is necessary to make expenditures to remedy structural defects in Magic Valley Hospital, this is an ordinary and necessary expense upon the part of the county. *City of Pocatello v. Peterson, supra.* For that reason, there is no violation of Article 8, section 3, of the Idaho Constitution by the agreement between Twin Falls County and the Authority to provide funds for remedying the substandard structure of Magic Valley Hospital, even though revenues from the Magic Valley Hospital become liable for expenditure beyond the current year.

Id. at 510.

In summary, the county hospital board is prohibited by state law from incurring debt in excess of the annual budget approved by the county commissioners. The county itself is prohibited from incurring debts on behalf of the county hospital in excess of county revenues for any given year, unless such expenditures are deemed "ordinary and necessary" or unless an appropriate election is held. What is "ordinary and necessary" depends on the individual case.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

March 9, 1990

Mr. Clyde J. Morgan
Property Tax Administrator
Department of Revenue and Taxation
STATEHOUSE MAIL

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

Re: Mobile Home Homestead Exemption

Dear Clyde:

You have asked whether Senate Bill No. 1225, codified at Idaho Code § 55-1001, *et*

seq., restricts the execution of a warrant of distraint against a mobile home for non-payment of property taxes.

The issue presented is the relative priority of an individual's personal property tax obligation versus the protection afforded by the Idaho Homestead Act. It has not before been addressed in our state.

The purpose of Idaho's homestead law is to "protect debtor's [sic] homes from action." Minutes of the Committee of Local Government and Taxation, 2-27-89. The Statement of Purpose for homestead bill S1225, later codified as Idaho Code § 55-1001 provides as follows:

> The law currently makes no mention of how a mobile home owner is to declare a homestead. Consequently, courts are consuming time and expense trying to determine mobile home Homestead status on a case by case basis.

In general, homestead exemptions are designed to preclude seizure and forced sale of people's homes, with the underlying policy considerations of promoting "state stability and welfare through preservation of *homes* where families may be sheltered beyond the reach of economic fortune." (Emphasis added.) *See Comment, Federal Tax Liens and State Homestead Exemptions: The Aftermath of United States v. Rogers,* 34 Buffalo L. Rev. 297 (1985).

Since the objective, then, of the exemption is not directed toward classification of the homestead property as real or personal property, but to protect the abode one calls home, a mobile home is exempt from attachment and from execution or forced sale for the debts of the owner up to the maximum homestead amount of $30,000 to the same extent a residence involving real property would be.

The general rule regarding execution of tax liens against homestead property is that the taxing authority may proceed against homestead property as if no homestead existed. 40 Am. Jur. 2d 110; *Iowa Mutual Insurance Co. v. Parr,* 189 Kan. 475, 370 P.2d 400 (1962) 94 ALR 2d 960 (1964). Homestead rights are purely statutory and give no greater rights than those granted by the statute. In some jurisdictions, statutes specifically provide that homestead protection does not apply to state or local tax liability.

In Idaho, while Idaho Code § 55-1005 describes certain types of judgments which may reach homestead property, the law makes no reference to the effect of tax liens or warrants of distraint on homestead property. In the absence of statutory classification, resort to the general rule is proper. The following prevails in California, a jurisdiction to which our state often looks for guidance on unresolved issues.

> The liability of homestead property for taxes does not differ from that of other property. The state, county, or city, as the case may be, proceeds against it as though there were no exemption law in existence . . . The general homestead exemption from "debts" may not be involved to defeat claims against the holder for taxes and assessments against the homestead property. The homestead is taxable.

Morrison v. Barham, 184 Cal. App. 2d 267, 7 Cal. Rptr. 442, 446 (1960).

The United States Supreme Court has clearly held that state homestead acts do not restrain enforcement of IRS tax liens against individuals who are delinquent in the payment of federal taxes. This decision, however, was based upon the objectives of uniformity and prompt and certain collection of taxes, upon the federal government's "sovereign prerogative" over state law, and also on the specific language of I.R.C. § 7403, which provides that the IRS may enforce its lien against any property, of any nature, in which the taxpayer has an interest.

> [T]he . . . homestead exemption does not erect a barrier around a taxpayer sturdy enough to keep out the Commissioner of Internal Revenue.

United States v. Estes, 450 F.2d 62, 65 (5th Cir. 1971). *See also United States v. Hoffman,* 643 F.Supp. 346, 349 (E.D. Wis. 1986).

Notably, Idaho law generally exempts certain property from attachment or levy. Pertinent to this inquiry is Idaho Code § 11-607, which provides:

> (1) Notwithstanding other provisions of this Act:
>
> (a) a creditor may make a levy against exempt property except property described in section 11-603, Idaho Code, to enforce a claim for:
>
> . . .
>
> 3. state or local taxes.

Idaho Code § 63-3058 provides that in the case of income tax delinquency, "[p]roperty exempt from distraint shall be the same property as is exempt from execution under the provisions of chapter 6, title 11, Idaho Code." The effect of this provision is to allow execution of claims for income taxes against an individual's property, except (1) personal and family burial plots, (2) health aids, (3) social security, public assistance, unemployment or veterans benefits, or (4) medical benefits. Section 11-607 applies to all other property and allows attachment or levy against an individual's property for state or local tax delinquency.

Following the maxim of statutory interpretation that "expressio unius est exclusio alterius," it is clear that because homestead exemption is not included in property exempt from execution for state or local tax claims, it was the intention of the legislature to exclude it.

Further, ad valorem taxes are levied under authority of article 7, § 2, of the Idaho Constitution, which provides in pertinent part:

> Revenue to be provided by taxation.
>
> The legislature shall provide such revenue as may be needful, by levying a tax by valuation, *so that every person* or corporation *shall pay a tax in proportion to the value of his, her, or its property,* except as in this article hereinafter otherwise provided.

This constitutional provision makes state and county taxes a superior lien to all other claims and liens. *Smith v. City of Nampa,* 57 Idaho 736, 744, 68 P.2d 344 (1937).

The state's interest, then, in enforcing claims against a delinquent taxpayer by executing against his property does not arise out of the privileges of an ordinary creditor, but from the express terms of the Idaho Constitution. The state or county may proceed on a warrant of distraint against homestead property as if there were no homestead exemption.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

March 14, 1990

The Honorable John Peavey
Minority Caucus Chairman
Idaho State Senate

The Honorable Bert Marley
Senator, District 27A
Idaho State Senate
STATEHOUSE MAIL

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

Re: Idaho's Call for a Constitutional Convention

Dear Senators Peavey and Marley:

You have asked the following questions regarding Idaho's call for a constitutional convention:

1. If two-thirds of the state legislatures are on record in favor of a convention, can the call be halted or rescinded?

2. Can the scope of the convention be limited to one amendment or could other matters, such as the repeal of the second amendment, be brought before the convention?

3. Must Idaho's call for a constitutional convention on abortion be rescinded at the same time the call for a convention for a balanced budget amendment is rescinded?

Article V of the United States Constitution reads in pertinent part as follows:

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

Thus, Article V provides that the amendment process may be initiated upon either a two-thirds vote of Congress or upon application for a constitutional convention by two-thirds of the states. The convention method gives the states an absolute power to

amend the Constitution: Congress is *required* to call a constitutional convention upon application by two-thirds of the states. Since 1879, the states have proposed varied issues as appropriate for an Article V convention, including: state legislative apportionment, direct election of Senators, abolishment of polygamy, revenue sharing, limiting federal taxes, and a balanced federal budget. *See* Praeger and Milmore, *Article V Applications Submitted Since 1789: A Tabulation of Applications by States and Subjects, in* **American Bar Association, Special Constitutional Convention Study Committee, Amendment of the Constitution by the Constitutional Method Under Article V,** at 59, 60-61 (1974).

The intent of the framers of Article V of the Constitution was to make available to the people a means of remedying abuses by the national government. A state's power to call for a constitutional convention derives from Article V. In *Leser v. Garnett,* 258 U.S. 130, 42 S. Ct. 217, 66 L.Ed. 505 (1922), the United States Supreme Court defined the role of a state legislature in ratifying an amendment to the United States Constitution as a "federal function derived from the Federal Constitution . . . which transcends any limitations sought to be imposed by the people of a state." *Id.* 258 U.S. at 136-37. By analogy, the application of a state to Congress for a constitutional convention is also a federal, and not a state, function. Thus, the answers to your questions are based solely on the validity of our state's actions under Article V of the United States Constitution.

Since no convention has ever been called or held under Article V, and because the terms of Article V are vague, issues regarding the scope and procedure appropriate to the convention call have sparked much debate and controversy among legal scholars. Of particular concern is the scope of Congress' duties in calling the convention. Our response to your inquiries is given against this backdrop.

1. If two-thirds of the state legislatures apply to Congress for a convention, can the call be halted or rescinded?

Answer: If two-thirds of the state legislatures are "on record" in favor of a convention, and those state applications to Congress are valid under Article V, Congress is required to call for the Constitutional Convention. There is no provision in the United States Constitution to halt the convention once two-thirds of the states have made that application. If the convention call is being used for leverage on the Congress, those calling for the convention risk the real possibility that sufficient leverage will not be generated until the required two-thirds of the states have actually made the convention call and at that point the convention must be called.

2. Can the scope of the convention be limited to one amendment?

Answer: This question has not been definitively answered and there is dispute among the various commentators whether or not the convention may be limited to

consideration of a single amendment. Those who argue it may not be limited base their argument in part on the fact that Article V refers in the plural to a "convention for proposing amendments." [Emphasis added.] Further, it has been argued that allowing state legislatures to define and limit the scope of the convention represents an impermissible transfer of power from the convention itself to the legislatures. *See* Dellinger, *The Recurring Question of the "Limited Constitutional Convention,"* 88 Yale L.J. 1623, 1633 (1979).

In considering the issue of whether the convention may be limited, one scholar takes note of the fact that while the 1787 convention was "for the sole and express purpose of revising the Articles of Confederation," that convention ignored the limited mandate and proceeded to draft the Constitution. See, Goldberg, *The Proposed Constitutional Convention,* 11 Hastings Const. L.Q. 1,3 (1983). Goldberg continues, "Logic therefore compels one conclusion: Any claim that Congress could, by statute, limit a convention's agenda is pure speculation, and contrary to a historic precedent."

Other commentators contend that a convention could be limited in scope, based upon the subject matter contained in the state convention calls. To date, however, the question of who can limit the scope of the convention and how is entirely unresolved. If the state applications for a convention are limited, and that limit is determined invalid, the result is uncertain: It may be that the call itself is null and void; or, in the alternative, the attempted limitation may be of no effect in determining the scope of the convention. There is even disagreement amongst the commentators as to whether Congress or the Supreme Court would be the final arbitrator of these questions. Most assume that the U.S. Supreme Court would make the ultimate determination as to convention procedures, the scope of a convention, and so on, since litigation would undoubtedly be involved. However, it has been suggested that the Court may abstain under the "political question" doctrine, leaving the question for Congress' determination.

If a convention were called on the balanced budget amendment and it was ultimately determined that the convention could not be limited in scope, the concern you expressed in your letter about possible repeal of the second amendment (dealing with the right to bear arms) or modifying the "Great Compromise" which granted the small states an equal voice in the Senate, could be realized. Such a convention could ignore or reject the balanced budget amendment, while proceeding to consider these and other questions for submission to the states. Again, with no definitive legal precedent, it is hard to say what might take place.

3. Must Idaho's call for a constitutional convention on abortion be rescinded at the same time the call for a convention for a balanced budget amendment is rescinded?

Answer: This is more a practical question than a legal one. From the standpoint of consistency, one can argue that all convention calls should be repealed, assuming that

the overriding concern is that of a "runaway convention." From a practical standpoint, however, to address the concern that a convention call will be realized by the action of 34 states, resulting in an unlimited convention, only those calls approaching the 34 state mark need be repealed. It has been argued that Congress could call a convention by aggregating convention calls on several subjects. See Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 Ariz. L.R. 1011, 1020 (1980). It is generally agreed that Congress will make the initial determination as to whether the applications are valid before calling a convention and Congress could presumably read any valid application for a convention as properly included within the two-thirds requirement. However, given the reluctance of Congress to accede to the idea of a constitutional convention, it is unlikely that it would employ this interpretation.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

March 19, 1990

The Honorable John D. Hansen
Idaho State Senate
STATEHOUSE MAIL

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

Re: Constitutionality of a Budget Reserve Account

Dear Senator Hansen:

This is in response to your question regarding the constitutionality of S.B. 1573, which would appropriate funds to a budget reserve account. You have asked if the creation of a budget reserve account would result in a violation of Idaho Constitution art. 7, § 2, which provides, in part, "the legislature shall provide such revenue as may be needful, by levying a tax...." The language of the section raises the question whether the accumulation of a surplus implies that the legislature has exceeded its authority on grounds that the surplus revenue is not "needful."

The Idaho Supreme Court considered this question in the early case of *Fenton v. Board of County Commissioners,* 20 Idaho 392, 119 P. 41 (1911). The case involved a state statute which provided funding for the public schools. The statute required the boards of county commissioners of each county to levy a tax of not less than five mills nor more than ten mills on each dollar of taxable property for school purposes. Ada County determined that a 3 mill levy was sufficient to support the schools and levied that amount. In the companion case, *Dart v. Board of County Commissioners,* 20 Idaho 445, 119 P. 52 (1911), the Kootenai County Commissioners had levied 2.45 mills for public school purposes. The 3 mill levy in Ada County was sufficient to raise one and one-half times as much money for school purposes as had been raised the prior year. 20 Idaho at 416. It was also asserted that some school districts had enough money left in their treasury to maintain their schools without the use of any levy for the year. 20 Idaho at 417. Thus, the question was raised whether the legislature could require a tax in excess of the amount needful for the purpose for which it was levied. The court referred to:

> section 2 of article 7 of the constitution, which reads in part as follows: "The legislature shall provide such revenue as may be needful by levying a tax by valuation," etc. Counsel contend that said section is a restriction on the power of the legislature, and that the legislature cannot levy or authorize the levy of any tax in an amount in excess of what is "needful" or necessary for the purpose for which it is levied, and an attempt to authorize an excessive levy is contrary to said provision of the constitution and void.

20 Idaho at 398-399.

The court acknowledged that the levy would raise more money than many of the districts would need, and characterized this as "unfortunate," but went on to state that it was not for the court to attempt to deprive the legislature of any power or authority given to it by the constitution. 20 Idaho at 405. The court stated:

> It is a familiar and fundamental principle of construction applicable to state constitutions that the legislature of the state has plenary power in regard to all matters of legislation that belongs to or resides in the people, except when restricted by express provisions or necessary implications in the constitution of the state and of the United States. 20 Idaho at 406. The court then held as follows:
>
> We find no inhibition in our constitution against such legislation, and we find nothing in the constitution prohibiting the legislature from fixing a maximum and minimum amount between which such tax may be levied. The legislature has full power and authority to enact said sec. 65, and it is not repugnant to any provision of the constitution, and is mandatory. 20 Idaho at 407.

Thus, the court determined that the provision of Idaho Constitution art. 7, § 2, providing that the legislature shall provide such revenue as may be "needful" does not limit the legislature's authority to impose taxes which result in a surplus.

It should also be noted that Idaho Constitution art. 7, § 2, deals only with property taxes, license taxes and per capita taxes according to its terms. *Diefendorf v. Gallet,* 51 Idaho 619, 636-637, 10 P.2d 307 (1932). Thus, it would be even more difficult to make an argument today that the legislature could not create a surplus since the majority of the state's revenue does not come from the sources arguably limited. Idaho Const. art 7, § 2.

In reviewing the question you raised, we also considered it significant that the provisions relating to counties and those relating to the state differ substantially. Idaho Constitution art. 7, § 15, requires counties to operate on a cash basis and requires surpluses at the end of each county fiscal year to be transferred to the county warrant redemption fund. In other words, the constitutional framers restricted the use of surplus funds by counties. They provided no similar limitation with respect to the state.

We also reviewed the proceedings of the Idaho Constitutional Convention regarding these two sections. There was substantial debate on the question whether counties should be constitutionally restricted with respect to surplus funds. See, e.g., Proceedings and Debates of the Constitutional Convention of Idaho, pp.1687-1691. In contrast, there was no such debate with respect to state finances.

In conclusion, it is our opinion Idaho Constitution art. 7, § 2, does not prohibit the state from creating a reserve fund to be used at a later date.

Sincerely,

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

March 23, 1990

Honorable Wayne Sutton
Chairman
Agricultural Affairs
Statehouse Mail
Boise, Idaho 83720

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

Re: Cottage Site Leasing

Dear Representative Sutton:

In response to your request, this office has prepared the following analysis of SB 1516.

QUESTION PRESENTED:

Whether the following provision in SB 1516 violates article 9, section 8, of the Idaho Constitution: "The board shall reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code, for single family, recreational cottage site and homesite leases."

CONCLUSION:

The quoted provision of SB 1516, which would exempt cottage sites from the conflict application and auction provisions of title 58, chapter 3, can be interpreted as not violating the constitutional requirement that revenues from endowment lands be maximized. It is also possible to interpret the bill as not violating the public auction requirements of article 9, section 8. The language of the bill, however, evinces an intent to benefit someone other than the beneficiaries of the endowment trusts, and thus could be challenged as a violation of the state's duty to act with undivided loyalty on behalf of the trust beneficiaries.

ANALYSIS:

Any legislation affecting state endowment lands must fulfill the requirements of article 9, section 8, of the Idaho Constitution. In making this analysis, it is presumed that the legislative act is constitutional unless it is clearly not susceptible to a valid constitutional interpretation. *See State v. Rawson,* 100 Idaho 308, 597 P.2d 31 (1979); *Idaho Water Resource Bd. v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976); and *Bd. of County Comm'rs v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975).

Article 9, section 8, contains three provisions that could possibly be construed as limiting the legislature's discretion to exempt cottage site leases from conflict application provisions. Each of these provisions will be analyzed in turn:

Provision 1:

The first sentence of article 9, section 8, provides:

> It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; provided, that no state lands shall be sold for less than the appraised price.

The sentence imposes a duty upon the land board to secure "maximum long term financial return." No similar duty is imposed upon the legislature. The Idaho Supreme Court, however, has ruled that legislative enactments cannot unduly interfere with the land board's constitutional duties: "[If a statute] goes beyond the scope of regulating the action of the board in the discharge of its constitutional duties, it is void." *Rogers v. Hawley,* 19 Idaho 751, 760, 115 P. 687 (1911). Thus, the requirement of maximizing revenues necessarily defines the bounds of allowable legislation.

The provision requiring the maximization of long term income should be read in light of the normal standards of prudence and reasonableness imposed upon trustees. Under the common law, trustees are not required to maximize income from trust property, probably because maximization of income may entail a higher risk of loss. Instead, a trustee normally has the discretion to make whatever lease arrangement is within the bounds of prudent and reasonable business judgment. See 3 A. Scott, *The Law of Trusts,* (4th ed. 1988), §§ 187, 189.1.

For instance, maximization of short-term incomes should not compromise a trustee's duty to preserve the corpus of the trust in order to maximize long-term gains. SB 1516 provides that its purpose is to maximize long-term gains by providing for stable leases at market value. Thus, even if SB 1516 requires the land board to forego competitive bids that may increase short-term gains, it can be argued that it does not violate the constitutional provision requiring maximization of long-term financial returns.

Additionally, constitutional challenges may be averted because the bill requires the land board to obtain fair market value for the leased property. In the context of endowment land trusts, courts usually use "fair market value" as the standard against which rental agreements of trust property are measured. For instance, the Nebraska

Supreme Court struck down a statute providing renewal of leases without competitive bidding, but noted that the requirement of obtaining a "reasonable rental based upon fair market value of the property" could be met by competitive bidding or "by some other method to be provided by statute consonant with the rules of law applicable to trustees acting in a fiduciary capacity." *State v. Bd. of Education*, 154 Neb. 244, 47 N.W. 2d 520, 523, 525 (1951).

Provision 2:

The second sentence of article 9, section 8, provides:

> No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly.

At first glance, this sentence may be construed as preventing the state from granting lessees of public lands any advantage, immunity or right that may reduce the rental income from those lands. This sentence, however, must be reviewed in its historical context. The sentence formed part of the original version of article 9, section 8, in the 1890 Idaho Constitution. At the time, settlement by homesteaders and others upon the public domain was a common practice. This provision was apparently aimed at such settlers, not at lessees of state lands. *See Balderston v. Brady,* 17 Idaho 567, 107 P. 493 (1910).

Provision 3:

The third sentence of article 9, section 8, provides in part:

> The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, *subject to disposal at public auction* for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants. . . . (emphasis added).

"Disposal" of the state's interests in endowment lands would normally include leases, which are a transfer of interest for a limited period. The Idaho Supreme Court, however, has construed the public auction provision of article 9, section 8, to apply only where a "fee-simple title is to be conveyed." *Idaho-Iowa Lateral & Reservoir Co., Ltd. v. Fisher,*

27 Idaho 695, 706, 151 P. 998 (1915). Nonetheless, it is doubtful whether the court would feel itself bound by this language if it were directly presented with the question of whether "disposal at public auction" included leases. The question presented to the court in the *Idaho-Iowa Lateral* decision was whether the provision prevented the state from granting easements across endowment lands without complying with the constitutional requirements for "disposal" of the lands. Clearly, the court's interpretation of the provision as applying only to fee-simple conveyances was broader than was necessary to decide the question before it, and must be regarded as non-binding obiter dictum.

Another early decision of the Idaho Supreme Court held that the land board could be required, by writ of mandate, to put a lease renewal up for public auction. *East Side Blaine County Livestock Assoc. v. State Bd. of Land Comm'rs,* 34 Idaho 807, 198 P. 760 (1921). The court stated that the "provisions of the constitution and statutes . . . made it the duty of the state board of land commissioners, under the facts and circumstances of this case, to offer the lease of said lands at auction to the highest bidder . . . ." *Id.* at 815. The decision, however, centered on statutes requiring auctions whenever two or more persons applied to lease the same land, and did not specifically apply the public auction provision of article 9, section 8, to leases. Moreover, if the decision is construed as interpreting article 9, section 8, to require public auctions for leases, it is difficult to reconcile with the court's decision in *Idaho-Iowa,* where the court stated that the public auction provision applied only to conveyances of fee-simple title.

In a later case, the court held that in the absence of legislation to the contrary, article 9, section 8, does not prohibit the land board from originating offers to lease, thus implying that leases need not be entered into by public auction. *Allen v. Smylie,* 92 Idaho 846, 452 P.2d 343 (1969). Again, however, the court did not directly address the issue. Thus, the decisions of the Idaho Supreme Court cannot properly be cited as authority for the proposition that the legislature can provide for leases by methods other than public auction.

Because the court decisions do not satisfactorily resolve the issue, it is necessary to refer to the proceedings of the Idaho Constitutional Convention. The proceedings indicate that the delegates to the convention believed "disposal" to include leases of the lands. During debates over article 9, section 8, Mr. Reid stated several times his belief that the word "disposition" included leases of such lands. 1 I. Hart, Proceedings and Debates of the Constitutional Convention 708, 755-56 (1912). This view was shared by other delegates also. *See id.* at 763 (remarks of Mr. Gray). Further, there was a suggestion that at the end of a lease, another person could come in and outbid the original lessee, implying that lease renewals were believed to be subject to public auction requirements. *Id.* at 743 (remarks of Mr. McConnel).

On the other hand, there seems to have been some sentiment among the delegates that the legislature should be granted a wide latitude of discretion in its handling of the disposition of endowment lands, in order to meet changing conditions. *See id.* at 663 (remarks of Judge Claggett); 712, 732 (remarks of Judge Gray). Additionally, there is at least one indication that lessees should be given a preference right of renewal at the expiration of their leases if they took good care of the land and preserved its value. *Id.* at 663 (remarks of Judge Claggett).

Given the wide disparity of views among the various delegates, it is impractical to conclude from the proceedings that there was any consensus on whether leases would be subject to the public auction requirement. Further indications of intent may be found in the actions of the first legislature, many of whose members were also delegates to the constitutional convention. The first act dealing with disposal of public lands was enacted in 1891. The act required that all sales of land had to take place by public auction. 1891 Sess. Laws, p. 111. In contrast, the land board was empowered to lease lands without public auction to the first person filing a lease application. *Id.* at 113-14. Leases had to be entered into by public auction only if two or more persons applied to lease the same tract of land. *Id.* at 114. Thus, it is apparent that the early legislature did not understand leases to be subject to the strict public auction requirements that were imposed on the sale of public lands.

In conclusion, it is possible to interpret article 9, section 8, as vesting in the legislature the discretion to lease public lands by methods other than by public auction. It should be cautioned that this conclusion is somewhat tentative, given that it is supported only by ambiguous statements of the Idaho Supreme Court, the delegates to the constitutional convention, and the early legislature. In making this conclusion, ambiguities have been resolved in favor of finding SB 1516 constitutional, given the general principle that a legislative act is presumed constitutional unless it is clearly not susceptible to a valid constitutional interpretation.

Federal Law:

Although your letter asked this office only to address the constitutionality of SB 1516, any analysis of legislation affecting endowment lands would be incomplete without addressing whether the legislation violates the federal laws that created the endowment lands trusts, namely, the Organic Act of the Territory of Idaho and the Idaho Admission Bill. The acts impliedly impose upon the state duties analogous to those imposed upon a private trustee under the common law. *See Barber Lumber Co. v. Gifford,* 25 Idaho 654, 159 P. 557 (1914).

Under common law principles, the state, acting as trustee, owes a duty of "undivided loyalty" to the trust beneficiary, to the exclusion of all other interests. *County of*

Scamping v. State, 102 Wash. 127, 685 P.2d 576, 580 (1984); *State ex rel. Ebke v. Bd. of Educational Lands & Funds,* 154 Neb. 244, 47 N.W. 2d 520 (1951). Paragraph (2) of the bill, which your letter asked this office to review, does not, on its face, violate the duty of undivided loyalty. If, however, paragraph (2) is read in light of the legislative findings in paragraph (1), it may be inferred that the rejection of conflict applications required in paragraph (2) is designed, at least in part, for the benefit of long term, single family lessees. For example, paragraph (1)(e) states that "the conflict application and auction procedure have caused considerable consternation and dismay to the existing lessee at the prospect of losing a long-time lease." The finding could be interpreted as implying an intent to benefit someone other than the beneficiaries of the trust, resulting in the bill being overturned as a breach of the state's duty of undivided loyalty to the beneficiaries of the endowment lands trusts.

A possible factor working against a finding of divided loyalty is the provision in SB 1516 requiring that leases "generate market rent throughout the duration of the lease." The state could assert that it has met its fiduciary duty because protection of cottage site lessees did not come at the expense of the beneficiaries, since the statute requires that the trust receive full market value for the leases. As previously stated, courts use market value as the standard against which disposals of trust property are measured.

I hope the above analysis provides the guidance you need concerning the constitutional issues involved in SB 1516. Please do not hesitate to contact this office if we can be of further assistance in this or other matters.

Sincerely,

Steven W. Strack
Deputy Attorney General
Natural Resources Division

March 28, 1990

The Honorable Myron Jones
House of Representatives
State of Idaho

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

Re: Statutory Qualifications for State Superintendent of Public Instruction

Dear Representative Jones:

You have asked whether the state of Idaho can require that a candidate for the office of state superintendent of public instruction be certified as an administrator.

Originally, the Idaho Constitution, art. 4, § 3, which also defined the qualifications for governor, lieutenant governor, secretary of state, state auditor, and state treasurer, specified that no person would be eligible for the office of superintendent of public instruction unless that person had attained the age of 25 years at the time of the election. This constitutional provision was amended in 1948 to "eliminate the superintendent of public instruction as an officer whose qualifications are prescribed by the constitution of the state of Idaho." S.L. 1947, p. 908, S.J.R. No. 6, ratified at the general election in 1948. There is, therefore, no longer any reference to qualifications for this office in the Idaho Constitution.

The qualifications of candidacy for this office are now set forth in Idaho Code § 34-613, which provides in pertinent part:

> (2) No person shall be elected to the office of superintendent of public instruction unless he shall have attained the age of twenty-five (25) years at the time of his election; is a citizen of the United States; holds a valid *Idaho administrator's certificate;* is a graduate of an approved college or university as determined by the state board of education; is actively engaged in educational work in the state public schools or in the state educational institutions and shall have resided within the state two (2) years next preceding his election.

I.C. § 67-1501 similarly provides:

> No person shall be a candidate for the office of state superintendent who does not hold a valid *Idaho administrator's certificate,* and who is not at the time of nomination a graduate of an approved college, or university as determined by

> the state board of education, and is also actively engaged in educational work in the state public schools or in the state educational institutions. (Emphasis added.)

Both of these sections formerly required a valid life or state life teaching certificate in lieu of the current requirement for an administrator's certificate. They were amended in 1974 to strike the reference to the life teaching certificate and replace it with the Idaho administrator's certificate because "[l]ife or state life teaching certificates have not been issued since 1948." R.S.1468, statement of purpose (1974).

The courts have generally held that where the constitution sets forth qualifications for a specific constitutional office, the state legislature does not have the power to change or add to those qualifications. *See Thomas v. State ex rel. Cobb,* 50 So.2d 173 (Fla. 1952), 34 A.L.R.2d 140. In Idaho, however, the constitutional qualifications for the office of public superintendent of public instruction were deleted in 1948. The Idaho Constitution, therefore, does not bar the Idaho Legislature from enacting the statutory candidate eligibility requirements for the office of superintendent of public instruction.

The federal courts have explored the constitutionality of candidate eligibility requirements that place a burden on the voting and associational rights of candidate supporters (*See Anderson v. Celebrezze,* 460 U.S. 780 (1983)), and on the candidate's right of access to the election ballot (*See Bullock v. Carter,* 405 U.S. 134 (1972)). Most of the cases involve restrictions such as exorbitant filing fees or political party limitations which have the effect of excluding certain classes of people or people with certain political views. Generally, in those cases, legislative schemes that act to restrict voting rights or ballot access are subject to strict scrutiny under the equal protection clause of the United States Constitution. States do, however, have the power to prescribe reasonable qualifications for public office. *See Storer v. Brown*, 415 U.S 724 (1974); *American Party of Texas v. White,* 415 U.S. 767 (1974); *Bullock v. Carter, supra; Boughton v. Price,* 70 Idaho 243, 215 P.2d 286 (1950). In *Anderson v. Celebrezze, supra,* the United States Supreme Court stated:

> Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. . . . Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects — at least to some degree — the individual's right to vote and his right to associate with others for political ends. *Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.*

Id. at 788-89 (emphasis added).

Restrictions upon candidacy for state office, such as that the attorney general be a lawyer and that the superintendent of public instruction possess specific teaching credentials, further legitimate state interests in assuring that the individual holding such office is capable of fulfilling the duties of that office. Unless they are arbitrary or discriminatory, it is unlikely that they may be successfully challenged as unconstitutionally restrictive of voter or candidate access to the ballot. Therefore, it is the conclusion of this office that the statutory requirement that the Idaho State Superintendent of Public Instruction possess an Idaho administrator's certificate is valid.

Sincerely,

Dan Chadwick
Deputy Attorney General
Chief, Intergovernmental
Affairs Division

April 4, 1990

Mr. Hal Messick, President
Garden Valley Rural Fire Department
Garden Valley, Idaho 83622

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

Re: Fire Protection District

Dear Mr. Messick:

You have presented the following questions relating to the possible formation of a fire protection district in Garden Valley:

1. Can the district be formed with two parcels, i.e., one in the Valley and one at Banks?

2. Can the City of Crouch be included in the district without an ordinance or resolution by the city council (in other words, without their expressed approval)?

3. Is a district legally bound to provide fire protection to other properties within the district that are tax-exempt — schools, city hall, churches, etc.?

4. Can a district contract with a church, school, the city, or a public utility — within the district — for fire protection?

5. Can a district contract for fire protection — a. with a private individual, or b. With a public agency (the state Dept. of Transportation) — outside the district?

6. Can district equipment/personnel go outside the legal boundaries of the district —without a formal agreement with someone/agency — to address emergencies?

7. The Garden Valley Fire Dept. — now and after a district is formed, if one is — is the closest and most logical organization to respond to highway/river accidents within several miles of the proposed district where fire and/or rescue operations are required. We would like to be able to continue to "legally" respond in such cases if a District is formed. Can we? If the answer is "no" — what has to be done to make it "legal"?

CONCLUSIONS

The answer to question No. 1 is no. Idaho Code § 63-2215 was amended in 1988 to require that "unless specifically authorized to form with noncontiguous boundaries, or to annex or de-annex properties so as to make noncontiguous boundaries, all taxing districts shall form with and maintain contiguous boundaries." Although the Fire Protection District Law was amended in 1984 to remove the requirement of contiguous territory for the formation of a fire protection district, and to strike the requirement that lands must be adjoining in order to be annexed, the law does not specifically authorize formation or annexation with noncontiguous boundaries. Currently, Idaho Code §§ 31-1402 and 31-1411 refer only to "territory" for the organization of a fire protection district or annexation. Also, when two statutes conflict, the one enacted later in time generally controls.

The answer to question No. 2 is also no. Idaho Code § 31-1429 addresses the inclusion, annexation or withdrawal of areas in cities and villages and provides that "any area embraced within the limits of any village or city may, *with the consent of the governing board thereof expressed by ordinance or resolution,* be included within the limits of a fire protection district, when formed." (Emphasis added.) The statute requires the consent of the governing board of the city for inclusion of the city within the fire protection district.

Question No. 3 requires an analysis of Idaho Code § 31-1422. This statute provides exemptions from taxation for all public utilities and unimproved real property (by ordinance of the board of county commissioners). Idaho Code § 31-1422(1) provides that public utilities "shall not be entitled to the privileges or protection hereby provided without their consent in writing." Presumably, exempt unimproved real property would also not be entitled to fire protection. Because public utilities and unimproved real property are the only two types of property addressed, other tax-exempt properties would be entitled to fire protection. Generally, when a statute specifies certain things the designation of such things excludes all others. *See State v. Michael,* 111 Idaho 930, 729 P.2d 405 (1986). Therefore, the answer to question No. 3 is yes.

Question No. 4 must be broken into two parts. First, a fire protection district may not contract with a church, school or other tax-exempt property for fire protection within the district. These properties are already entitled to fire protection. See answer to question No. 3. Second, Idaho Code § 31-1422(1) allows an otherwise exempt public utility to consent in writing to taxation to gain fire protection. Therefore, a contract with a public utility would not be necessary.

The answer to question No. 5 is yes, with a distance limitation. Idaho Code § 31-1430B allows a fire protection district to contract with property owners outside the boundaries of the district for fire protection. The statute provides that the contracts shall be for a term of one year, and that monetary consideration shall be paid in advance by such property owner. The monetary consideration must take into account the distance between the property and the fire station and may not be less than the amount that would have been paid in taxes under the provisions of the Fire Protection District Law. However, Idaho Code § 31-1430B further provides:

> No such contract may be entered into with any property owner whose house and outbuildings are situated further distant from the fire house or other facility wherein such district's fire protection equipment is kept than the point on the external boundary of such district that is furthest distant from the fire house or other facility wherein such district's fire protection equipment is kept.

The answer to question No. 6 is no, for several reasons. First, generally a political subdivision, such as a fire protection district, has no authority to furnish service beyond its boundaries. 56 Am.Jur. 2d, Municipal Corporations, etc., §§ 228 and 568. Second, the Fire Protection District Law is specifically intended to allow the creation of an entity to provide fire protection within the district, to adjoining cities with or without a contract, to other fire protection districts under written agreement, and to individual property owners outside the district under contract. The mention of these specific instances of fire protection service outside the district implies the exclusion of all other services outside the district. Third, if fire protection district equipment or personnel go outside district boundaries, there is potential liability for fires which occur within the

district at properties entitled to protection that the absent equipment and personnel cannot respond to. Whether this problem is also addressed in your liability insurance policy would require analysis of the specific policy provisions.

The answer to question No. 7 is also no. A fire protection district is not authorized to respond outside the boundaries of the district except as noted in Idaho Code §§ 31-1430, 31-1430(A), and 31-1430(B). The Fire Protection District Law is intended to provide fire protection, not accident or rescue assistance. A statutory amendment would be required to allow a fire protection district to respond to highway or river accidents outside district boundaries. Additionally, Idaho Code §§ 31-3901 through 3910 provide for the creation of an ambulance district within a county "whenever existing ambulance service is not reasonably available to the inhabitants of the county or any portion thereof." The solution to your problem may lie in the creation of both a fire protection district and an ambulance district.

Yours very truly,

W. Dallas Burkhalter
Deputy Attorney General
Intergovernmental Affairs Division

April 11, 1990

Paul B. Rippel, Esq.
Hopkins, French, Crockett, Springer & Hoopes
Salisbury Building
428 Park Avenue
P.O. Box 51219
Idaho Falls, Idaho 83405-1219

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

Re: Previously Bid Contracts Under Idaho Competitive Bidding Laws

Dear Mr. Rippel:

You have requested guidance concerning the propriety of a sale proposal received by the Lost River Highway District. The sale proposal offers the District a motor grader of

the same type and at the same contract terms as previously accepted by the city of Ketchum pursuant to competitive bidding. The proposal further states that it qualifies as a "previously bid state contract" and therefore may be accepted "without the necessity of competitive bidding, as stated in Idaho Code § 31-4002."

A highway district is required to utilize competitive bidding for expenditures which exceed $5,000.00, or $10,000.00 if for equipment. Idaho Code § 40-906. However, as noted in your letter, the definition of "expenditure" was amended in 1984 to exclude "the acquisition of personal property through a contract that has been competitively bid by the state of Idaho, one of its subdivisions or an agency of the federal government." 1984 Idaho Sess. Laws, chap. 136, p.321 (House Bill 483). This type of language is applicable to cities, counties, county highway systems, highway districts and irrigation districts.

An examination of the legislative intent behind House Bill 483 shows that it was intended to allow local governments to participate in previously bid state contracts without incurring the cost and delay of competitive bidding. The title to H.B. 483 states that the amendment is "to provide that local governments may participate in previously bid state contracts without the necessity of competitive bidding." 1984 Idaho Sess. Laws, chap. 136, p.321. The statement of purpose for H.B. 483 provides:

> This proposal allows local units of government to participate under state contracts when and if they exist without going through a bidding process that essentially involves the potential of "re-inventing the wheel."

The fiscal note for H.B. 483 says: "Potentially significant savings to local units of government without any impact on the State General Fund." During committee meetings it was explained that "[i]t is simply a housekeeping measure. It provides that if there is a bid in place at the state for a particular product, it will allow local units of government to participate without going through a bidding process." House, Local Government Committee Minutes, February 28, 1984.

The statutes do not provide any guidelines as to when a local governmental entity may participate in a previously bid state contract. Presumably, a local governmental entity may participate in the previously bid state contract as long as the vendor is willing to provide the equipment at the same price and contract terms. There is no time limit in the statutes. To protect itself and establish an adequate basis for action, the local governmental entity should: (1) develop specifications for the product or equipment; (2) gauge current market conditions; and (3) by formal resolution forego competitive bidding and adopt the previously bid contract as its own (vendor willing).

One guideline that is clear from the statutes is that the previously bid contract must

have been "competitively bid by the state of Idaho, one of its subdivisions, or an agency of the federal government."

Since this sale proposal is identical to the proposal accepted by the city of Ketchum after competitive bidding and the vendor is willing to extend the same contract terms to the Lost River Highway District, the Highway District may accept the sale proposal without competitive bidding pursuant to Idaho Code § 40-106(2).

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

Sincerely,

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

April 26, 1990

Clifford T. Hayes
Chief of Police
City of Post Falls
P.O. Box 937
Post Falls, ID 83854

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

Re: Emergency Communications Act

Dear Chief Hayes:

In your letter of April 5, 1990, you ask two questions concerning the Emergency Communications Act (hereafter "Act") found at Idaho Code § 31-4801, et seq. Since 1982, the city of Post Falls, the Post Falls Fire Protection District and the Post Falls Ambulance District have operated a joint emergency communications system. With the adoption of the Act, your question restated is whether your particular service area is entitled to the fees generated by the area if the county adopts a county-wide system pursuant to the Act.

Idaho Code § 31-4807 disposes of this question and states in full as follows:

> **31-4807. Right to fee not affected by nonservice.** — All governmental entities within the county that have an already established emergency communications system using 911 call access, upon resolution duly adopted and approved and presented to the joint powers board or in their absence to the board of county commissioners, may ask that their existing emergency communication system area be excluded and *such area shall be excluded* from the county-wide emergency communications service but such exclusion shall not affect the right of the board of county commissioners to levy the fees as herein provided. No city or other agency shall establish an individual emergency communication system once a county-wide system as provided in this chapter has been adopted by the board of county commissioners. Whenever an area is excluded pursuant to this section, the board of county commissioners *shall remit to the excluded entity one hundred percent (100%) of the fees collected in the excluded area* as provided pursuant to this chapter. Any area excluded pursuant to this section may be subsequently included upon resolution duly adopted and approved and presented to the joint powers board or, in their absence, to the board of county commissioners. [Emphasis added.]

As indicated in the statute, your existing service area is entitled to 100% of the fees generated by the phones in your area if a county-wide system is adopted. Furthermore, § 31-4810 provides that you may continue to operate your service area even though the county adopts a county-wide system. This is true for all systems in operation prior to July 1, 1987.

Your second question concerns the amendments to the Act made by the 1990 Centennial Legislature in Senate Bill 1576. You ask whether the new language found at Idaho Code § 31-4808(2) requires consolidation of areas existing prior to July 1, 1987. This new language states as follows:

> (2) If, after the formation of any 911 service area of less than county-wide extent, the voters of the county approve 911 service for the entire county, the newly formed county-wide 911 service area shall assume all of the assets and liabilities of all 911 service areas existing in that county at the time of formation of the county-wide system. Existing 911 service areas shall have two (2) years from the date of the county-wide election to merge into the county-wide consolidated emergency communications system.

The Statement of Purpose for Senate Bill No. 1576 clearly states that the purpose of the amendments to the Act is to provide for the establishment of service areas within a county "*only after* it is determined that a county-wide 911 system cannot be created." [Emphasis in the original.] The purpose of the amendments was not to require merger of

those systems created prior to July 1, 1987. In fact, the statutes which provide for continued operation of these 911 service areas were not affected by the amendments to the Act. Thus, the only conclusion that can be reached in these circumstances is that the new language affects only those systems created after July 1, 1987, and that prior existing systems are not required to merge with the county.

Specifically, your service area, in operation since 1982, continues to operate as before. Further, your area is entitled to 100% of the fees generated by the phones in your area if the county adopts a county-wide system. Finally, no merger is required of your service area under the existing Act or 1990 amendments until such as time that decision is made by your joint powers board.

I hope this information has been helpful. If you have any questions, please do not hesitate to contact me.

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

May 9, 1990

Bona Miller
Administrative Management Services
Idaho Department of Correction
1075 Park Blvd.
STATEHOUSE MAIL

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

Re: Workers' Compensation

Dear Ms. Miller:

You have asked for an opinion regarding the Department's liability for workers' compensation benefits to correctional officers and staff using the fitness equipment at the Idaho Maximum Security Institution (IMSI).

ISSUE:

Are Department of Correction staff members who lift weights or otherwise engage in physical exercise at the IMSI weight and fitness room covered by workers' compensation for accidental injuries received there while on shift or off shift?

CONCLUSION:

It is most likely, given the facts of use set out below, that Department staff members are covered by workers' compensation insurance for accidental injuries received while exercising at the IMSI weight and fitness room. A written waiver of liability, signed by the employees using the room, will most likely be invalid.

FACTS:

The IMSI weight and fitness room is a fully equipped Olympic free-weight room located in the Administration Building of IMSI. It is open daily to all departmental staff during posted hours from 5:00 a.m. to midnight. The room is under the supervision of the IMSI training officer, Steve Crossman, who tours the area at least twice daily Monday through Friday.

The room was designed for the convenience of Department personnel. When the institution was designed and built, there was a concern that Department personnel should have easier access to conditioning and exercise equipment at the institution. Having this room would save the fifteen (15) mile one-way trip into Boise. It is fair to say that the Department installed the weight room for the convenience of the staff.

The Department does not charge to use the room or the weights or to view the videotapes. No additional supervision, other than Crossman's twice daily visits, is supplied.

Use of the room and its equipment is encouraged by the Warden's office and by the training officer. Staff members may train in the room during off hours as well as during their lunch break. However, correctional officers, who are required to remain in cell blocks during their lunch period, may only use the facility during their off hours. The Correctional Emergency Response Team (CERT) performs drills and training in the room. Members of CERT are paid for their training time. However, participation in CERT is voluntary.

While there is no regular exercise program or class for staff at IMSI, use of the facility is encouraged. In a letter sent to all departmental staff, Warden A.J. Arave stated that a healthy staff uses less sick time; exercise may reduce stress; reduction of stress makes the environment in a correctional institution safer; if people are fit they are able to handle

stressful physical confrontations. The only other requirements for using the room are to review a videotape, made by Bill Braseth, a training officer at the training academy, on techniques and rules to follow when weight lifting; sign and date the liability waiver; and keep the number of people in the room to a maximum of ten (10) at one time. Arave's letter also stated that if the room was abused by persons, the doors would be closed off.

There are also a number of booklets available in the room regarding such subjects as nutrition and how to calculate your maximum optimal heart rate.

While neither classes nor instructors are present in the room, Bill Braseth has offered to assist with weight training and perform physical assessments (including resting heart rate, level of conditioning and body fat content). To date, there have been no reported injuries due to use of the facility.

ANALYSIS:

The facts posed here fall into the general workers' compensation categories of recreation and social functions. The general rules for determining whether injuries incurred in recreation and social functions arise out of and in the course of employment are:

(1) Did they occur on the premises during a lunch or recreation period as a regular incident of the employment; or

(2) Did the employer, by expressly or impliedly requiring participation or by making the activity part of the services of that employee, bring the activity within the orbit of the employment; or

(3) Did the employer derive substantial direct benefit from the activity beyond the intangible value of improvement of employee health and morale that is common to all kinds of recreation and social life.

C.f., Grant v. Brownfield's Orthopedic and Prosthetic, 105 Idaho 542, 651 P.2d 455 (1983); *Briar Cliff College v. Campolo,* 360 N.W.2d 91 (Iowa 1984) (both cases referring to *Larson,* 1A *Workmens' Compensation Law,* § 22.00).

Idaho has no statutory authority on this area other than the general compensability statute, Idaho Code § 72-102.

The Idaho Supreme Court has not ruled on a case with the same facts as those posed here. However, in a somewhat similar case, the court upheld a denial of benefits. In *Teffer v. Twin Falls School Dist. No. 411,* 102 Idaho 439, 631 P.2d 610 (1981), *rehearing denied,* the claimant, a custodian at Twin Falls High School, had completed

his work before his shift ended. He and other custodians began playing basketball in the school gymnasium. Claimant later injured his knee. At the time he was hired, his supervisor told him that he could use the gym or the weight room "after work." The supervisor meant after hours. The court affirmed the Industrial Commission's decision, on the ground that the accident did not arise out of and in the course of employment. The *Teffer* case is obviously distinguishable in that use of the recreational facilities there was tolerated, not encouraged, by the employer and did not form an integral part of conditioning expected of staff members to perform the job properly. Justice Bistline wrote an extensive and forcefully worded dissent in *Teffer* arguing that the Industrial Commission abused its discretion in not finding for the claimant. He also stated that the trend of the law was to award compensation in these cases.

More recently, in *Grant v. Brownfield's Orthopedic and Prosthetic, supra,* Justice Bistline wrote the majority opinion finding that an employee who chokes to death at an employer's annual, employer-sponsored Christmas party suffered an accident arising out of and in the course of employment. Justice Bistline came to this conclusion based on the fact that the party had been an annual event for twenty-seven (27) years; the employer paid all costs of the party; the purpose was to promote good will and morale amongst its employees and to foster good employee relations; attendance, though not mandatory, was encouraged by the employer; the party was held after working hours at the Crane Creek Country Club. In our opinion, the factors enumerated in *Grant* dictate the conclusion that accidents resulting from use of recreational and social opportunities, such as those provided by the weight room at IMSI, will be held to be compensable in Idaho.

In a similar case, a New York correctional officer was injured playing softball at the prison in which he worked. The incident happened during his off-duty hours. The New York Court of Appeals (the state's highest court) held the injury was compensable because the facility was at the work site, and the employer encouraged the games and received a benefit from them. *Nazario v. New York State Department of Correction,* 86 A.D.2d 914, 448 N.Y.S.2d 531 (App.Div. 1982).

In short, the Idaho Supreme Court, like other courts, has shown an increased willingness to find compensation in these kinds of cases especially where the injuries are severe, the essential nexus between the activity and the employer is strong, the activity is at the place of work and the employer supplies the facility and encourages participation.

In our opinion, the waiver that is signed by Department employees in order to use the facilities at IMSI would not absolve the Department of liability in this case. This is because the facilities are on the Department premises, they were designed and built for employee convenience, Department money has been used to equip the room, Warden Arave has encouraged staff participation, training time is given and a staff training

officer will assist persons upon request in figuring out their level of fitness and helping them use the equipment. Under these facts, I believe it is most likely that compensation would be awarded to a person injured while using the equipment.

Very truly yours,

Robert R. Gates
Deputy Attorney General

May 18, 1990

Jack Hoopes
Attorney at Law
22 West 1st North
St. Anthony, ID 83445

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

Re: Municipal Initiative and Referendum Power

Dear Jack:

You recently asked whether the city of St. Anthony is required to go forward with an initiative petition presented to determine whether an ordinance will be adopted requiring a vote of the people before the city can lease its property. Before addressing the question of whether the initiative process is appropriate, it is necessary to discuss the nature of the authority of a city to enter into a lease.

Idaho Code § 50-1409 provides in pertinent part:

> The mayor and council may, by resolution, authorize the lease of any property not needed for city purposes, upon such terms as may be just and equitable.

The Idaho Supreme Court in the case of *Bopp v. City of Sandpoint*, 110 Idaho 488, 491, 716 P.2d 1260 (1986), stated: "This power to lease is a purely discretionary function *entrusted to the elected officials of the municipality*. . . ." [Emphasis added.] Thus, the legislature has established a policy that cities have the authority to lease city property at

the discretion of elected city officials. The establishment of this policy is important in the analysis of whether decisions to lease are subject to the initiative process.

The question then becomes whether this authority to lease is subject to the initiative process. Idaho Code § 50-501 states in part: "The city council of each city shall provide by ordinance for direct *legislation* by the people through the initiative and referendum." [Emphasis added.] Clearly, the right to legislate is reserved to the people, both at the state level, Idaho Constitution, article 3, section 1, and at the local level, § 50-501. The people, just as the legislature, even have the right to consider unconstitutional proposals even though the legislation may never take effect for the same reason. *Westerberg v. Andrus,* 114 Idaho 401, 757 P.2d 664 (1987). However, the right to initiative and referendum generally has not been extended to executive or administrative acts, 5 *McQuillen on Municipal Corporations* § 16.55, and for good reason.

> On a day-to-day basis, elected city officials are required to make decisions on administrative functions facing the city, such as purchase of city vehicles, establishment of parking fees, and the proper maintenance of city-owned lands and buildings. . . [T]o subject each such decision to referendum [or initiative] would result in chaos and bring the machinery of government to a halt. . .The rule that administrative functions are not subject to referendum [or initiative] is therefore both logical and well grounded in common sense. Moreover, even to the extent that it excludes the referendum [or initiative], this limitation on the referendum [or initiative] power does not leave citizens without remedy. Citizens who disagree with the manner in which their municipal government is administered are free to elect new officials or recall those who are currently in office.

Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986) [Bracketed material added.]

To determine whether a measure is legislative or administrative in character, *Witcher v. Canon City, supra,* provides specific instruction. In that case, the court set forth and reaffirmed three specific tests for determining whether a municipal action was legislative or administrative in nature.

> First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not. [Citations omitted.] Second, "acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative." [Citations omitted.] Third, if an original act was legislative, then an amendment to the original act must also be legislative. [Citations omitted.]

716 P.2d at 450, *citing from City of Aurora v. Zwerdlinger,* 571 P.2d 1074 (Colo. 1977).

In the context of a lease, the creation, execution and amendment of a lease of real property clearly is not a permanent act. "Moreover, in the context of a lessor-lessee relationship, changing circumstances often require amendments to an original agreement between parties. In making changes to a lease, neither party presumes an amendment to be permanent in nature." 716 P.2d at 450.

The issue of public policy was resolved by the Idaho Legislature in adopting Idaho Code § 50-1409, which gives city officials the *discretionary* authority to lease unneeded city property. Furthermore, "[t]he question of approval of the specific terms and conditions of the lease is not a matter of public policy. The negotiation of the leases and the amendments thereto are administrative acts. . . ." 716 P.2d at 450. The third test is not applicable to this situation since the original act consists of entering into a lease which by definition is an administrative act as opposed to a legislative act.

The foregoing analysis clearly indicates that leasing city property is not a legislative function but an administrative function. As such, whether or not to enter into a lease is not subject in the first instance to the initiative or referendum process. Based on *Witcher* and the cases cited therein, the city of St. Anthony clearly can deny the petition and refuse to hold the election. *Amalgamated Transit Union-Division 757 v. Yerkovich,* 545 P.2d 1401, 1404, n. 7 (Or. App. 1976). To do otherwise would subject the city's day-to-day operations to the chaos described in *Witcher.*

Sincerely,

Daniel G. Chadwick
Chief, Intergovernmental
Affairs Division

May 21, 1990

Clayton Andersen
Valley County Prosecuting Attorney
Box 532
Cascade, ID 83611

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

Re: Issuance of Subpoenas By Prosecuting Attorneys

Dear Mr. Andersen:

I am responding to your letter of March 16, 1990, concerning the issuance of subpoenas by prosecuting attorneys. As I understand the situation, you have issued subpoenas, signed by yourself, in criminal cases. The sheriff's office in Canyon County has informed you that such subpoenas must be sealed by the clerk of the court. Your question is whether you, as prosecuting attorney, have the authority to issue subpoenas on your own in criminal cases.

After an examination of the applicable statutes and rules, our conclusion is that prosecuting attorneys can issue their own subpoenas in criminal cases. The approval, signature, or seal of the judge or clerk of the court is not required.

Express authority for the issuance of subpoenas by a prosecuting attorney in criminal matters is found in two statutes. Idaho Code § 19-3004 provides as follows:

> Compelling attendance of witness — Subpoena and how issued. — The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by:
>
> 1. A magistrate before whom an information is laid, for witnesses in the state, either on behalf of the people or of the defendant.
> 2. The prosecuting attorney, for witnesses in the state in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.
> 3. The prosecuting attorney, for witnesses in the state in support of an indictment or information, to appear before the court in which it is to be tried.
> 4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon application of the

> defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state or without the state as provided in section 19-3005, as the defendant may require.

Idaho Code § 31-2604 sets forth the duties of the prosecuting attorney. In pertinent part, it provides:

> It is the duty of the prosecuting attorney:
> * * *
> 4. To attend, when requested by any grand jury for the purpose of examining witnesses before them; to draw bills of indictments, informations and accusations; to issue subpoenas and other process requiring the attendance of witnesses.

While the latter statute might arguably be regarded as pertaining only to subpoenaing witnesses to appear before the grand jury, the former statute clearly gives authority to the prosecuting attorney to subpoena witnesses in all criminal proceedings.

The rule that was cited to you in support of a contrary position is Idaho Rule of Civil Procedure 45(a), which states in part, "Every subpoena shall be issued by the clerk of the district court under the seal of the court . . . . " This rule, of course, is applicable only in civil proceedings and has no application in criminal proceedings. Idaho Rule of Civil Procedure 1(a). The relevant provision of the Idaho Criminal Rules is contained in Rule 17(a), which states:

> A subpoena shall be issued by the clerk of the court or the judge thereof, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk may issue a subpoena, signed and sealed, but otherwise in blank to a party requesting it who shall fill in the blanks before it is served.

This section does not explicitly provide for the issuance of subpoenas by the prosecuting attorney; neither does it disapprove of or exclude the possibility of such issuance. Rule 17(a) does not state, as does Idaho Rule of Civil Procedure 45(a), that "*[e]very* subpoena shall be issued by the clerk of the district court under the seal of the court. . . . " (Emphasis added.) If Rule 17(a) and the statutes cited above were actually in conflict as to the procedural question of the issuance of subpoenas, it could be argued that the provisions of the rule would prevail. *See, State v. Currington,* 108 Idaho 539, 700 P.2d 942 (1985). However, it does not appear that there is any actual conflict. The statutes provide for an alternative method of issuing subpoenas that is not precluded by the Idaho Criminal Rules.

Further, a separate constitutional basis for the statutory provisions assigning the power of issuing subpoenas to the prosecuting attorneys may be found in article 5, section 18, of the Idaho Constitution. That section provides that a prosecuting attorney "shall perform such duties as may be prescribed by law." As noted earlier, Idaho Code § 31-2604 prescribes those duties; listed among them is the issuing of subpoenas.

Finally, it should be noted that a deputy prosecuting attorney would have the same power as a prosecuting attorney to issue subpoenas in criminal proceedings. *See,* Idaho Code § 31-2008; *State v. Jaramillo,* 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987), *review denied,* 116 Idaho 467, 776 P.2d 829 (1988).

I trust that this answers your question. Please contact us if you have any further concerns in this area.

Sincerely,

Michael A. Henderson
Deputy Attorney General
Criminal Law Division

June 14, 1990

Mr. Gary H. Gould, Director
Department of Labor and
Industrial Services
STATEHOUSE MAIL

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

Re: 1990 Amendments of Section 44-1502, Idaho Code

Dear Mr. Gould:

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* defines minimum wages and sets certain standards for hours of work. It applies to employees of federal, state and local governments, employees engaged in or producing goods for interstate commerce, and employees in certain enterprises. It does not apply to private employers

who are not engaged in interstate commerce and who have annual gross sales less than $500,000.

As a result of action taken this year by the 1990 Centennial Legislature, Idaho wage law now has its own overtime requirement that applies to private employers. The essential question involved in your inquiry is whether the overtime requirements of FLSA have been extended to *all* private employers in the state of Idaho by the 1990 amendments to Idaho Code § 44-1502. For the reasons outlined below, the answer is "no."

In order to determine the effect of these recent changes in Idaho law, we will analyze the amendments to § 44-1502(3) in the order in which they were offered.

1. HB 596

The first bill introduced to amend Idaho Code § 44-1502 was HB 596. This bill made no reference to FLSA, but would have included *all* private employers in the state:

> (3) Except as hereinafter otherwise provided, no employer shall employ any employee longer than forty (40) hours in a workweek consisting of seven (7) consecutive twenty-four (24) hour periods unless such employee receives compensation for employment in excess of forty (40) hours at a rate of not less than one and one-half (1 1/2) times the employee's regular rate of pay.

The phrase, "Except as hereinafter otherwise provided," refers to the basic exemptions for executive, administrative, professional and certain other employees that are contained in Idaho Code § 44-1504. The state exemptions parallel the federal statute but are less extensive. The list of employee classes exempted from the federal law can be found at 29 U.S.C. § 213.

The second definition of importance in interpreting HB 596 is the definition of "employer." Since the bill contained no definition, one would rely on the definition contained in the chapter being amended, Idaho Code § 44-1503:

> "Employer" includes any person employing an employee or acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any state or political subdivision of a state, or any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> "Person" means any individual, partnership, association, corporation, business, trust, legal representative, or any organized group of persons.

The above state law definition of "employer" contains no interstate commerce or dollar volume test. Therefore, Idaho employers not otherwise covered by federal law would have been required to comply with state law, had HB 596 taken effect as originally drafted. The question of the scope of the state law must then be answered by analyzing whether later amendments changed the definition of "employer" to that contained in FLSA.

2. HB 903

The next amendment to Idaho Code § 44-1502(3) was contained in HB 903. The change is shown in legislative format:

> Except as hereinafter otherwise provided *in the case of overtime pay only and subject to the same exemptions and/or exceptions for overtime as provided now or hereafter under the federal fair labor standards act,* no employer shall employ any employee longer than forty (40) hours in a workweek consisting of seven (7) consecutive twenty-four (24) hour periods unless such employee receives compensation for employment in excess of forty (40) hours at a rate of not less than one and one-half (1 1/2) times the employee's regular rate of pay.

This language is an attempt to incorporate all the intricacies of federal law into the state overtime requirement. The term "exemptions," as noted earlier, refers to classes of employees not covered by the FLSA overtime requirements.

The term "exceptions" has no clear referent in the federal law, i.e., there is no section in the FLSA labeled "exceptions." Nonetheless, the overtime requirements of the FLSA do not apply to enterprises that are not engaged in interstate commerce and that do not have gross annual sales volume in excess of $500,000. Such enterprises fall outside the FLSA definition of an "enterprise engaged in commerce or in the production of goods for commerce" under 29 U.S.C. § 203 and thus need not comply with the overtime requirements of 29 U.S.C. § 207.

We conclude that the Legislature's intent, "in the case of overtime pay only," was to incorporate into Idaho law "the same exemptions and/or exceptions for overtime as provided now or hereafter under the federal fair labor standards act. . . ." Thus, the overtime law does not apply to the classes of *employees* found at 29 U.S.C. § 213; nor does it apply to the classes of *employers* found at 29 U.S.C. 203.

Any other interpretation would turn the language of HB 903 into mere surplusage, in contravention of the normal rule of statutory interpretation. *Hartley v. Miller-Stephan,* 107 Idaho 688, 692 P.2d 332 (1984). When a statute is amended, it must be presumed that the legislature intended the statute to have a meaning different from the meaning accorded to the statute before the amendment. *In Interest of Miller,* 110 Idaho 298, 715 P.2d 968 (1986).

As noted earlier, the 1990 Legislature's first amendment to Idaho Code § 44-1502 was contained in HB 596. That amendment was signed into law by the Governor on March 22, 1990 and would have subjected *all* private businesses to the overtime law. It must be presumed that HB 903, which was introduced in the House less than a week later, was intended to reach a different result, and did so, by incorporating into Idaho's overtime law "the same exemptions and/or exceptions" found under the FLSA.

3. HB 903a

The final amendment to § 44-1502(3) was inserted on the floor of the Senate during discussion of HB 903, and was later accepted by the House and signed into law by the Governor. This change, likewise shown in legislative format, left the law as it now stands:

> (3) Except as hereinafter otherwise provided in the case of overtime pay only and subject to the same exemptions and/or exceptions for overtime as provided now or hereafter under the federal fair labor standards act; *i.e., those employers not exempted or excepted by the overtime provisions of the federal fair labor standards act shall pay overtime as provided in this section,* no employer shall employ any employee longer than forty (40) hours in a workweek consisting of seven (7) consecutive twenty-four (24) hour periods unless such employee receives compensation for employment in excess of forty (40) hours at a rate of not less than one and one-half (1 1/2) times the employee's regular rate of pay.

We interpret this language to be an explicit restating of the bill's mandate to pay overtime and to take advantage of all the federal exemptions and exceptions. We do not read the amendment in HB 903a as changing the meaning of HB 903 itself. The phrase "i.e.," — literally, "that is" or "that is to say" — is usually taken to provide merely an example or further clarification, not to fundamentally alter, the matter commented upon.

In answer to the questions as they were asked:

1. In general, is the coverage of this state overtime law now exactly coextensive with the coverage of the maximum hour provisions of the federal Fair Labor Standards Act?

Yes, state law covers only those employers who have to comply with FLSA.

2. In particular, are Idaho employers whose annual gross volume of sales falls below the $500,000 "enterprise test" threshold (29 U.S.C. § 203(s)(1)(A), as amended by Public Law 101-157 Section 3), covered by the state overtime law, § 44-1502, Idaho Code?

No. Such employers are not subject to the overtime requirements of FLSA and thus are not subject to the Idaho overtime law requirements either.

3. If the answer to question no. 2 is in the affirmative, then do the exemptions set forth in 29 U.S.C. §§ 213(a)000100and (b) apply to exempt such employers who fall below the $500,000 threshold of the enterprise test from the operation of the state overtime law?

Not applicable.

4. Are employees who are covered by the "grandfather" provisions of Section 3(b) of Public Law 101-157 also subject to the state overtime law?

The 1989 amendments to the Fair Labor Standards Act (Public Law 101-157) provided for a minimum wage of $3.80 effective April 1, 1990 and $4.25 per hour in April, 1991. The threshold volume of sales for enterprises engaged in interstate commerce was raised to $500,000. Employers who are no longer covered by FLSA because of that change are nonetheless required to continue to pay the previous minimum wage of $3.35 per hour, must continue to pay overtime, and must comply with the child labor laws. 29 U.S.C. § 206, Note: Preservation of Coverage.

Employees who receive the benefit of these "preservation of coverage" requirements will be treated the same no matter how state law is interpreted. If it is ultimately determined that the coverage of state law is the same as the federal, the "grandfathered" employees will be entitled to be paid overtime in accordance with the federal scheme, except that the higher state minimum wage would be due. If it is determined that the definition of "employer" is the broader state definition, the "grandfather" provisions would still affect only those employers who were previously required to comply with the FLSA. Since the state minimum wage, overtime and child labor provisions are equal to or stricter than federal law, this provision of federal law should not create enforcement problems.

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

Very truly yours,

John J. McMahon
Chief Deputy Attorney General

June 15, 1990

Daniel M. Johnson
Secretary/Treasurer
Prairie Highway District
P.O. Box 36
Nez Perce, ID 83543

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

Re: Conflict of Interest of Highway District Commissioner

Dear Mr. Johnson:

By letter dated April 25, 1990, you requested an informal opinion from this office whether a highway district commissioner could enter into a rock pit lease with his district. For the reasons stated below, such contract would create a conflict of interest for the commissioner and would be contrary to clear language of Idaho Code §§ 59-201 and 59-202. Furthermore, such contract is voidable. Idaho Code § 59-203.

The general statutory provisions regarding conflicts of interest for public officers is found at 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.

More direct to this question is Idaho Code § 59-202:

> 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.

These provisions are intended to prohibit public officers from placing themselves in certain contractual positions which might bring their private interests into conflict with commitments to the general public interest. The obvious conflict in this instance is the commissioner's desire to maximize his gain as a private citizen in negotiating with the district and his duty to minimize costs and expenditures as a trustee for the highway district.

Even if the commissioner has the best intentions in making the contract and is not maximizing his private interests at the expense of the highway district, the contact is still forbidden by law. According to *McRoberts v. Hoar*, 28 Idaho 163, 175, 152 P. 1046 (1915):

> It is the relation that the law condemns and not the result. 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 multiply 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 commissioners as private individuals. The Idaho Supreme Court stated:

> The contract of employment in question interferes with the unbiased discharge of the 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.

Therefore, both case law and statutory law clearly prohibit the commissioner of a highway district from contracting with a highway district.

Please do not hesitate to contact me if you have any questions regarding this matter.

Yours very truly,

Francis P. Walker
Deputy Attorney General

June 15, 1990

H. F. Magnuson
Scott Building
P.O. Box 469
Wallace, ID 83873

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

Re: Recall of Hospital Trustees

Dear Mr. Magnuson:

By letter dated May 1, 1990, you requested an opinion from this office regarding the ability to recall trustees of East Shoshone Hospital district. You note that you have received differing legal opinions from attorneys in your area.

The fact that different opinions have arisen is not surprising when comparing the statutory authority for recall elections in art. 6, § 6, of the Idaho Constitution and Idaho Code § 34-1701. Article 6, § 6, of the Idaho Constitution provides:

> *Every public officer* in the state of Idaho, excepting the judicial officers, is subject to recall by the legal voters of the state or of the electoral district from which he is elected. The legislature shall pass the necessary laws to carry this provision into effect. (Emphasis added.)

The legislature in implementing the constitutional provision enacted Idaho Code § 34-1701, which states:

> **Officers subject to recall.** — The following officers, whether holding their elective office by election or appointment, *and none other*, are subject to recall:
>
> (1) State officers:
>
> (a) The governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction;
>
> (b) Members of the state senate, and members of the state house of representatives.
>
> (2) County officers:
>
> (a) The members of the board of county commissioners, sheriff, treasurer, assessor, prosecuting attorney, clerk of the district court, and coroner.
>
> (3) City officers:
>
> (a) The mayor;
>
> (b) Members of the city council.
>
> (Emphasis added.)

The two statutes are in direct conflict. In light of this direct conflict, the question then is whether Idaho Code § 34-1701 is constitutional.

The appellate courts of Idaho have not addressed the constitutionality of Idaho Code § 34-1701. The issue was addressed by District Court Judge Arthur Oliver in *Brewster v. Ellis,* Case No. 39-198-B, Sixth Judicial District of the State of Idaho, in and for the County of Bannock (1985). Speaking directly to the constitutionality of the statute, Judge Oliver stated:

> While the legislature may no doubt regulate the details of such recall elections for the purpose of "carrying this provision into effect", the legislature is overstepping its authority when it excludes some public officers from recall.... The court concludes that Idaho Code Section 34-1701 is *unconstitutional* to the extent that it excludes school board trustees from recall in violation of article VI, Section 6, of the Idaho Constitution.

Judge Oliver's decision was cited and utilized by District Court Judge John H. Bengtson in *In re John Bennett,* Case No. C-1040, Second Judicial District of the State of Idaho, in and for the County of Latah. Although Judge Bengtson was addressing the recall of school board trustees pursuant to Idaho Code §§ 33-424, *et seq.,* he concurred with the analysis and conclusion drawn by Judge Oliver in relation to the force and effect of article 6, § 6, of the Idaho Constitution.

> The policy of Article VI, Section 6, of the Idaho Constitution is undoubtedly to reserve to the electorate the unfettered, unlimited right to recall public officers — the exercise of a political process; the policy behind Section 33-424, Idaho Code, was undoubtedly to protect a particular class of public officers, i.e., school trustees, from the vicissitudes and often fickle whims of public opinion. However, rules for expediency must not be placed above the constitution, State v. Arregui, 44 Idaho 43; and the policy of the Constitution of this state must prevail over legislative policy in conflict therewith. *State v. Johnson,* 50 Idaho 363.

The legal principles set forth by Judge Oliver and Judge Bengtson are sound. To the extent that Idaho Code § 34-1701 conflicts with the clear language of art. 6, § 6, of the Idaho Constitution, it is constitutionally infirm.

The conclusion that Idaho Code § 34-1701 is partially unconstitutional does not resolve the issues presented. There is still no enabling legislation from the legislature for the recall of hospital district trustees.

The recall process, as established by Idaho Code §§ 34-1701, *et seq.,* is based upon voter registration and the percentage of registered voters calling for the recall of the

public official. The election of hospital district trustees does not require special registration to qualify as an elector, merely residency in the district. As a result, the mechanics of Idaho Code §§ 34-1701, *et seq.*, are not compatible with recalling hospital district trustees.

The state legislature has addressed this incompatibility in regard to recalling school board trustees and irrigation district directors. Idaho Code §§ 33-424, *et seq.;* Idaho Code §§ 43-214, *et seq.* The legislature has not specifically addressed the recall of hospital district trustees and until such enabling legislation is passed, hospital district trustees are not subject to recall by any effective means.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Yours very truly,

Francis P. Walker
Deputy Attorney General

June 20, 1990

Senator Michael Crapo
President Pro Tem
P.O. Box 50130
Idaho Falls, ID 83405

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

Re: Participation of legislative employees in campaign activities

Dear Senator Crapo:

In your letter dated May 15, 1990, you requested an opinion from this office as to possible restrictions on legislative staff members from participating in political or campaign activities on behalf of elected officials. You also requested information relating to any guidelines regulating the employment duties of legislative staff members.

ANALYSIS:

This office has been unable to identify any relevant guidelines that would impact the employment functions of the Idaho Legislature's staff. Idaho Code § 67-610 states:

> The selection, removal, duties and compensation of employees of the legislature shall be prescribed by the rules of the house of representatives and the senate.

This statute has never been addressed by the judiciary in Idaho. Clearly, hiring legislative staff members and defining their duties is within the province of the respective legislative bodies. The following discussion, however, indicates some limitations placed upon this discretionary power.

Staff members in the Idaho Legislature are not significantly restricted by federal or state statute from personally engaging in political activities on their own time. 5 U.S.C. § 7324; Idaho Code § 67-5311. Although the issue of legislative staff members being utilized for political purposes while on the public payroll has not arisen in Idaho, the issue has been the subject of limited litigation in federal court. In each instance, the courts have held that without express statutory guidance, e.g., franking privilege regulations, the judiciary will not infringe upon the purely internal matters of the legislative branch.

The case which crystalizes a legislature's separate and independent power to define and regulate internal affairs is *United States ex rel. Joseph v. Cannon,* 642 F.2d 1373, (D.C. Cir. 1981) *cert. denied,* 455 U.S. 999 (1982). In *Cannon,* the plaintiff brought an action against Senator Howard Cannon, pursuant to the False Claims Act, 31 U.S.C. § 231, alleging that Senator Cannon's administrative assistant worked exclusively for the Senator's 1976 reelection campaign while on the public payroll.

The United States District Court for the District of Columbia dismissed the case. In affirming the district court on other grounds, the Court of Appeals for the District of Columbia noted the lack of statutory, administrative or case law on the issue. The court further stated that there were no discernible rules or standards for the judiciary to rely upon in making a decision. The court therefore held the claim brought by the plaintiff was a "political question" and not justiciable:

> In the absence of any discernible legal standard — or even of a congressional policy determination — that would aid consideration and decision of the question raised by appellant's first count, we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that

> Congress gave the courts a free hand to deal with so sensitive and controversial a problem, or invite them to assume the rule of a political overseer of the other branches of Government.

Cannon, supra, 642 F.2d at 1385.

The *Cannon* case stands for the proposition that unless a legislature enacts a statute granting the judiciary the ability to review the employment affairs of the legislative branch, the issue of legislative personnel engaging in political activities remains within the discretion of the legislature. If control or guidance becomes necessary, each legislative body must address the issue and develop internal rules.

You have provided us with the Ethics Manual for members of the United States House of Representatives, published in 1987 by that body's Committee on Standards of Official Conduct. The Committee's discussion of political and campaign participation by legislative staff members provides useful guidance for the Idaho Legislature.

The manual addresses the dubious conduct raised in the *Cannon* case:

> The underlying standard for the receipt of compensation by an employee of the House is that the employee has regularly performed official duties commensurate with the compensation received. Employees are paid United States Treasury funds to perform public duties. Appropriated funds are to be used solely for the purposes for which appropriated (31 U.S.C. § 1301(a)). Funds appropriated for congressional staff to perform official duties should be used only for assisting a Member in his legislative and representational duties, working on committee business, or performing other congressional functions. *Employees may not be compensated from public funds to perform nonofficial, personal, or campaign activities on behalf of the Member, the employee, or anyone else.*

Ethics Manual at 84 (emphasis added). In direct response to the *Cannon* decision and the judiciary's refusal to monitor congressional staff activities, the Committee cautioned:

> The absence of definitive ruling should not be read as suggesting that it is appropriate under the House rules to compensate an employee for campaign or other nonofficial work.

Id.

In particular instances, Congress has enacted statutory prohibitions against diverting public funds and resources to personal profit. Given specific authority, the judiciary will

enforce laws regulating the use of certain public resources. *U.S. v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) *cert. denied*, 466 U.S. 982 (1980); *U.S. v. Bramblett* 348 U.S. 503 (1955) (mail fraud and falsifying payroll authorization forms); *Common Cause v. Bolger*, 512 F.Supp. 26 (D.D.C. 1980) (franking privilege abuse). By enacting such statutes, Congress acknowledges that public resources may not be used to fund nonofficial, personal or campaign activities.

The principle that a public officer should not personally profit from public resources is also found in article 7, § 10, of the Idaho Constitution:

> The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purposes not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

This provision is applicable to the legislature and its staff. Although the judiciary defers to the legislative branch to establish standards and procedures for internal regulation of conduct, the use of public funds for nonofficial, personal or campaign purposes is improper and unacceptable.

The Ethics Manual further addressed the natural and inevitable overlapping of employee duties in an official legislative or representational capacity with campaign-related activities:

> Concern has been expressed over the potential, and arguably unavoidable, "overlap" or intrusion of some minimal campaign related activities into official operations when dealing with the practical, day-to-day realities of a Member's functioning office. In responding to the "official" inquiries from the press or inquiries from constituents, for example, congressional staff may need to respond to issues that relate to a Member's political campaign as well as his official duties. Similarly, scheduling assistance and information from the Member's official staff may be requested by the campaign staff to ensure that the Member's campaign schedule does not conflict with his official agenda. This Committee has recognized that it may not be possible to have an absolute separation of duties during the workday but that the "Committee expects Members of the House to abide by the general proposition" that staffers are to work on campaign-related matters during their "free time" after the completion of their official duties.

Id. at 87.

The Committee makes no attempt to delineate which staff functions are "sufficiently official" or "too political." The standards are deliberately flexible to meet the realities of Congress' official/political environment. Yet the underlying premise is clear: public employees on a House Member's staff are paid their salaries to perform legislative and representational work, not to work on political campaigns for a party or any individual member thereof.

CONCLUSION:

Staff members of the Idaho Legislature are not restricted by the Hatch Act, 5 U.S.C. § 7324, or its Idaho counterpart, Idaho Code § 67-5311, from participating in most political activities during their free time. There are presently no statutory or administrative guidelines in Idaho regulating legislative staff members in regard to political or campaign activities. The establishment of standards and administrative guidelines in relation to the duties of legislative staff members is within the province of the legislative branch and, for the most part, beyond judicial review.

To the extent that public employees (legislative staff members) work in an unavoidably political arena, the matter is subject to the control and discretion of the legislature and its leaders. Despite this discretion, the legislature must be mindful of restrictions placed upon it by the Idaho Constitution as well as the principle that it is inappropriate to compensate an employee from public funds for performing non-official, personal or campaign-related tasks.

Very truly yours,

Francis P. Walker
Deputy Attorney General

July 31, 1990

Carlyne E. Reed
Boise County Treasurer
P.O. Box 156
Idaho City, ID 83631

Zelda Nickel
Canyon County Treasurer
1115 Albany
Caldwell, ID 83605

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

Re: Idaho Code § 63-1102A — Receipt Of Deposits To Be Later Applied To Payment Of Taxes

Dear Ms. Reed and Ms. Nickel:

This is in response to your questions regarding deposits made toward the payment of property taxes. In particular, you asked if partial payments of taxes reduce penalty and interest charges for late payment of taxes.

The pertinent statutes involved are Idaho Code §§ 63-1102 and 63-1102A. Idaho Code § 63-1102 provides that taxes are payable to the tax collector without penalty on or before December 20 of the year in which the taxes are extended on the roll and provides that taxes may be paid in two equal installments, the first on or before December 20 and the second on or before June 20 of the following year. The statute goes on to provide, in pertinent part:

> (b) If the first installment is not paid on or before December 20, that installment becomes delinquent and a penalty of two percent (2%) shall be added. Interest on the amount of the first installment plus penalty, at the rate of one percent (1%) per month, shall be calculated from January 1 of the following year. No tax, penalty or interest may be receipted by the tax collector between December 21 and the first Monday of January to allow the tax roll to be balanced and audited. Payments received by the tax collector during the audit period shall be held in a tax custodial account but not receipted until the first Monday in January, as provided in § 63-1102A, Idaho Code.

The statute includes at subsection (c) a similar provision with respect to the second half of the property tax which is due on or before June 20. Thus, if the tax is not paid by the due date, the statute imposes "interest on the amount of the first [or second] installment plus penalty."

Section 63-1102A establishes a procedure for receipt of deposits to be later applied to payment of taxes. Such deposits are accumulated until sufficient to satisfy the tax due, including penalty and interest. Such deposits are not applied against taxes due until the accumulations are sufficient to pay the tax due, penalty and interest. This is made clear from several provisions of § 63-1102A. For example, subsection (a) of the section provides, in pertinent part:

> Any person, upon application to the tax collector, may establish a payment schedule to allow payments of at least twenty five dollars ($25.00) or the balance owing, *to be accumulated toward the payment of real or personal property taxes,* including penalty, interest and costs, beginning with the oldest delinquency.

(Emphasis added.)

Thus, the subsection does not provide that the amounts paid are tax payments. Rather, payments are "accumulated toward" the payment of the taxes. Subsection (e) makes this conclusion even more clear by providing in pertinent part:

> The tax collector shall post the payment to the tax roll charge when the sufficient payment is received to satisfy the tax lien, including penalty, interest and costs, . . .

In other words, the amounts are merely accumulated toward payment of the tax charges, but are not posted against the tax due until amounts received are sufficient to pay in full or "satisfy" the tax lien, including penalty, interest and costs.

Also, Idaho Code § 63-1102A(c) provides that the county shall pay no interest on the tax custodial receipts. Again, this is consistent with the conclusion that payments accumulated do not affect interest calculations.

In summary, Idaho Code § 63-1102A permits the taxpayer to make deposits toward the payment of property taxes. However, the deposits accumulated are not applied against taxes due until they are sufficient to pay the full amount of the tax due, together with penalty, interest and costs. Thus, they do not affect penalty and interest calculations.

Sincerely,

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

August 21, 1990

Fritz A. Wonderlich
City Attorney, Twin Falls
c/o Benoit, Alexander, Sinclair,
Doerr, Harwood & High
126 2nd Avenue N., P.O. Box 366
Twin Falls, Idaho 83303-0366

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

Dear Mr. Wonderlich:

This letter is in response to your telephone inquiry regarding the recently amended statutes comprising chapter 13A, title 18, Idaho Code. You expressed concern as to what conduct was prohibited due to the statutory definition of "pecuniary benefit" in Idaho Code § 18-1351(7) and its relationship to Idaho Code § 18-1356(2).

To illustrate the problem, a hypothetical situation would be a highway district's board of commissioners being provided a weekend of golf and accommodations at Sun Valley by a large construction firm which does considerable business with the district. This is the precise type of activity forbidden under Idaho Code § 18-1356(2), which governs "gifts to public servants by persons subject to their jurisdiction":

> (2) Officials concerned with government contracts and pecuniary transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept *any pecuniary benefit* from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction. (Emphasis added.)

Undoubtedly, the private party providing the golf holiday is an interested party within the scope of this section. Similarly, the highway district commissioners' control and discretion over the enforcement of highway district contracts bring them within the scope of this section.

The question then focuses on whether the type of benefit being bestowed upon the district commissioners is "pecuniary" in nature and within the scope of Idaho Code § 18-1356(2). "Pecuniary benefit" is defined as follows by Idaho Code § 18-1351(7), as amended:

> (7) "Pecuniary benefit" is *any* benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain. (Emphasis added.)

It is the opinion of this office that the legislature's definition of "pecuniary benefit" was intended to prohibit gifts of *any* sort that provide economic gain, *regardless* of the form such gifts might take. Thus, under the hypothetical example, the commissioners would clearly be receiving a "pecuniary benefit" from the interested contractor.

This analysis is bolstered by the language in which the statute provides for exceptions. Specifically, Idaho Code § 18-1356(5)(c) states:

> (5) Exceptions. This section shall not apply to:
>
> . . . .
>
> (c) trivial benefits not to exceed a value of fifty dollars ($50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

The legislature set the $50 limitation upon "trivial benefits" in order to close an obvious loophole which could be abused by a subjective construction of the term "trivial." 1990 Idaho Sess. Laws, ch. 328 at 903. The fact that trivial benefits not exceeding $50 *in value* are permitted supports the conclusion that benefits which have a much larger cash-equivalent value, such as a golf weekend in Sun Valley, are improper. The legislature recognized the function of private interest groups in government and the need to occasionally conduct business in social settings. The "working lunch" has been retained in the ethics legislation. However, the "trivial benefits" language of Idaho Code § 18-1356(5)(c) would be pointless if the activities discussed above were permitted under a cramped reading of "pecuniary benefits" under § 18-1356(2).

In conclusion, a "pecuniary benefit" may include goods or services purchased by a private party on behalf of a public employee. The legislature has established an

exception for "trivial benefits" received. The $50 value limitation should be strictly followed. The hypothetical example of a weekend in Sun Valley golfing and being entertained by a private interest group is absolutely contrary to the provisions of Idaho Code § 18-1351 *et seq.*, and punishable through criminal prosecution. Idaho Code § 18-1360.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Very truly yours,

Francis P. Walker
Deputy Attorney General

August 24, 1990

Steve M. Parry, Esq.
Idaho Transportation Department
P.O. Box 7129
Boise, Idaho 83707-1129
Via Statehouse Mail

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

Re: Interpretation of House Bill No. 474

Dear Steve:

In your letter of July 20, 1990, you asked the Attorney General to render an opinion on H.B. 474. The Idaho Public Utilities Commission and the Idaho Department of Transportation disagree as to the legal and practical implementation of this bill. After reviewing the comments of each agency during our July 27, 1990, meeting, this letter responds to your inquiry.

STATUTORY BACKGROUND

Idaho Code § 61-812 establishes the annual regulatory fees per power unit at $21 for common and contract motor carriers and at $7 for private motor carriers operating

within Idaho. Idaho Code § 61-811A designates the Idaho Department of Transportation (ITD) as an agent of the Public Utilities Commission (PUC) for purposes of collecting and remitting these regulatory fees. Finally, Idaho Code § 61-812A provides that the annual regulatory fee for power units for each common, contract, or private carrier "shall be prorated" as registration fees of vehicle fleets used in interstate commerce. This "proration is based upon the number of fleet miles driven in Idaho compared to the total fleet miles driven as an interstate motor carrier."

HOUSE BILL 474

House Bill 474, enacted by the 1990 Centennial Legislature, amends § 61-812A of the Idaho Motor Carrier Act. This section provides for the collection of a minimum annual PUC regulatory fee.

The legislative intent embodied in the title to the 1990 amendment provides: "THAT REGULATORY FEES FOR COMMON, CONTRACT OR PRIVATE MOTOR CARRIERS SHALL NOT BE PRORATED BELOW THE MINIMUM REGULATORY FEE FOR REGISTRATION OF A SINGLE POWER UNIT." 1990 Idaho Sess. Laws Ch. 14, p.25. The bill amends § 61-812A as indicated by the emphasized portion below:

> **61-812A. Prorating.** The annual regulatory fee to be collected per power unit of each common or contract or private motor carrier prescribed by section 61-812, Idaho Code, shall be prorated as other registration fees according to valid interstate agreements for the proration of registration fees of fleets of vehicles used in interstate commerce; *provided, however, that the minimum annual regulatory fee for a common, contract or private motor carrier shall not be less than the annual regulatory fee for one (1) power unit for that class of motor carrier.*

The agencies agree that the annual regulatory fee for vehicles is to be prorated on Idaho's share of the vehicle's (or fleet of vehicles) interstate mileage and that a minimum fee must be charged at the time the annual fee is collected.

The only dispute between the agencies concerns the registration of additional vehicles after a carrier has been assessed the one minimum regulatory fee. The Public Utilities Commission asserts that registration of additional vehicles not covered under the carrier's initial registration would justify imposition of another minimum fee. The Department of Transportation argues that additional vehicles should be registered without a regulatory fee until such time as the additional prorated fee exceeds the one minimum fee.

LEGISLATIVE HISTORY

The PUC drafted H.B. 474 at the suggestion of the Legislative Auditor. In 1988, the Legislative Auditor noted that the PUC and the ITD were calculating and collecting the regulatory fee differently. The PUC followed the policy of prorating the fees for motor carriers but collected a minimum one unit fee for each carrier. ITD collected prorated fees from instate based motor carriers without regard to collecting a minimum of one unit fee. This resulted in ITD collecting regulatory fees in the amounts of $.05, $.61, $2.99, $1.60 and $.07. The Auditor recommended in his 1988 report that "the PUC put together a legislative package to get Idaho Code § 61-812A, amended."

In compliance with the Auditor's recommendation, the PUC submitted draft legislation in 1989 and 1990. This 1990 legislation is found in House Bill 474. In testimony before the House and Senate Transportation Committees, the PUC asserted that the Legislative Auditor recommended the proration not be allowed to result in a fee less than the fee for registering one power unit. The PUC testified that H.B. 474 implements the Legislative Auditor's recommendation. The PUC further stated that the bill will "prevent the Commission from spending more to collect a fee than the actual amount of the fee involved."

CONCLUSION

Having reviewed H.B. 474 and its legislative history, this office concludes that the PUC's interpretation of the bill comports with the Legislature's intent. Since the amendment to § 61-812A requires that a minimum annual regulatory fee not be less than the annual regulatory fee for one power unit, the PUC and ITD must collect that fee when the carrier pays its registration fee. If the carrier *transfers* registration from fleet vehicles no longer used to new fleet vehicles, then the agencies would not have to collect a new minimum annual fee. However, if the carrier registers additional vehicles after his initial fleet registration, then the fact that these new vehicles were not covered under the carrier's initial registration would justify the imposition of another minimum fee.

I hope this answers your question. If you have additional questions, please do not hesitate to contact our office.

Sincerely,

John J. McMahon
Chief Deputy Attorney General

August 30, 1990

Dean Sangrey
Executive Director
State of Idaho
Outfitters and Guides Licensing Board
1365 N. Orchard, Room 372
Boise, ID 83706

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

Re: Scope of Statutory Authority for Rule Making

Dear Mr. Sangrey:

This informal guideline is in response to your inquiry submitting the following questions:

1. Does the Licensing Board have the statutory authority to issue outfitter and guide licenses for the conduct of bicycle touring activities?

2. Does the Licensing Board also have the statutory authority to require safety inspections of outfitter vehicles as part of the licensing procedures?

3. The Legislative Council has recommended that a proposed addition to the Board's Rules and Regulations establishing guidelines for guide qualifications and training, and the conduct of bicycle and mountain bike touring activities, be stricken from the proposed rules package because, in their opinion, the Board does not have the authority to promulgate such rules. If this, in fact, is found to be the case, what effect would this position have on the mountain bike touring outfitter licenses that have previously been issued by the Board and are currently active?

CONCLUSIONS:

1. Yes. The term "hazardous desert or mountain excursions" contained in Idaho Code section 36-2102(b) appears to be broad enough, and was intended, to allow the Idaho Outfitters and Guides Licensing Board ("Board") to address a variety of recreational activities conducted by outfitters and guides.

2. Yes. The Board is expressly authorized to prescribe rules and regulations concerning the condition and type of gear and equipment used by outfitters and guides. I.C. § 36-2107(b).

3. See 1. and 2. above. Because the Board appears to have statutory authority to license these activities, the currently issued mountain bike touring outfitter licenses remain valid.

ANALYSIS:

1. The determination of whether the Idaho Outfitters and Guides Licensing Board has the statutory authority to license bicycle touring activities requires an analysis of the Outfitters and Guides Act ("Act"), and the Board's Rules and Regulations. The legislative intent of the Act is set forth in I.C. § 36-2101:

> The intent of this legislation is to promote and encourage residents and nonresidents alike to participate in the enjoyment and use of the deserts, mountains, rivers, streams, lakes, reservoirs and other natural resources of Idaho, and the fish and game therein, and to that end to regulate and license those persons who undertake for compensation to provide equipment and personal services to such persons, for the explicit purpose of safeguarding the health, safety, welfare and freedom from injury or danger of such persons, in the exercise of the police power of this state.

Notably, this statement of intent is not limited to the conduct of any particular activity.

The definitions of "outfitter" and "guide" set forth in I.C. § 36-2102 do address types of outdoor recreation activities suitable for licensing:

> (b) "Outfitter" includes any person who, while engaging in any of the acts enumerated herein in any manner: (1) advertises or otherwise holds himself out to the public for hire; (2) provides facilities and services for consideration; and (3) maintains, leases, or otherwise uses equipment or accommodations for compensation for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing on Idaho lakes, reservoirs, rivers and streams; and *hazardous desert or mountain excursions*. . . .
>
> (c) "Guide" is any natural person who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities directly related to the conduct of activities for which the employing outfitter is licensed. . . .

(Emphasis added.)

As can be seen from the definitions, an activity must fall within the enumerated "outdoor recreational activities" for the Board to have statutory authority to address that

activity. For the Board to have statutory authority to address bicycle touring, bicycle touring or other activities must fit within the term "hazardous desert or mountain excursion."

The Act does not define hazardous desert or mountain excursion. However, the Board's Rules and Regulations provide the following definitions:

> "Desert" — shall mean a region of scarce rainfall and vegetation in areas often having great differences between day, night and seasonal temperatures. A desert is a land surface ranging from level, plateau lands, or undulating to sharply breaking hill-lands and sand dunes that, in addition, may be broken by poor to well-defined, deeply entrenched drainage systems, rims, cliffs and escarpments.
>
> "Hazardous Excursions" — shall mean outfitted or guided activities conducted in a desert or mountainous environment which may constitute a potential danger to the health, safety, or welfare of participants involved. These activities shall include, but are not limited to: trail rides, backpacking, technical mountaineering/rock climbing, cross-country skiing, back country alpine skiing, llama packing, snowmobiling, survival courses, and motored and non-motored cycling.
>
> "Mountainous" — shall mean a region receiving limited to abundant annual precipitation with an associated vegetative cover of grass, weeds, shrubs or trees. Cool summer temperatures and cold winter temperatures prevail. A mountainous area is a land surface ranging from level to gently rolling low hills to elevated lands that are often broken with poor to well-developed, deeply entrenched drainage systems, rims, cliffs, and escarpments to steep-sided land masses of impressive size and height.

The definition of "hazardous excursions" was first adopted on March 1, 1986. The definition of "hazardous excursions" expressly includes non-motored cycling conducted in a desert or mountainous environment.

The Board is expressly granted the power to adopt rules and regulations to effect the provisions of the Act. I.C. § 36-2107 provides that the Board shall have such powers:

> (d) The Board is expressly vested with the power and authority to enforce the provisions of this chapter and make and enforce any and all reasonable rules and regulations which shall by it be deemed necessary and which are not in conflict with the provisions of this chapter, for the express purpose of safeguarding the health, safety, welfare and freedom from injury or danger of those persons utilizing the services of outfitters and guides, and for the conservation of wildlife and range resources.

Thus, the Board is empowered to adopt reasonable rules and regulations regarding hazardous desert or mountain excursions if the Board deems such rules necessary and not in conflict with the Act.

A review of some of the rules of statutory construction is necessary for further analysis of this question. Generally, a statute should be construed as a whole, giving meaning to all of its parts, if possible, in light of the legislative intent. Legislative intent "may be discerned from the occasion and necessity of the law, from the mischief felt and the remedy in view," and by tracing the history of the pertinent legislation. *Bastian v. City of Twin Falls,* 104 Idaho 307, 310, 658 P.2d 978 (Ct.App. 1983); *Mix v. Gem Investors, Inc.,* 103 Idaho 355, 647 P.2d 811 (Ct.App. 1982). Absent express indication to the contrary, an amendment to a statute is evidence of a changed legislative intent. *Nebeker v. Piper Aircraft Corp.,* 113 Idaho 609, 747 P.2d 18 (1987). In *Kopp v. State,* 100 Idaho 160, 163, 595 P.2d 309 (1979), the court noted:

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

Applying these rules of construction to the Act, it is clear that the legislature intended the Board to license outfitters and guides conducting hazardous desert or mountain excursions. The legislature did not define the meaning of hazardous desert or mountain excursions. However, the Board has defined these terms. The Board's definition of "hazardous excursions" includes non-motored cycling. Further, the Board's construction of the statute is entitled to deference. Therefore, the Board appears to have statutory authority to issue outfitter and guide licenses for the conduct of bicycle touring.

This conclusion is further supported by the legislative history of the Act. In 1976, the Act was amended to include the term "hazardous mountain excursions." This amendment was intended to address the question of whether the Board would be responsible for recreational excursions. House Resources and Conservation Committee Minutes, March 15, 1976. The purpose for this amendment was previously addressed in an informal guideline directed to Mr. Glen R. Foster, Chairman, Idaho Outfitters and Guides Board, dated September 19, 1983, which states in part:

> The interpretation that hazardous modifies mountain excursions is supported by James Baughman, vice-chairman of the Board when that statute was modified in 1976 to include this category. He indicated that the amendment was intended as a housekeeping measure to clarify the Board's right to regulate any activities conducted in a mountain terrain that imposed a significant risk of harm to the consumer. At the time of the amendment, the Board was uncertain as to its power to regulate backpacking, survival schools, cross-county skiing, and helicopter skiing.

Idaho Attorney General's Opinions and Annual Report 1983, pp. 226-234.

The 1976 amendment to the Act was repealed on January 1, 1977, as a result of the recodification of the fish and game laws which included the chapter governing outfitters and guides. The Act was "reamended" in 1977 to again include the term "hazardous mountain excursions." The 1977 amendment was not intended to change the law, but to correct the repeal of the 1976 amendment to the Act. House Resources and Conservation Committee Minutes March 9, 1977.

The Act was again amended in 1988, in part to "better accommodate the needs of the industry." Statement of Purpose RS21006C2, Senate Bill 1333. The 1988 amendment included the addition of the term "desert," thereby creating the term "hazardous desert or mountain excursions." The Senate Resources and Environment Committee Minutes of March 2, 1988, provide the following discussion of the amendment:

> The purpose and intent of the proposed amendments to the Outfitters and Guides Act is to update and clarify board authority in the implementation and enforcement of the Act. . . .
>
> Bill Meiners, Outfitters and Guide Board, explained the bill in detail going through the bill section by section noting the changes and the reasoning behind same.
>
> There was discussion regarding the intent of the legislation and declaration of policy. Also what activities are covered and the procedure to determine if an activity should be covered by the Act. *It was noted by Rules and Regulation hazardous excursions has been identified.*

(Emphasis added.)

Clearly, the legislature intended these amendments to broaden the Board's authority to address diverse recreational activities conducted in desert or mountainous regions. The legislature was specifically informed of the Board's rules defining the term "hazardous excursions" and the legislature did not object to the Board's definition.

The Board's authority to license bicycle touring is further supported by its previous licensing of diverse activities as hazardous desert or mountain excursions without challenge. For years, the Board has licensed trail rides, llama packing, snowmobiling (Rules 45 and 61), cross-country ski touring (Rules 42, 43 and 58), technical mountaineering/rock climbing (Rules 44, 59 and 60) and Jeep tours. None of these recreational activities is expressly enumerated in the Outfitters and Guides Act but, like bicycle touring, each is regulated by the Board as part of its statutory mission to

safeguard the health, safety and welfare of residents and non-residents who use the services of outfitters and guides.

2. The question whether the Board has the statutory authority to require safety inspections of outfitter vehicles requires an analysis of the powers of the Board. Pursuant to I.C. § 36-2107(b) the Board is empowered:

> To prescribe and establish rules of procedure and regulations to carry into effect the provisions of this Act, including but not limited to regulations prescribing all requisite qualifications of training, experience, knowledge of rules and regulations of governmental bodies, *condition and type of gear and equipment*, examinations to be given applicants whether oral, written or demonstrative, or a combination thereof.

(Emphasis added.)

Applying the rules of construction outlined previously, this section must be construed with the entire Act, including the intent to safeguard the health, safety, welfare and freedom from injury or danger of persons utilizing the services of outfitters and guides. Clearly, the legislature intended the Board to regulate the condition of gear and equipment utilized by outfitters and guides for the protection of persons utilizing their services. The terms "gear" and "equipment" are not defined by the Act or the Board's Rules and Regulations. Outfitters and guides normally utilize a variety of gear and equipment in providing their services, including float boats, power boats, horses, llamas, tents, cooking equipment, buses, other motor vehicles and trailers. Black's Law Dictionary (Rev. 4th Ed.) defines equipment as "Furnishings, or outfit for the required purposes. An exceedingly elastic term, the meaning of which depends on context."

Given the intent of the Act, a reasonable construction of the terms "gear" or "equipment" should include vehicles utilized by outfitters and guides to provide services to their clients. The condition of outfitter vehicles clearly may affect the health, safety, welfare and freedom from injury or danger of clients.

Additionally, you represent that the Board worked with the Idaho Public Utilities Commission in proposing a rule concerning safety inspections of outfitter vehicles and that the actual inspections would be performed by the Idaho Public Utilities Commission, the Port of Entry, or the Idaho State Police. The Board was not attempting to become a vehicle safety inspection entity, but was merely proposing a rule to require safety inspections.

3. As explained above, the Board has the statutory authority to license bicycle touring and to require safety inspections of outfitter vehicles. The Legislative Council's

opinion that these Board actions exceed its statutory authority is not persuasive. Pursuant to Idaho Code § 67-5203(a)(2), the Legislative Council is directed to analyze and refer proposed administrative rules to the germane joint subcommittee. The Legislative Council's opinion does not affect the validity of currently issued licenses. However, the Legislative Council's opinion will be considered by the legislature, which has the power, pursuant to Idaho Code § 67-5218, to reject, amend or modify agency rules by concurrent resolution if it determines that the rule violates the legislative intent of the statute under which it was made.

Sincerely,

John J. McMahon
Chief Deputy Attorney General

September 7, 1990

Dale W. Storer
City Attorney
City of Idaho Falls
P.O. Box 51630
Idaho Falls, ID 83405-1630

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

Re: Commercial Endorsements by Public Officers

Dear Mr. Storer:

The mayor of Idaho Falls has been invited to participate in a "charity cruise" scheduled by Royal Cruise Lines. The mayor and his wife would act as host and hostess of the cruise and would be listed as such in regional advertisements. In return for this endorsement the cruise and all transportation would be provided to the mayor and his wife without charge. It is your understanding that similar cruises are being offered to other mayors and elected officials throughout the state of Idaho.

Your letter of August 13, 1990, requested an opinion from this office regarding the propriety of such commercial endorsements in light of the recently amended Bribery

and Corrupt Influences Act. Idaho Code § 18-1351 et seq. For the reasons set forth below, this office concludes that activities involving commercial endorsements by public officials for which they receive compensation is prohibited by the Act.

Prior to the recent amendments made to title 18, chapter 13A, Idaho Code, the above-described activity would not have been a violation of any Idaho statute. It was in response to "loopholes and gaps that exist under current statutes" that the legislature amended the Bribery and Corrupt Influences Act in 1990. Statement of Purpose, House Bill 881, chapter 328, Laws of 1990. To this end, the legislature enacted Idaho Code § 18-1359 which prohibits a public official from using his position for personal gain.

Relevant to this present question is Idaho Code § 18-1359(1)(a) which states:

> (1) No public servant shall:
>
> > (a) Without the specific authorization of the governmental entity for which he serves, use his official position or public funds or property to obtain a pecuniary benefit from sources other than lawful compensation as a public servant.

This section would apply to commercial endorsements made by public officials for which they receive compensation in the nature of a pecuniary benefit.

The question then focuses on whether the type of benefit being provided to the mayor and his wife is "pecuniary" in nature and within the scope of Idaho Code § 18-1359(1)(a). "Pecuniary benefit" is defined as follows by Idaho Code § 18-1351(7), as amended:

> (7) "Pecuniary benefit" is any benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain.

It is the opinion of this office that the legislature's definition of "pecuniary benefit" was intended to prohibit compensation of *any* sort that provided economic gain, *regardless* of the form such compensation might take. This would include goods and services provided by a private corporation on behalf of the mayor or his wife. Furthermore, the mayor and his wife would be receiving compensation which has a definite cash equivalent. Thus, the mayor would clearly be receiving a pecuniary benefit as compensation for the cruise endorsement.

Your letter further inquired whether Idaho Code § 18-1359 would be violated if the mayor did not use his official title in the endorsement. In answering this question the

focus must be directed to the "use of his official position" in gaining the endorsement, not necessarily the use of an official title. For instance, Clint Eastwood could conceivably host a cruise based upon his identity as an actor and not have his position as mayor of Carmel, California, be a factor in the endorsement. However, it is doubtful that the mayor of an Idaho city can garnish such an endorsement without reliance upon his official position. There should be a clear understanding that an attempt to sanitize an endorsement will not defeat the prohibitions set forth in § 18-1359 absent clear circumstances justifying the endorsement without reliance upon the official's public position.

Finally, the applicability of the Ethics in Government Act, Idaho Code § 59-701 et seq., as enacted by the 1990 legislature, was raised in your letter. The Ethics in Government Act of 1990 is not applicable in this instance. This act is directed primarily towards improper activities of public officials in the course of their official duties. Although the mayor would be benefitting from the cruise due to his official position, the act of hosting a cruise would not involve any activity directly relating to municipal business or government. Essentially, the mayor would be "cashing-in" on his title but would probably not be creating a "conflict of interest" in his official capacity regarding city business. Therefore, the acceptance of a complimentary cruise by a public officer would be beyond the scope of Idaho Code § 59-701 et seq.

Yours very truly,

Francis P. Walker
Deputy Attorney General

September 17, 1990

Charles B. Lempesis
Lempesis, Kroeger, P.A.
Attorneys at Law
P.O. Box 218
Post Falls, ID 83854

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

Re: Legality of "Centennial Traffic Safety Ordinance," allowing payment of civil assessment to city clerk in lieu of filing of traffic citation with the court.

Dear Mr. Lempesis:

This letter is in response to your inquiry concerning the adoption of a Centennial Traffic Safety Ordinance by the city of Post Falls. According to the information I have received from your letter and subsequent telephone conversations, the ordinance would be in effect only between Memorial Day and Labor Day. It would allow persons charged with basic rule (speeding) violations who had no traffic violations within the preceding 12 months to enter into a "civil compromise." Such persons would be offered a chance to pay a $30 "civil assessment" to the city clerk of Post Falls within 36 hours after the time of the alleged violation. If the payment was made, the charge would not be filed with the court. Otherwise, the uniform traffic citation would be filed with the court and processed in the same manner as any other traffic infraction case. Although there is no draft of the proposed ordinance, these would be its essential provisions. You have asked us to evaluate the validity of such an ordinance.

It is our conclusion that such an ordinance would be invalid for several reasons. The ordinance would violate Idaho Code § 49-206, which requires that the provisions of title 49 of the Idaho Code be applicable and uniform throughout the state. Also, the ordinance would violate the statutes and rules pertaining to the issuance and processing of uniform traffic citations. These conflicts with statutes would also render the ordinance unconstitutional, since article 12, section 2, of the Idaho Constitution provides that city regulations cannot be in conflict with the general laws.

Article 12, section 2, of the Idaho Constitution provides as follows:

> 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.

The power to enact ordinances and prescribe penalties for their violation is also recognized by statute. Idaho Code § 50-301 provides that cities 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 § 50-302 states in part, "Cities shall make all such ordinances, by-laws, 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." That statute goes on to provide that violations of ordinances may be punishable as misdemeanors. Cities may also create ordinances whose violation is punishable as an infraction. Attorney General Legal Guideline, 1989 *Annual Report* at 169.

The breadth of the constitutional grant of police power to local governments has been recognized by the courts. "[A] municipality, under the constitutional provision in question, has authority to make police regulations not in conflict with general laws, coequal with the authority of the legislature to pass general police laws." *Clyde Hess Distributing Co. v. Bonneville County,* 69 Idaho 505, 512, 210 P.2d 798 (1949). However, the importance of the requirement that ordinances not be in conflict with the general laws has also been recognized. "[T]he right to exercise the police power of the state in local police, sanitary and other regulations, has not been granted to counties and municipalities without limitation. That right is limited to such regulations as are not in conflict with general laws." State v. Robbins, 59 Idaho 279, 286, 81 P.2d 1078 (1938).

The development of the law as to what constitutes a conflict between local ordinances and the general laws of the state was discussed in *Envirosafe Service of Idaho v. County of Owyhee,* 112 Idaho 687, 735 P.2d 998 (1987):

> The concept of "conflict" broadens when put in the context of a determination of state preemption over a field of regulation. Of course, direct conflict (expressly allowing what the state disallows, and vice versa) is "conflict" in any sense. *State v. Musser,* 67 Idaho 214, 176 P.2d 199 (1946). Additionally, a "conflict" between state and local regulation may be implied. This state firmly adopted the doctrine of implied preemption in *Caesar v. State,* 101 Idaho 158, 610 P.2d 517 (1980).
>
> > Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state. *Caesar, supra,* 101 Idaho at 161, 610 P.2d at 520. (*See also, United Tavern Owners of Philadelphia v. School District of Philadelphia,* [441 Pa. 274] 272 A.2d 868 (Pa. 1971); *Boyle v. Campbell,* 450 S.W.2d 265 (Ky. 1970); *In re Hubbard,* [62 Cal.2d 119, 396 P.2d 809] (Cal. 1964).)
>
> The doctrine of implied preemption typically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.
>
> > "The [local governmental entity] cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern." *Caesar,* 101 Idaho at 161, 610 P.2d at 520.

Other jurisdictions have commonly found that the doctrine of implied preemption will also apply where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.

> [I]f the court finds that the nature of the subject matter regulated calls for a uniform state regulatory scheme, supplemental local ordinances are preempted. *Township of Cascade v. Cascade, Resource Recovery Inc.,* 118 Mich.App. 580, 325 N.W.2d 500, 502 (Mich. App. 1982). (*See also, People v. Llewellyn,* 401 Mich. 314, 257 N.W.2d 902 (1977), *cert. den.,* 435 U.S. 1008, 98 S.Ct. 1879, 56 L.Ed.2d 390 (1978).
>
> * * *
>
> Moreover, the underpinnings for the doctrine of implied preemption are principles of long-standing in this state. In *Clyde Hess Distributing Co. v. Bonneville County,* 69 Idaho 505, 210 P.2d 798 (1949), this Court acknowledged the ability of the legislature to implicitly preempt local regulation by occupying the field of regulation.

112 Idaho at 689-90.

The court went on to hold that the state had "fully occupied and preempted both the fields of hazardous waste disposal and PCB disposal," and that a county ordinance which attempted to regulate these areas was void. 112 Idaho at 693.

Other cases in which ordinances have been held to be in conflict with state laws include *Caesar v. State,* 101 Idaho 158, 162, 610 P.2d 517 (1980) (local building ordinance could not be applied to state-owned buildings; the "statutes indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature"); *State v. Frederic,* 28 Idaho 709, 155 P. 977 (1916) (state could not authorize municipalities to prohibit by ordinance acts that would be felonies or indictable misdemeanors under the general laws of the state); and *In re Ridenbaugh,* 5 Idaho 371, 49 P. 12 (1897) (ordinance permitting licensing of gambling houses was in conflict with state law forbidding gambling).

With these explanations and holdings as to the meaning of a "conflict" between an ordinance and state law, it becomes apparent that the proposed ordinance would be in conflict with various state laws.

Idaho Code § 49-206 provides a strict limitation on local regulation of traffic and motor vehicles:

> Provisions uniform throughout state. — The provisions of this title shall be applicable and uniform throughout this state in all political subdivisions and municipalities and no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this title unless expressly authorized.

This statute indicates an intent to preempt the field of traffic regulations, subject to exceptions only where local regulation is expressly authorized. Among the "provisions of this title" that are to be uniform throughout the state are speeding regulations. Idaho Code § 49-654. A violation of that section is an infraction. Idaho Code § 49-236(2).

Certain local regulations with regard to speed limits are expressly authorized. Idaho Code § 49-207(1) provides that "[t]hese provisions of law shall not be construed to prevent cities from enacting and enforcing general ordinances prescribing additional requirements as to speed, manner of driving, or operating vehicles on any of the highways of such cities . . .." Further, local authorities are authorized, on the basis of engineering or traffic investigations, to vary speed limits within their jurisdictions in urban districts and on arterial highways. Idaho Code §§ 49-207(2) and (3). Idaho Code § 49-208 also authorizes local authorities to, among other things, establish speed limits in public parks; alter or establish speed limits; establish minimum speed limits; establish maximum speed limits on bridges and other elevated structures; and prohibit drivers of ambulances from exceeding maximum speed limits.

None of these provisions can be considered to be an authorization of the proposed ordinance. The ordinance would not impose an "additional requirement as to speed," but rather would provide a method of resolving charges of speeding violations entirely different from that which is set forth in the statutes. Nor would the ordinance vary speed restrictions in the manner authorized by Idaho Code §§ 49-207 and 49-208. No other provision has been found in title 49 that would authorize the adoption of the type of procedures contemplated by this ordinance. The ordinance therefore must be considered to be in violation of the requirements of Idaho Code § 49-206.

Conflicts with the general laws of the state also become apparent when we consider the provisions of title 49 relating to the processing of traffic citations. The procedure that would be followed under the proposed ordinance, as I understand it, is that the alleged offender would be given a uniform traffic citation charging him with the basic rule violation, along with some type of notice that he can avoid having the citation filed with the court if he pays a "civil assessment" of $30 within 36 hours. If the payment is made, the citation would be, in effect, cancelled.

Such a procedure is expressly prohibited by Idaho Code § 49-1415(1), which provides, "Any person who cancels or solicits the cancellation of any traffic citation, in any manner other than as provided in this chapter, shall be guilty of a misdemeanor." An

ordinance authorizing cancellation of a citation in a manner not authorized by the Idaho Code would be in violation of this section, and therefore would be beyond the power of the city; it could also involve the city clerk and police officers in the commission of a crime.

The ordinance fares little better under chapter 15 of title 49, which pertains specifically to the processing of traffic infractions. Idaho Code § 49-1502(1) provides in part, "The procedure for processing an infraction citation and the trial thereon, if any, shall be the same as provided for the processing of a misdemeanor citation under rules promulgated by the supreme court, except there shall be no right to a trial by jury." The supreme court rules specify the color and distribution of the various copies of the citation; they also require that two of the copies of each citation are to be given to the court. Idaho Misdemeanor Criminal Rule 5(g); Idaho Infraction Rule 5(e). Idaho Code § 49-1503 provides, "The penalty for an infraction citation and the judgment entered for the commission of an infraction shall be the amount set for that infraction in the payment schedule to be adopted by supreme court order and published annually by the administrative director of the courts." A failure to pay the prescribed penalty will result in suspension of the driver's license under Idaho Code § 49-1505.

These requirements take on special significance in view of Idaho Code § 49-1506:

> Provisions uniform throughout state. — The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions.

Under the proposed ordinance, the provisions of chapter 15 of title 49 would not be applied uniformly within the city of Post Falls. Instead, basic rule violations for a specified class of persons would be processed in a different manner and would result in payment of a different penalty. Even if the amount of the "civil assessment" were made equal to the prescribed penalty for moving traffic infractions — which is currently $43 under Idaho Infraction Rule 9(b)(4) — it would still be considered a different penalty, since it would go directly to the city, rather than being distributed in the manner required by state law. Idaho Code §§ 19-4705, 49-239. Thus, the ordinance would be in direct conflict with Idaho Code § 49-1506.

In summary, the state has preempted the area of traffic regulation and the processing of uniform citations for traffic infractions, subject only to certain specified exceptions. The proposed ordinance does not fall within any of these exceptions. The ordinance is in direct conflict with the requirements for uniform application of the law contained in Idaho Code §§ 49-206 and 49-1506. These conflicts with the general laws of the state also mean that the ordinance would be beyond the city's regulatory power as prescribed by article 12, section 2, of the Idaho Constitution. Thus, the ordinance would be unconstitutional.

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

Sincerely,

Michael A. Henderson
Deputy Attorney General
Criminal Law Division

September 24, 1990

Blaine Beaderstadt, Sergeant of Arms
United Plant Guard Workers of America
11785 S. 1st E.
Idaho Falls, Idaho 83404

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

Re: Request for Information

Dear Mr. Beaderstadt:

This letter is in response to your letter dated August 10, that asked six questions concerning the relative jurisdiction of the state and federal government at the Idaho National Engineering Laboratory (INEL).

The answers to your questions are as follows:

> QUESTION 1: Is the INEL property, both real and personal, owned by the federal government? If yes, has the real property always been in the ownership of the U.S. government? If it was deeded by Idaho, when?

ANSWER: The real property within the INEL is owned by the United States. The United States acquired the land at the INEL by discovery, exploration, settlement, and cession of foreign sovereigns. *See generally,* B. Hermann, *The Louisiana Purchase,* 48-52 (1898).

Small amounts of the land within the present boundaries of the INEL had passed into private or state ownership by about 1940. However, the United States reacquired the

inholdings of land by condemnation. *See United States v. 18,217.58 Acres of Land,* Civil Case No. 1227 (D. Idaho 1945); *United States v. 15,357.16 Acres of Land,* Civil Case No. 1624 (D. Idaho 1951); *United States v. 8617.87 Acres of Land,* Civil Case No. 2160 (D. Idaho 1959).

The United States withdrew some of the land within the present boundaries of the INEL and reserved it initially for a naval proving range beginning in 1946. *See* Public Land Orders 318, dated May 13, 1946 (156,832.75 acres of public and nonpublic lands) and 545, dated January 7, 1949 (640 acres). Later, the Navy transferred the land withdrawn and reserved by Public Land Orders 318 and 545 to the Atomic Energy Commission. See Public Land Order 691, dated December 8, 1950. Finally, the United States withdrew further land for the INEL in 1950 and 1958. See Public Land Orders 637, dated April 7, 1950 (259,549.8 acres of public and nonpublic lands) and 1770, dated December 19, 1958 (123,648 acres).

This office understands that the United States has granted easements for various purposes across the INEL. Since the office has not reviewed the documents for such easements, the office cannot describe the nature of the interests granted by these documents.

This office has no specific information on the ownership of personal property present at the INEL site.

> QUESTION 2: Can we verify that INEL or DOE pays no property or sales tax?

ANSWER: Idaho Code § 63-3622BB provides the following tax exemption for the INEL:

> There is exempted from the taxes imposed by this chapter, the sale or use of that property primarily or directly or consumed in connection with research, development, experimental and testing activities, when exclusively financed by the United States in connection with the Idaho national engineering laboratory.

Obviously neither the contractors at the INEL nor the United States would pay any property tax to the extent their activities are exempt under Idaho Code § 63-3622BB (1989).

> QUESTION 3: Do state and/or local law enforcement officials come on the INEL site and premises?

ANSWER: The Idaho Department of Law Enforcement has never attempted to regulate activities at the INEL site, except for activities on the state highways. The Division of Environmental Quality, however, does regulate activities at the INEL site.

> QUESTION 4: What is the basis and scope of federal law enforcement authority on the site?

ANSWER: The United States Congress under the Property Clause, U.S. Const. art. 4, § 3, clause 2, has the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States...."[1] The U.S. Supreme Court has described the authority of Congress under the Property Clause as "plenary." *United States v. New Mexico,* 426 U.S. 529, 539 (1976). Accordingly, Congress has virtually unlimited power to enact civil and criminal laws with respect to its property.

The existence of this unlimited authority does not mean that Congress in any specific instance intended to exercise fully its authority under the U.S. Constitution. In the past, substantial disputes in other jurisdictions and under other circumstances have occurred between the United States and a particular state because of the lack of clarity in federal legislation over the scope of state authority on a particular federal reservation. Your letter did not provide sufficient information about your concerns for this office to provide any guidance on the relative authority of the State of Idaho and the United States in this particular case.

> QUESTION 5: Is the site regulated and inspected by state health and safety officials?

ANSWER: The federal Occupational Safety and Health Administration (OSHA) laws and regulations do not currently apply to DOE and do not include a specific waiver of federal sovereign immunity authorizing the application of state laws and regulations. District health departments conduct some inspections of food-related services at the INEL at the request of DOE even though state laws and regulations are not applicable to activities at the INEL. See also the answer to Question 6 below.

> QUESTION 6: Is there any state regulation of INEL? If so, please provide details.

ANSWER: The Department of Energy and its contractors operating at the INEL must comply with state environmental laws and regulations in accordance with the waiver of sovereign immunity provisions provided in most federal environmental laws including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act (hazardous waste management) and the Comprehensive Environmental Response, Compensation and Liability Act (Super-

fund). State officials, including health officials, conduct inspections at the INEL under the authority of parallel state environmental laws, which include the Idaho Environmental Protection and Health Act and the Idaho Hazardous Waste Management Act, among others.

Sincerely,

David J. Barber
Deputy Attorney General

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[1]Other powers of the Congress under the U.S. Constitution also may authorize Congress to legislate concerning the INEL.

September 24, 1990

Gene M. Gray, Chairman
Idaho Water Resource Board
Statehouse
Boise, ID 83720

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

Re: Inspection of Public Records

Dear Mr. Gray:

You have requested an opinion from this office as to whether certain documents retained by you in your capacity as Chairman of the Idaho Water Resource Board constitute "public records" and are thus available for public inspection under the provisions of the Idaho Public Records Act, Idaho Code §§ 9-337 to 9-348.

The documents in question, as described in your letter, are individual poll ballots provided to you by members of the Payette River Advisory Group (PRAG). PRAG is composed of 30 individuals from the geographic area who have volunteered to serve as a local advisory group to inform the Board of local concerns in the development of a comprehensive water plan for the Payette River. PRAG's formation is provided for under the Board's Comprehensive State Water Plan Rules and Regulations.

According to your letter, the ballots were labeled "PRAG Internal Advisory Ballot" and sought individual member recommendations as to how various river reaches should be designated in the plan. The ballots were circulated to the PRAG members at an August 15, 1990 meeting. The PRAG members completed and returned the ballots to you at the same meeting with the explanation that the individual ballots would not be made public. A summary of the ballot results was prepared and made available to the PRAG members and the public.

You have asked whether the individual advisory ballots completed by the voluntary advisory group members are "public records," subject to the provisions of Idaho Code §§ 9-337 through 9-348, and thus must be released even though the cumulative results of the balloting have already been made public.

The Idaho Public Records Act, enacted by the 1990 Legislature defines "public record" to include, but not be limited to, "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." Idaho Code § 9-337(10). "State agency" is defined as "every state officer, department, division, bureau, commission and board or any committee of a state agency including those in the legislative or judicial branch, except the state militia." Idaho Code § 9-337(11). Finally, the Act defines "public official" to mean "any state, county, local district or government official or employee, whether elected, appointed or hired." Idaho Code § 9-337(9).

In your capacity as Chairman of the Idaho Water Resource Board, a constitutional "agency" of the state of Idaho, there is no doubt that you are a "public official" within the meaning of the Public Records Act. *See* Idaho Const. art. 15, § 7; Idaho Code § 42-1732. Further, in performing your duties as chairman of a local advisory group to inform the Board of local concerns in formulating a comprehensive state water plan pursuant to Idaho Code § 42-1734A, it is clear that you are performing tasks "relating to the conduct or administration of the public's business."

The advisory ballots described in your opinion request must, therefore, be deemed writings containing information relating to the conduct or administration of the public's business retained by a state agency. As such, the ballots must be made available for public inspection under the Public Records Act unless an exception is expressly provided by statute. Idaho Code § 9-338. A careful examination of the types of records exempt by statute from disclosure under the Act does not reveal any exemption which could even arguably apply to the advisory ballots in question. See Idaho Code § 9-340.

We therefore conclude that the individual advisory ballots in your possession are public records and must be made available for public inspection under the provisions of the Public Records Act even though the cumulative results of the balloting may have been made public.

Your letter expresses a concern that it is necessary to protect the opinions of individual members of the advisory group if volunteers are expected to continue to serve in such a capacity. There is no recognition under the Act of a general need to protect the identity of individuals who provide specific recommendations or advice to public officials or boards in carrying out the public's business. In fact, the policy behind the Act appears to be quite the opposite:

> Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Idaho Code § 9-338(1).

If additional clarification is required, please do not hesitate to contact this office.

Sincerely,

John J. McMahon
Chief Deputy

October 9, 1990

Denise L. Rosen
Deputy Prosecuting Attorney
Nez Perce County
P.O. Box 1267
Lewiston, ID 83501

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

Dear Ms. Rosen:

By letter dated September 5, 1990, you requested an opinion from this office regarding the definition of the word "premises," as used in the provisions of the Idaho Code regulating the retail sale of liquor by the drink. Title 23, ch. 9, Idaho Code. Your request arises from recent activities by the proprietors of the Wooden Nickel, a bar in

Lewiston, Idaho, licensed to sell liquor by the drink as well as beer and wine. These people have leased a tavern adjacent to the Wooden Nickel known as Carters Inn and have now begun to sell liquor by the drink at Carters Inn without a separate liquor license. There is a large, unpaved parking area between the two businesses and it is evident that the two establishments are distinct and separate businesses. There is no common scheme to the businesses nor improvements indicating such.

The proprietors of the Wooden Nickel claim that pursuant to Idaho Code § 23-902(k), as amended in 1986, they are permitted to sell liquor by the drink in both establishments so long as the bars are located on adjacent parcels of property. This claim is based upon their interpretation of the term "premises" as defined by Idaho Code § 23-902(k).

Prior to 1986, "premises" for the purpose of selling liquor by the drink was defined by Idaho Code § 23-902(j):

> j. "Premises" means the building in which the sale of liquor by the drink at retail is authorized under the provisions of this act.

In 1986 the Idaho Legislature amended Idaho Code § 23-902 and expanded the definition of the term "premises."

> 23-902: Definitions — k. "Premises" means the building and contiguous property owned, or leased or used under a governmental permit by a licensee as part of *the business establishment* in the business of sale of liquor by the drink at retail, which property is improved to include decks, docks, boardwalks, lawns, gardens, golf courses, ski resorts, courtyards, patios, poolside areas or similar improved appurtenances in which the sale of liquor by the drink at retail is authorized under the provisions of law. (Emphasis added.)

The legislative intent in amending the definition was to "allow service of alcoholic beverages on patios, terraces, and decks." (Minutes, House State Affairs Committee, February 26, 1986.) The Statement of Purpose accompanying the legislation, Senate Bill 1362, states further:

> The purpose of this measure is to expand the definition of the word PREMISES as defined in Section 23-902, Idaho Code.
>
> The intent is to clarify the existing law so that parties licensed to sell liquor by-the-drink will be permitted to *utilize their licensed property rather than just the interior portions of their licensed buildings.*

> Present language is not clear about the legal status of outdoor bars at poolside fashion shows or bars set up at outdoor barbecue pits where food is served.
>
> The changes contained in this measure will clearly permit such functions without resorting to temporary construction projects that may make such an area part of the building or to other subterfuges. (Emphasis added.)

The subsection is not the model of clarity, yet the statute is directed to a *single business establishment*. The amended definition allows the holder of a liquor license to utilize the licensed property, not merely the enclosed structures. There is nothing in the legislative proceedings amending Idaho Code § 23-902 which would indicate an intent to expand the term "premises" to include two separate business establishments. Thus, there is no basis to conclude that two separate and distinct establishments can operate under one license simply because the establishments are located on contiguous parcels of property. The same holds true for beer and wine licenses pursuant to § 23-1001(j).

This letter is limited to the factual circumstances presented in your letter. If I may be of further help in this matter, please do not hesitate to contact me.

Yours very truly,

Francis P. Walker
Deputy Attorney General

October 17, 1990

Mr. Henry R. Boomer
Attorney at Law
P.O. Box 70
American Falls, ID 83211

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

Dear Mr. Boomer:

You have requested an opinion from this office whether a person could serve as a county commissioner while his daughter was employed as a deputy clerk of the district court. The daughter is currently employed by Power County and her father is seeking a

seat on the Power County Board of Commissioners. It is the conclusion of this office that since the daughter had established employment with the county prior to her father's run for office, and since the father, if elected, will not directly appoint, hire or supervise his daughter, the continued employment by the daughter would not violate Idaho's anti-nepotism statute, Idaho Code § 18-1359(e).

Idaho's long-standing nepotism statutes, Idaho Code §§ 59-701 and 59-702, were repealed during the last session of the legislature. The provisions relating to nepotism in public office are now found in Idaho Code § 18-1359, which states in part:

> Using public position for personal gain. —
>
> (1) No public servant shall: . . .
>
> (e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation or such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose 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 public servant when such appointment is made on the agreement or promise of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment of any public fund of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

This new section combines the provisions of former §§ 59-701 and 59-702. Idaho Code § 18-1359(e) does not substantively differ from these repealed statutes.

Parenthetically, we note the clerk of the district court is an elective office, art. 5, § 16, Idaho Constitution; Idaho Code § 34-619. The clerk has the authority, subject to limited commissioner control, to hire deputy clerks. Idaho Code §§ 31-2003, 31-3107. The commissioners of the county have no authority in the actual selection or appointment of individual deputies. *Crooks v. Maynard,* 112 Idaho 312 (1987); *Dukes v. Board of*

County Commissioners, 17 Idaho 736 (1910). If the clerk makes a showing that assistance is necessary, the county commissioners must authorize the appointment. *Dukes v. Board of County Commissioners, supra.* For the purposes of Idaho Code § 18-1359(e), the board of county commissioners has no role in the appointment of deputy clerks. Thus, having a father serving as county commissioner and his daughter employed as a deputy clerk of the court will not violate the "appointment" aspect of § 18-1359(e).

The measure of control exercised by the board of county commissioners in setting wages or salaries of county employees, Idaho Code § 31-3107, would ordinarily prohibit the hiring of a deputy county clerk who is related within the second degree to a sitting county commissioner. Policy considerations behind the anti-nepotism statutes in promoting efficiency in public employment and discouraging favoritism would be compromised by such a situation. However, this rule should not apply in instances where the subordinate appointed employee was hired prior to the election of a relative within the prohibited degree.

The critical factor in this particular instance is that the daughter was employed by Power County long before the question of nepotism arose. The daughter, as a public employee, has a protected property interest in her employment. *Harkness v. City of Burley,* 110 Idaho 353, 715 P.2d 1283 (1986); *Allen v. Lewis-Clark State College,* 105 Idaho 447, 670 P.2d 854 (1983). In addition, the father as a county commissioner has no supervisory control over the clerk's deputies. The Idaho case law dealing with nepotism is scant. The only appellate case comprehensively construing Idaho's anti-nepotism statutes is *Barton v. Alexander,* 27 Idaho 286, 148 P.2d 471 (1915). For the purposes of this factual situation, *Barton v. Alexander* provides little guidance. Furthermore, concern over the constitutionally protected "property interest" in public employment was not an issue in 1915 when the Idaho Supreme Court decided *Barton v. Alexander.*

Other jurisdictions have had the opportunity to address the issue in more recent times. In *Backman v. Bateman,* 263 P.2d 561 (1953), the Utah Supreme Court endorsed the conclusions of the Idaho landmark decision in *Barton v. Alexander.* Nonetheless, the Utah court struck down an anti-nepotism statute which prohibited continued employment of persons when a relative within the prohibited degree was subsequently elected to an office which held some measure of control over the existing related employee. (The reach of the Utah statute would have directly encompassed the present situation and would have required the resignation of the commissioner's daughter.) In *Backman,* a high school principal was fired on advice from the attorney general and the state superintendent of public instruction after his brother became a member of the district's school board. In declaring this statute unconstitutional, the Utah Supreme Court stated:

> We agree that statutes which prohibit public officials from choosing and hiring their relatives, serve the salutary purpose of preventing selection of employees on the basis of favoritism to relatives rather than on merit. Such laws tend to make for better efficiency in public office, and are therefore a valid exercise of the police power. The authorities referred to, however, are concerned with anti-nepotism laws prohibiting the *hiring* of relatives in the original instance. Thorough research by ourselves and capable counsel has failed to discover any nepotism law which goes as far as this new Utah statute in that it proposes to *interrupt* and *destroy* the employment of persons who *had been lawfully hired* and had continued to work under the identical conditions for years. This presents a greatly different problem.

263 P.2d at 564. (Emphasis added.) The court further stated:

> As compared with the relatively negligible harm which might come from the sole fact of relationship as above discussed, far-reaching and drastic are the effects of this statute upon the lives and careers of plaintiffs and other capable and faithful public employees who have given many years to a particular job. Persons who had obtained employment on merit in the first place, and who had virtually given their working lives to making a career of such pursuit, simply by continuing to work under the same conditions which had existed for years, following what was theretofore a career of honorable service, are by this statute declared to be guilty of crime on July 1st; their plans are upset and the economic basis of their lives, upon which all its other aspects — social, religious and family — must devolve, is destroyed because of a circumstance arising through no fault of theirs and wholly beyond their control, and bearing little or no relationship to their capacity to render efficient service.

Id. at 564-5. See also *New Mexico State Board of Education v. Board of Education of Alamagordo Public School District,* 624 P.2d 530 (N.M. 1981); *State v. Fletchall,* 412 S.W.2d 423 (Mo. 1967); *Hinek v. Bowman Public School District No. 1,* 232 N.W.2d 72 (N.D. 1975).

The conclusion reached by the Utah Supreme Court is sound. In light of the county employee's establishment of public employment in her own right and the employee's interest in continued public employment, it is difficult to argue that the harm potentially addressed by the nepotism statute will outweigh the actual harm visited upon the daughter if she is denied continued employment.

This opinion is limited to situations where the issue of nepotism arises subsequent to the establishment of employment by a person to an appointed, subordinate public office. This opinion is also limited to situations where the newly elected official does not

exercise direct supervisory control over the established employee. In such situations both the appointment and fiscal aspects of the circumstances would have to be evaluated.

Yours very truly,

Francis P. Walker
Deputy Attorney General

November 6, 1990

The Honorable J.D. Williams
State Auditor
700 West State Street
Boise, ID 83720

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

Re: State Troopers' Meal Reimbursements

Dear Mr. Williams:

You have requested that we reexamine whether the state should withhold taxes and FICA on state troopers' meal reimbursements. This question finally has been resolved by regulation. Based upon our understanding of the current procedures of the department of law enforcement, the reimbursements are excluded from the employee's gross income, are not required to be reported on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes. 26 C.F.R. § 1.62-2T (1990).

Business or Personal Expense

The first question which must be resolved is whether the state troopers' meal expenses are business expenses or personal expenses. Pursuant to 26 U.S.C. § 62(a)(2)(A), employees are allowed to deduct business expenses as set forth in 26 U.S.C. § 162. However, personal, living or family expenses are not deductible. 26 U.S.C. § 262. The cost of meals is ordinarily a nondeductible personal expense. *Christey v. United States,*

841 F.2d 809, 811 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989) (citing Treas. Reg. § 1.262-1(b)(5)(1987)). However, under some circumstances a personal expense may be so limited by regulations that it becomes a business expense. *Id.* at 811-812. Two cases involving law enforcement officers have opposing results.

In *Moscini v. Commissioner*, 36 TCM 1002 (1977-245), Moscini was a police officer in the city of South San Francisco. He was allowed a thirty minute lunch break when he was free, was required to remain in constant contact with the dispatcher and notify the dispatcher of his location, was prohibited from carrying a bag lunch and was not reimbursed by the police department for any luncheon expenses. The restrictions placed upon these meals were found to be insufficient to turn a personal expense into a business expense.

In *Christey*, the court determined that the restrictions placed upon members of the Minnesota Highway Patrol were sufficient to conclude that the troopers' meal expenses were deductible as ordinary and necessary business expenses pursuant to § 162. 841 F.2d at 812-13. Restrictions found to be substantial by the *Christey* court included: meals must be eaten in a public restaurant adjacent to the highway whenever practical; troopers must report when and where they eat; the restaurant must be open to the public and may not serve liquor; troopers may not eat at home nor bring meals from home to eat in their patrol cars; restrictions are placed upon the time at which troopers may eat, the time allowed for a meal, and the number of troopers who may eat together; and troopers are required to be available to the public during meals to respond to emergencies and to provide information to the public — resulting in frequent interruptions and subjecting troopers to being called away for an emergency whether they have eaten what they paid for or not. *Id.* at 810, 813. The rationale of the *Christey* court was followed by the court in *Pollei v. Commissioner*, 887 F.2d 838 (10th Cir. 1989), in holding that costs incurred by Salt Lake City police captains in using their personal, unmarked police cars to travel between their residences and police headquarters were deductible business expenses when the captains were required to be on duty to and from headquarters.

Lt. Col. Fisk of the Idaho Department of Law Enforcement provided the following information regarding restrictions placed upon state troopers in Idaho: meals must be eaten in a restaurant near the highway whenever practical; troopers must report when and where they eat; the restaurant must be open to the public; a thirty minute lunch break is allowed if duties permit — troopers are required to stay within their patrol area during that time, are not allowed to eat at home, and are discouraged from coming to the larger cities within their patrol areas for meals; restrictions are placed on mealtimes and number of troopers eating at a particular time to provide better coverage during meals; troopers are required to be available to the public during meals — are frequently interrupted to provide information to the public and are subject to being called away for an emergency whether they have eaten what they have paid for or not. The restrictions

placed upon Idaho state troopers closely resemble those placed upon the Minnesota state troopers in the *Christey* case. Therefore, the meal expenses of Idaho state troopers fit within the parameters of § 162 as deductible business expenses.

Accountable Plan

Pursuant to 26 C.F.R. § 1.62-2T, if the arrangement for reimbursement of business expenses as defined in § 162 is an "accountable plan" the amounts paid are "excluded from the employee's Form W-2, and are exempt from the withholding and payment of employment taxes." To qualify as an "accountable plan" reimbursement must meet three tests: business connection, substantiation and returning amounts in excess of expenses. 26 C.F.R. § 1.62-2T.

The business connection test requires that the reimbursement be for business expenses which are deductible pursuant to various code provisions, including § 162, and "that are paid or incurred by the employee in connection with the performance of services as an employee." 26 C.F.R. § 1.62-2T(d). Since the troopers' meal reimbursements are for business expenses within § 162 and are paid in connection with the troopers' services as employees, the business connection test is satisfied.

Since meal expenses not related to overnight travel do not fall within 26 U.S.C. § 274(d), the substantiation test requires that the "information submitted to the payor be sufficient to enable the payor to identify the specific nature of each expense and to conclude that the expense is attributable to the payor's business activities." 26 C.F.R. § 1.62-2T(e)(3). Darell Ehlers of the department of law enforcement's fiscal bureau has advised me that each trooper is required to turn in a daily log for each duty day and a separate log including the cost of any meal consumed on duty. These logs meet the substantiation requirement.

The final test which must be met is that amounts provided in excess of expenses must be returned. 26 C.F.R. § 1.62-2T(f). Reimbursements are provided to troopers only after the precise cost has been submitted and are limited to a specified amount. Since advances are not provided and only substantiated expenses are reimbursed, troopers are not paid any amount in excess of expenses. Therefore, under the facts and circumstances of this reimbursement program, the final test that amounts provided in excess of expenses be returned is met.

Since the meal reimbursement plan for state troopers meets the business connection, substantiation and returning amounts in excess tests, the plan is an accountable plan. Therefore, meal reimbursements are excluded from the employee's gross income, are not required to be reported on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes.

Sincerely,

Barbara J. Reisner
Deputy Attorney General

November 14, 1990

Edward J. McHugh, Administrator
Idaho Commission for the Blind
341 W. Washington St.
Boise, ID 83702

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

Re: Food Service Facilities in Public Buildings

Dear Mr. McHugh:

You have requested an analysis of the Food Service Facilities Act, Idaho Code §§ 67-6901 through 6905 (Attachment A), and its effect on the operation of food service facilities in public buildings by the Idaho Commission for the Blind ("Commission") or its clients. You have informed me that the Commission has met resistance from some agencies which prefer to operate vending facilities for the benefit of "fun funds," or which expect payment to employee "fun funds" by a vending machine operator, or which claim grandfather rights to operate vending facilities.

Generally, any governmental agency "which proposes to allow, to operate or to continue a food service facility in a public building" is required to notify non-profit organizations representing the handicapped of the opportunity, to give first priority to proposals submitted by the Commission, and priority to proposals submitted by non-profit organizations representing the handicapped other than the Commission. Idaho Code § 67-6903. The governmental agency may not charge rent for the food service facility. *Id.* Finally, the Act provides that it will not impair any valid contract existing as of March 1, 1982. Idaho Code § 67-6905. By its terms, this grandfather right does not apply to the renewal of contracts except contracts with the Commission, or the continuation of an agency's operation of a food service facility.

The purpose of the Food Service Facilities Act is stated in Idaho Code § 67-6901:

> It is the policy of this state to encourage and enable the physically and mentally handicapped to participate fully in the social and economic life of the state and to engage in remunerative employment.

The Act provides definitions of the terms "public buildings," "food service facilities," "handicapped" and "non-profit organization representing the handicapped." Idaho Code § 67-6902. The Act applies to all state, county or city buildings used primarily as governmental offices except public schools, institutions of higher education or vocational-technical training or facilities of the State Board of Correction. Buildings of the Department of Health and Welfare are not defined as public buildings by the Act, but are included by the Act for purposes of providing vending machine service. Idaho Code § 67-6904.

Attachment B is a copy of the Statement of Purpose for the Act. Clearly, the legislative intent of the Act was to allow all non-profit organizations representing handicapped persons to operate food service facilities in public buildings which previously could be operated only by the Commission.

The Act provides that "any governmental agency which proposes to allow, to operate or to continue a food service facility in a public building shall first attempt, in good faith, to notify non-profit organizations representing handicapped persons of the opportunity to operate a food service." Idaho Code § 67-6903. The Act provides a procedure for the selection of an organization if more than one organization responds to the notice, and provides priority for the Commission and other non-profit organizations representing the handicapped. A governmental agency may not grant a food service contract to any other party unless it "determines in good faith that no non-profit organization representing handicapped persons is willing or able to provide satisfactory food service." Idaho Code § 67-6903.

Generally, the words of a statute must be given their plain, usual and ordinary meaning. *Walker v. Hansley Trucking,* 107 Idaho 572, 691 P.2d 1187 (1984). The term "good faith" is defined as "honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry." Black's Law Dictionary, Revised 4th Edition. The phrase "in good faith" means:

> [A]ctually; honestly; in an attitude of trust and confidence; innocently; in the absence of all information or belief of facts that would render the transaction unconscientious; really; without fraud, collusion or deceit; without pretense.

35 CJS "Faith" 608. Therefore, a governmental agency must make an honest attempt to notify non-profit organizations representing the handicapped of the opportunity to

operate a food service facility in a public building. Before awarding the contract to another party, the governmental agency must actually find that no non-profit organization representing the handicapped is willing or able to provide satisfactory food service.

No rent may be charged for the operation of a food service facility by a non-profit organization representing the handicapped. The term "rent" means "consideration paid for use or occupation of property." Black's Law Dictionary, Revised 4th Edition. The prohibition against rent would include payments to an employee "fun fund."

The effect on employee "fun funds" by the operation of food service facilities by non-profit organizations representing the handicapped is not relevant under the Act. The only reason for not granting a food service contract to a non-profit organization is the agency's determination that no non-profit organization is willing or able to provide satisfactory service.

Finally, the Act provides grandfather rights to valid contracts in effect on March 1, 1982, and renewals of such contracts by the Commission. These grandfather rights do not apply to renewals of contracts by any other organizations. Further, the grandfather rights do not apply to an agency's operation of food service facilities. Under Idaho Code § 67-6903, an agency which proposes "*to operate* or *to continue* a food service facility in a public building" must comply with the Act.

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

Sincerely,

W. Dallas Burkhalter
Deputy Attorney General

November 14, 1990

The Honorable Michael Crapo
President Pro Tem
P.O. Box 50130
Idaho Falls, ID 83405

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

Re: Public Official Ethics

Dear Senator Crapo:

In light of the legislature's enactment of the Ethics in Government Act of 1990, Idaho Code § 59-701 et seq., you have requested an opinion from this office whether the act would prohibit attorneys who serve in the legislature from representing clients before a state agency or from representing a state agency in their professional activity. It is the opinion of this office that such professional activity would not be prohibited by the new act.

The purpose of the legislation is to protect the integrity of state and local government through the mandatory disclosure of any conflict of interest a public officer may have in his official activities with his private pecuniary interests. A conflict of interest for the purposes of chapter 7, title 59, Idaho Code is defined in Idaho Code § 59-703(4):

> "Conflict of interest" means any *official action or any decision or recommendation by a person acting in a capacity as a public official,* the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated. . . . (Emphasis added.)

When an attorney who serves in the legislature represents a client before a state agency or represents a state agency as a client, the representation is based upon the lawyer's ability to engage in the practice of law. Conversely, the attorney/legislator does not engage in any official legislative activity in the professional representation of his client. Since the attorney/legislator is not acting in an official capacity, Idaho Code § 59-701 et seq. is not applicable.

Yours very truly,

Francis P. Walker
Deputy Attorney General

November 14, 1990

The Honorable Michael D. Crapo
Idaho State Senator
P.O. Box 50130
Idaho Falls, ID 83405

Dale W. Storer
City Attorney for Idaho Falls
P.O. Box 51630
Idaho Falls, ID 83405-1630

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

Re: Conflict of Interest of City Council Member

Dear Senator Crapo and Mr. Storer:

You have requested legal guidance from this office regarding Idaho Falls City Councilman Joseph Groberg and a business in which he is a part-owner, G.H.G. Investment Company (G.H.G.). G.H.G. has several business relationships with the City of Idaho Falls and concern has arisen over these relationships and Mr. Groberg's position on the city council.

Early Adopter Program and Super Good Cents Program

The Bonneville Power Administration (BPA) has initiated two energy conservation programs directed, in part, toward local contractors and home builders who choose to install electric space heating and air conditioning units exclusively in newly constructed residential buildings. These programs are officially administered and managed by the City of Idaho Falls. both programs involve large grants of monies by BPA to Idaho Falls which in turn awards a portion of the funds to contractors and home builders who participate in these conservation programs. Program participation by the builders is voluntary in both instances.

The BPA Early Adopter Program provided funding to the City of Idaho Falls for voluntarily adopting and implementing the Model Conservation Standards (MCS). The program as it relates to G.H.G. provides incentive payments to builders to assist them in meeting the MCS requirements. The incentive payments provided by the BPA through the City of Idaho Falls can amount to $3,400 per single-family residential structure or $3,400 plus $1,000 per living unit for multi-family residential buildings. The City of Idaho Falls is reimbursed by BPA for the administrative costs of the program which

include ensuring MCS compliance by the builders prior to receiving their incentive payments. The Idaho Falls City Council makes the final approval of payment to the builders.

The other BPA program administered through the City of Idaho Falls is the Super GOOD CENTS Program. The Super GOOD CENTS Program is essentially a promotional program wherein electrically heated homes meeting the MCS requirements are entitled to display the Super GOOD CENTS logo. The primary purpose of the program is to create public identification with a standard of construction in relation to energy conservation. The program provides reimbursement of up to $1,000 per year for builders who advertise and promote the Super GOOD CENTS Program. The Idaho Falls City Council approves the payments made to the builders and has assumed responsibility for ensuring program compliance.

G.H.G. has participated and continues to participate in these programs. Due to Mr. Groberg's ownership interest in G.H.G. and his position on the Idaho Falls City Council the issue presented is whether payment of incentive payments and promotional costs under the programs would violate Idaho Code § 59-201. Idaho Code § 59-201 states in full:

> 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.

The Idaho Supreme Court has interpreted this statute strictly. Regardless of the intentions of the public servant toward the public body he serves, any contractual relationship is prohibited. The supreme court stated in *McRoberts v. Hoar,* 28 Idaho 163, 175, 152 P. 1046 (1915):

> There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by considerations of private benefit to himself.

* * * *

> 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 multiply opportunities for malfeasance in office.

In *Nampa Highway District No. 1 v. Graves,* 77 Idaho 381, 8386, 293 P.2d 269 (1956), taxpayers challenged the payment to the highway 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.

See also, art. 7, § 10, Idaho Constitution; 10A McQuillin, Municipal Corporations § 29.97 (3rd Ed.). Therefore, both case law and statutory law clearly prohibit council members from entering into or benefitting from contractual relationships with the city they serve.

The contracts in this instance are unilateral and are created by the performance of G.H.G. in compliance with the terms of both programs. *Deer Creek v. Clarendon Hot Springs Ranch,* 107 Idaho 286, 688 P.2d 1191 (Idaho App. 1984). When Mr. Groberg assumed his position on the Idaho Falls City Council his interest in G.H.G. placed him in a dual position of acting as a trustee for the public and as a businessman with considerations of private benefits to himself. This division of interest is precisely the type of relationship prohibited by Idaho Code § 59-201 and strongly condemned by Idaho case law. Therefore, any contractual relationship between G.H.G. and the City of Idaho Falls, arising subsequent to Mr. Groberg's taking office, is prohibited pursuant to Idaho Code § 59-201.

It has been noted that the action taken by the city council in approving payments under both programs is perfunctory in nature. This fact may be true, but the statute and case law speak to the actual relationship rather than the performance aspects of the relationship. There are no good faith or de minimus exceptions to the statute. "It is the relation that the law condemns. . . ." *McRoberts v. Hoar,* 28 Idaho at 175.

Annexation Agreements

In addition to residential construction, G.H.G. also develops large tracts of real

property in the Idaho Falls area. In the process, G.H.G. is concerned with annexation and zoning issues that come before the Idaho Falls City Council. In the past, G.H.G. has entered into annexation agreements with the city and the question has arisen whether G.H.G. can continue to enter into these agreements.

The annexation agreements are contracts. *The Village of Orland Park v. First Federal Savings,* 481 N.E.2d 946 (Ill. App. 1985). Since the agreements are ultimately approved by the city council, Idaho Code § 59-201 prohibits G.H.G. from entering into annexation agreements with the city when one of its owners is a city council member.

Mr. Groberg has expressed concern over annexation agreements that were made by the City of Idaho Falls and G.H.G. prior to his being elected to the city council. These contracts remain executory and the actual annexation of the property has not occurred. Since the contracts were entered into prior to Mr. Groberg's election, they are not prohibited by Idaho Code § 59-201. *Independent School District #5 v. Collins,* 15 Idaho 535, 98 P. 857 (1908). Any participation by Mr. Groberg in performance of the contracts on behalf of the city would be controlled by Idaho Code § 67-6506 as well as chapter 7, title 59, Idaho Code. Idaho Code § 67-6506 deals with conflicts of interest within the framework of local planning and zoning. This section states:

> A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business(,) associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. A knowing violation of this section shall be a misdemeanor.

The Ethics in Government Act of 1990, Idaho Code §§ 59-701 et seq., deals with conflicts of interest in public service and is much broader in scope than Idaho Code § 67-6506. A conflict of interest for the purpose of this chapter is defined in Idaho Code § 59-703(4):

> (4) "Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, . . .

Clearly, any action taken by a city councilman with respect to annexation of property being developed or owned by a business in which a councilman is a part-owner poses a real conflict of interest. In such circumstances Idaho Code § 59-704(4) requires the councilman to disclose the conflict. If zoning issues are involved in the proceeding, Idaho Code § 67-6506 prohibits any participation by Mr. Groberg.

Finally, if the existing contracts are not complete in their terms and require further negotiation, the contracts cannot be considered antecedent to Mr. Groberg's taking office and would be prohibited. Idaho Code § 59-201. See also *City of Imperial Beach v. Bailey,* 103 Cal. App. 3d 191 (1980). Similarly, the contracts cannot be modified or renegotiated without violating Idaho Code § 59-201.

Yours very truly,

Francis P. Walker
Deputy Attorney General

November 28, 1990

Eric Love, President
Associated Students of Boise State University
BOISE STATE UNIVERSITY
1910 University Drive
Boise, ID 83725
STATEHOUSE MAIL

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

Re: ASBSU/Idaho Open Meeting Act

Dear Mr. Love:

By your letter dated October 24, 1990, you asked the following questions:

1. Is the Associated Students of Boise State University required to comply with Idaho Open Meeting Act?

2. Are senate, senate committees, executive branch, ASBSU judiciary meetings required to be held in public?

3. Can there be closed meetings?

4. As stipulated in the ASBSU Constitution, can the senate meet in executive session removing all non-members of the senate?

The answer to your first question is the key to answering the remaining questions. That is, if ASBSU is not subject to the Open Meeting Act, Idaho Code § 67-2340 et seq., then the meetings of the various groups which you have listed are subject only to any requirements set forth in the ASBSU Constitution, rules, by-laws or other applicable organizational policies.

In its preface to the Open Meeting Act, the Idaho Legislature declared "that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret." Idaho Code § 67-2340. More specifically, with respect to conducting public business in the open, the legislature declared:

> (1) All *meetings* of a *governing body* of a *public agency* shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

Idaho Code § 67-2342(1) (emphasis added).

The definitions of the terms used in the statute are critical in determining whether ASBSU or any of its organizations are subject to the Act.

> *"Meeting"* means the convening of *a governing body of a public agency* to make a decision or to deliberate toward a decision on any matter.

Idaho Code § 67-2341(5) (emphasis added).

> *"Governing body"* means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

Idaho Code § 67-2341(4) (emphasis added).

> "Public agency" means:

> (a) *any* state board, commission, department, authority, *educational institution* or other state agency which is *created by or pursuant to statute,* other than courts and their agencies and divisions, and the judicial council, and the magistrates commission;
>
> (b) any regional board, commission, department or authority *created by or pursuant to statute;*
>
> (c) any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;
>
> (d) any subagency of a public agency which is *created by or pursuant to statute,* ordinance, or other legislative act.

Idaho Code § 67-2341(3) (emphasis added).

Reading the statute, including the definitions as a whole, only meetings of governing bodies of public agencies which are created by or pursuant to statute or the Idaho Constitution (*see* Idaho Atty. Gen. Op. 85-9) are subject to the Act. In this case, the "public agency" is Boise State University, *i.e.,* the "educational institution" which is "created by or pursuant to statute." The "governing body" of Boise State University is, by statute, the State Board of Education acting as trustee of Boise State University. Idaho Code § 33-4002. ASBSU would not be considered the governing body of Boise State University (*see, Idaho Water Resources Board v. Kramer,* 97 Idaho 535, 548 P.2d 35, 72 (1976) (an administrative committee of state water resources board "does not constitute the governing body of the state water resources board with authority to make decisions for or recommendations to the board as these terms are defined")); *The Minnesota Daily v. University of Minnesota,* 432 N.W.2d 189 (Minn. App. 1988) (presidential search committee held not to be "governing body" of University of Minnesota under statute similar, but broader than Idaho Open Meeting Act), nor would ASBSU be considered a "public agency" or "subagency of a public agency" apart from Boise State University since it is not created by statute or the Idaho Constitution. Idaho Code §§ 33-4001 to 33-4007, the statutes creating Boise State University and establishing the powers and duties of its board of trustees, make no mention of ASBSU or similar student organizations. Based upon the ASBSU Constitution which you forwarded to our office, it appears that ASBSU is an internal, student-created organization.

In conclusion, it is our opinion that ASBSU is not subject to the Idaho Open Meeting Act, but rather, is subject to its own constitution, by-laws and regulations. However, the Act does establish a laudatory policy that public business be conducted in public. Certainly ASBSU could, by way of its own constitution or rules, voluntarily choose to incorporate its provisions.

Sincerely,

Bradley H. Hall
Deputy Attorney General and
Chief Legal Officer,
State Board of Education

November 28, 1990

The Honorable Kathleen W. Gurnsey, Chairman
House Appropriations Committee
1111 W. Highland View Drive
Boise, ID 83702

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

Re: Transfer of $40,000 to the Idaho State Racing Commission

Dear Representative Gurnsey:

This is in response to your questions regarding a recent transfer of $40,000 from the department of law enforcement to the Idaho State Racing Commission. I understand that in late September, after the departure of the former executive director of the racing commission, the commission discovered that it had insufficient funds currently available to pay its bills and its payroll. The problem was brought to the attention of the division of financial management (DFM). DFM worked with the commission to establish a budget which would keep the expenditures of the commission within its revenue for the fiscal year. However, a substantial part of the commission's revenue will not be received until later in the fiscal year. Revenue received to date is not sufficient to pay bills outstanding.

To solve the current cash flow problem for the racing commission, DFM worked with the department of law enforcement to provide a transfer of $40,000 from the department of law enforcement to the commission, with reimbursement to be made before the end of the fiscal year. The mechanism chosen was Idaho Code § 67-3511, which is commonly used to make transfers between programs of an agency. In particular, Idaho Code § 67-3511(2) provides:

> Appropriations may be transferred from one program to another within a budgeted agency, as appropriated, upon application duly made by the head of any department, office or institution of the state (including the elective officers in the executive department and the state board of education) and approval of the application by the administrator of the division of financial management and the board of examiners provided the requested transfer is not more than ten percent (10%) cumulative change from the appropriated program amount. Requests for transfers above ten percent (10%) cumulative change must, in addition to the above, be approved by law.

Thus, Idaho Code § 67-3511 provides a procedure for transfer of appropriations between programs of a budgeted agency. Chapter 261, 1990 Session Laws, provides an appropriation to the department of law enforcement. The racing commission is a program within the department of law enforcement appropriation designated to receive $637,200. Thus, DFM authorized the transfer of $40,000 to the racing commission pursuant to Idaho Code § 67-3511. It was intended that a reimbursement occur toward the end of the fiscal year once the racing commission had received sufficient revenues to make the reimbursement.

In your letter, you have pointed out that Idaho Code § 54-2514 provides, in pertinent part:

> All sums due the commission from the licensee shall be paid to and retained by the commission for the payment of salaries, travel, operating costs and other expenses necessary to carry out the provisions of this act, except that no payment need be made for office accommodations furnished by the state: provided, however, that no salary, wages, expenses or compensation of any kind shall be paid by the state of Idaho for, or in connection with, the work of the commission in carrying out the provisions of this act.

Though somewhat unclear, the above-quoted language indicates that the commission is to be self-supporting from its license revenues with the exception that the state may pay for office accommodations from other state revenues. In light of this provision, you have asked if the general procedure for transfer of appropriations provided by Idaho Code § 67-3511 should be used since the transfer includes general fund revenues. If not repaid, the general fund would end up supporting the racing commission.

As discussed below, we recommend the use of the registered warrant procedures of § 67-1212 to handle the cash flow problems of the racing commission. The problem which we see in using the procedures of § 67-3511 is that transfers made pursuant to that section do not require repayment. Thus, if for some reason the general account were not later reimbursed, the provisions of Idaho Code § 54-2514 regarding the self-supporting nature of the racing commission would be violated.

In our opinion, it is preferable to use the registered warrant provisions of § 67-1212 in these circumstances. Idaho Code § 67-1212(1) provides, in pertinent part:

> All warrants upon funds the balance in which is insufficient to pay them must be turned over to the state treasurer by the state auditor. All of such warrants shall be registered by the state treasurer as follows: he shall date and sign such warrants on the back thereof underneath the words "Presented for payment and not paid for want of monies" and return the same to the state auditor for delivery to the respective payees.... Any such warrants, registered by the state treasurer, shall from date of registration until paid bear interest at a rate to be fixed by the state treasurer.

Thus, the registered warrant procedure provides a mechanism for the operation of government when the cash balance in a fund is currently insufficient to pay current obligations. The procedure creates a legal obligation to pay the amount of the registered warrant plus interest. Registered warrants are legal investments of the State of Idaho which may be purchased with general account funds pursuant to § 67-1210(g), Idaho Code.

The registered warrant procedure has not been used in recent years by the state because revenue anticipation notes and appropriation transfers pursuant to Idaho Code § 67-3511 are typically more efficient. However, the use of registered warrant procedures in this case would avoid any possibility of violating Idaho Code § 54-2514.

The registered warrant procedure could be used in this case to provide the racing commission the cash flow required to operate within its appropriation while maintaining the obligation to repay the general account with interest. The procedure would not result in a violation of the provisions of Idaho Code § 54-2514, regarding the self-supporting nature of the racing commission. By use of the registered warrant procedure, the general account would merely be making a legal investment in a registered warrant of the racing commission.

The procedure could work in this case as follows: The racing commission could request a warrant to be drawn payable to the department of law enforcement to reimburse the department for the funds which were transferred to the racing commission. The warrant could be registered by the state treasurer and the treasurer could establish an interest rate based upon her estimate of the interest rate which could be received by the general account from alternative investments. By receiving an equivalent interest rate, the general account would not lose interest revenue due to the transfer of funds. The department of law enforcement would hold the registered warrant until it was repaid by the racing commission.

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

Sincerely,

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

December 10, 1990

The Honorable Lydia Justice Edwards
State Treasurer
STATEHOUSE MAIL

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

Re: Letter of Credit as Security for Self Insurers
Under the Worker's Compensation Law

Dear Ms. Edwards:

This is in response to your question whether a letter of credit issued by an out of state bank would be adequate security for a self insurer under the worker's compensation law. Idaho Code § 72-301 requires every employer to secure the payment of compensation either by obtaining a policy of workmen's compensation insurance or by qualifying as a self insurer with approval of the industrial commission. Idaho Code § 72-301(2) provides, in pertinent part:

> An employer may become self insured by obtaining the approval of the Industrial Commission, and by depositing and maintaining with the Commission security satisfactory to the Commission securing the payment by said employer of compensation according to the terms of this law. Such security may consist of a surety bond or guaranty contract with any company authorized to transact surety insurance in Idaho. The Commission shall adopt rules and regulations governing the qualifications of self insured employers, the nature and amount of security to be deposited with the Commission, and the conditions under which an employer may continue to be self insured.

Thus, a person seeking to be self insured under the act must either obtain a surety bond or guaranty contract from an Idaho surety or deposit security satisfactory to the commission consistent with the commission's rules. I understand the commission will be considering the question of what security should be allowed.

The state treasurer's office is involved with respect to such deposits pursuant to Idaho Code § 72-302, which provides in pertinent part:

> *The securities so deposited* [pursuant to § 72-301] with the state treasurer *shall be an exclusive trust* for the benefit of the employees of the employers whose compensation liability is so secured, to remain with the treasurer in trust to answer any default of any employer, self insured employer or surety upon any such obligation established by final judgment upon which execution may lawfully be issued against the employer or surety; the surety, however, at all times shall have the right to collect the interest, dividends and profits upon the securities . . . . [Emphasis added.]

This section indicates that the security used by a self- insured employer should be "securities" held in an exclusive trust and upon which execution may lawfully be issued. This implies that the securities tendered must be something other than a letter of credit. Rather, the section requires deposit of "securities" upon which execution may lawfully be issued against the employer or surety. This section goes on to provide, in pertinent part:

> The surety shall not be permitted to withdraw from the state treasurer the *deposits of money or bonds* or permit the surety bonds to lapse for a period of one (1) year after discontinuing business within this state . . . *Securities which are used to satisfy the requirements* of this section may be held in the federal reserve book entry system, as defined in section 41-2870(4) and interests in such securities may be transferred by bookkeeping entry in the federal reserve book-entry system without physical delivery of certificates representing such securities. [Emphasis added.]

Again, this section implies that the deposit will involve money or bonds or securities, including securities eligible for the federal book-entry system.

I understand the commission currently accepts certificates of deposit issued by Idaho banks. If certificates of deposit are allowed, I would encourage the continued acceptance only of Idaho certificates of deposit. Certificates of deposit are unsecured obligations of the banks. Thus, their value as security depends upon the solvency of the bank. The state is likely to be aware of potential financial problems of Idaho banks. This would likely not be the case with respect to out of state banks. This is important since the commission

has the right to withdraw its approval of self insured employers if it shall appear to the commission that workmen are not fully protected. Idaho Code § 72-301.

In your discussions with the industrial commission, it is important to look for a solution which adequately protects employees but which is not too restrictive on employers. However, with respect to any instruments which may not provide adequate security for Idaho's workers, in my opinion, the policy of the law would favor insistence upon adequate security as opposed to convenience of employers.

I hope this letter will be useful to you in your discussions with the industrial commission.

Sincerely,

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

December 14, 1990

Susan Lynn Mimura
Deputy City Attorney
City of Boise
P.O. Box 500
Boise, ID 83701-0500

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

Re: Conflicts of Officer Discretion/Supervisory Duty

Dear Ms. Mimura:

The Attorney General has asked me to respond to your letter of November 29, 1990. You have asked for guidance on three questions:

(1) May a supervisory peace officer cancel a Uniform Citation issued by a subordinate?

(2) May a supervisory peace officer release a person arrested by a subordinate?

(3) May the police immediately release a person who has been arrested illegally, in a case of mistaken identity?

A Uniform Citation, even filled out and signed by a police officer and a prospective defendant, is, in and of itself, of no legal significance. Rather, it is a form designed to be used as a criminal complaint. M.C.R. 2(b), I.I.R. 3(a).

A complaint, by definition, is not effective until it is made to a magistrate. Idaho Code § 19-501.

It follows logically that if a citation is found to be erroneous, either as to form or content, it should not be delivered to a magistrate. As a matter of policy, the citizen who had received the citation should be notified. This procedure achieves the dual desirable result of keeping the judicial system from being clogged with unprosecutable complaints while ensuring that the erroneously cited citizen will not have to attempt to defend against an improper charge. It is, however, recommended that the city develop precise guidelines and procedures for the handling of erroneous citations in order to avoid even the appearance of "ticket fixing."

This procedure, of course, will not deter an officer or city attorney from filing a proper complaint against someone erroneously cited.

When a peace officer makes a valid arrest subject to an arrest warrant, his supervisor may not release the person on his own volition. Indeed, the warrant itself is written in mandatory language. The arrestee must be taken before a magistrate, Idaho Code § 19-507, subject to the time limits set forth in I.C.R. 5(b). No one has the authority to countermand the magistrate's order, except a magistrate or district judge.

When a peace officer makes a valid warrantless arrest, he must also bring the defendant before a magistrate "without unnecessary delay." Idaho Code § 19-615. Again, the terms of the statute are in mandatory language. A supervisor may not thwart the statute by ordering the person released. However, a prosecutor or city attorney may authorize the release of an arrestee prior to the filing of a complaint and appearance before a magistrate by exercising his or her prosecutorial discretion. Idaho Code §§ 31-2604, 50-208A. A peace officer has no such discretion.

Finally, if it is determined by a peace officer that the person he has arrested is in fact not the person named in the warrant, the person should be released immediately. The criminal statutes and rules presuppose that the person being held has been correctly identified. The warrant cannot be considered as having been validly served if it is served

on the wrong person. If a person has been misidentified, the law pertaining to holding the person has no application. Again, it is recommended that the city develop procedures regarding this issue in order to minimize liability.

Yours very truly,

Michael Kane
Deputy Attorney General
Chief, Criminal Law Division

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