IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

AND

SELECTED INFORMAL GUIDELINES

FOR THE YEAR

1992

Larry EchoHawk
Attorney General

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GEORGE M. PARSONS	1893-1896
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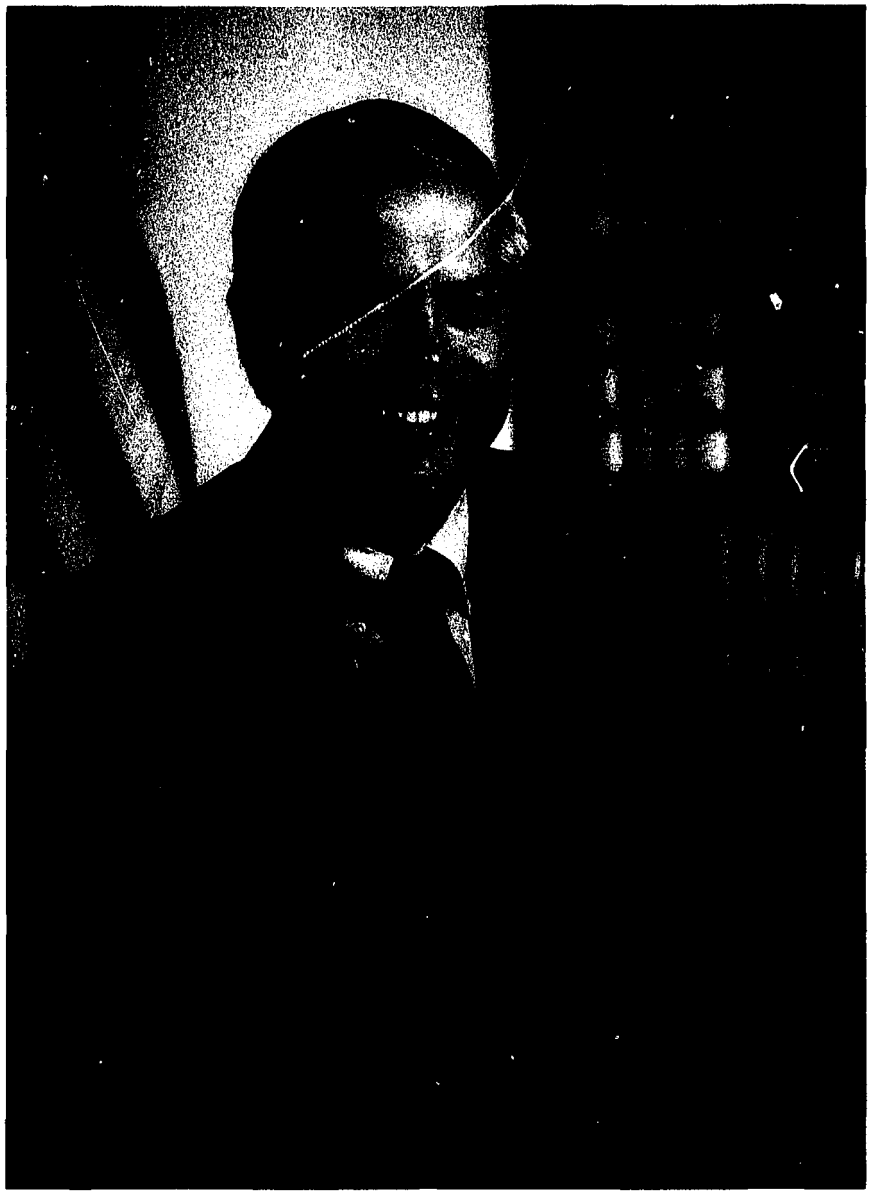

Larry EchoHawk
Attorney General

INTRODUCTION

Dear Idahoan:

This volume of opinions represents the half-way mark in my term of office as Idaho's Attorney General. I am proud of the high standards of research and writing it embodies.

Against a broader canvas, this volume provides an index of the last eighteen years of opinions produced by the Office of the Attorney General. For fourteen of those eighteen years, Larry Harvey and Jack McMahon served as Chief Deputy. These two attorneys served sometimes as authors themselves, sometimes as mentors to younger deputies, always as quality control editors of the opinions in those fourteen volumes.

The citizens of Idaho are the beneficiaries of the high standards set by these two chief deputies. I present this volume, which summarizes so much of the work of my predecessors, with pride.

Best Wishes,

LARRY ECHOHAWK
Attorney General
State of Idaho

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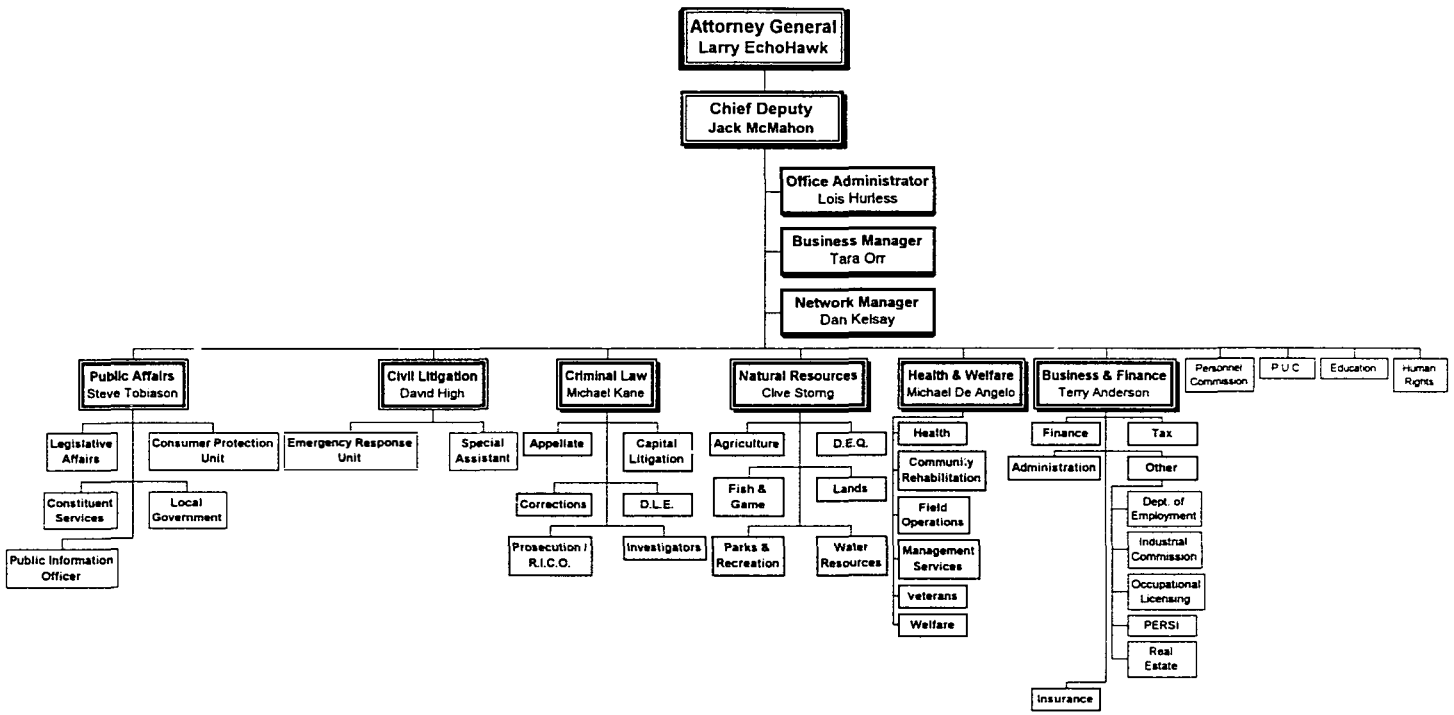
ORGANIZATION CHART — Office of the Attorney General



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1992

Larry EchoHawk
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 92-1

TO: Olivia Craven West
Executive Director
Commission for Pardons and Parole
280 N. 8th St., Suite 140
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

When a person is sentenced to consecutive sentences for multiple criminal offenses, with a fixed and indeterminate term provided for in each sentence, how are the fixed and indeterminate portions of the sentences to be calculated for purposes of determining parole eligibility?

CONCLUSION:

The fixed term of each sentence must be served consecutively before the person is eligible for parole consideration. Once all of the fixed terms have been completed, the person's indeterminate terms are added to determine the maximum time the person may serve. The person is eligible for parole at all times during the pendency of the indeterminate sentences.

ANALYSIS:

You have requested an opinion regarding Idaho's Unified Sentencing Act. Specifically, you have asked for an interpretation of the following language in Idaho Code § 19-2513 pertaining to consecutive sentences:

> [I]f consecutive sentences are imposed for multiple offenses, the court shall, if required by statute, direct that . . . each consecutive sentence contain a minimum period of confinement; in such event, all minimum terms of confinement shall be served before any indeterminate periods commence to run.

You have asked how the fixed and indeterminate portions of consecutive sentences are to be juxtaposed by the Department of Correction and the Parole Board in the determination of the date the prisoner becomes eligible for parole.

By way of illustration, you have posed a hypothetical situation in which a person is sentenced to a minimum period of confinement of two years followed by an indeterminate period of one year, which is followed by a consecutive sentence of a minimum period of one year followed by an indeterminate term of three years. When does such a person become parole eligible? Is it after two years (the period of time after the first fixed term), three years (the period of time after both fixed terms are added together), or four years (the period of time after both fixed terms and the first indeterminate term)? Of course, the scenario becomes even more complicated when three or more sentences are ordered to be served consecutively.

Several mutually exclusive theoretical models have been proposed for the interpretation of this section. The first is alluded to in your letter. Under this model, the prisoner will first serve a period of years equivalent to the full amount of all consecutive fixed terms. Then, he will be required to serve each indeterminate term consecutively, *with separate determinations regarding parole for each count.*

		PAROLE HRNG	
CT I	FIXED TERM	↓IND TERM	
			PAROLE HRNG
CT II		FIXED TERM	↓IND TERM

Under this model, the first indeterminate term would be treated by the commission in virtually the same manner as a fixed term, because the parole commission will not release the prisoner when he has yet to serve another indeterminate term.

A second model would add together all the indeterminate terms once the combined total of fixed terms has been served. This model would call for a single parole determination, which would apply to all consecutive indeterminate sentences.

		PAROLE HRNG	
CT I	FIXED TERM	↓IND TERM	
CT II		FIXED TERM	IND TERM

Yet a third model was implied in dicta in the recent decision of the Idaho Court of Appeals in *State v. Alberts,* 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991). The court seemed to suggest that a prisoner must serve both the fixed and indeterminate portions of the first count before becoming eligible for parole upon completion of the consecutive fixed term. Under this approach, only in those cases where a person has had his indeterminate sentence formally commuted under art. 4, § 7, of the Idaho Constitution will he be relieved from serving the first sentence in full before beginning the second sentence.

PAROLE HRNG
CT I FIXED TERM ⸸IND TERM
PAROLE HRNG
CT II FIXED TERM ⸸IND TERM

There is a complete lack of firm authority supporting any of these theoretical models. Arguments can be made for each of them. For example, the third model is closest to a true consecutive sentence. And it does seem to have support in *Alberts.*

On the other hand, either the first or second model seems required by a close reading of the statute: "*[A]ll* minimum terms . . . shall be served before *any* indeterminate periods commence . . . ."

Criminal statutes must be strictly construed. *State v. Charboneau,* 116 Idaho 129, 153, 774 P.2d 299, 322 (1989). Given the clarity of the language mentioned above, it is the opinion of this office that the third theoretical model, implied in *Alberts,* is contrary to the express terms of Idaho Code § 19-2513. Under the third model, the parole commission would have to engage in the futile exercise of deciding whether to grant parole to a prisoner upon the commencement of the first indeterminate term, while a second fixed term loomed on the horizon. The likely result of the *Alberts* scheme would be the automatic transmutation of the first indeterminate term into a de facto fixed term, or in the wholesale granting of commutations of the first indeterminate term. Clearly, this would be contrary to the reason the Unified Sentencing Act was adopted in the first place — truth in sentencing.

If all fixed terms are to be served first, what then should be done when a prisoner has served his consecutive fixed terms?

The parole commission has the power to place the prisoner on parole at any time during the pendency of an indeterminate term. Indeed, a prisoner need not spend a single day in prison on an indeterminate sentence. (See Att. Gen. Op. No. 91-8.) Such a decision is left entirely in the hands of the commission. Idaho Code § 20-223. This being the case, there is no practical reason why the commission cannot make determinations regarding the parole status of a prisoner immediately upon (or even shortly before) the termination of the fixed portions of the sentences in a single hearing, even in those cases involving consecutive indeterminate terms. In other words, the second theoretical model mentioned above is the most reasonable as it is both practical and in keeping with the statute.

In summary, it is the opinion of this office that when two sentences are ordered to be served consecutively, and when they both contain fixed and indeterminate terms, the fixed sentences must be served first, one after the other. Then, the parole commission

shall determine when and if parole will be granted at any time during the pendency of the consecutive indeterminate terms in a single proceeding.

As a final note, it should be pointed out that indeterminate sentences are not required by Idaho Code § 19-2513. Therefore, the district courts have the power to assure absolute certainty in sentencing by simply ordering fixed terms for those counts that are to be followed by consecutive sentences.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

   Art. 4, § 7.

2. *State Statutes*

   Idaho Code § 19-2513.

   Idaho Code § 20-223.

3. *Idaho Cases*

   State v. Alberts, 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991).

   State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989).

4. *Other*

   Idaho Att. Gen. Op. No. 91-8, Annual Report (1991).

DATED this 30th day of April, 1992.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

Michael Kane
Deputy Attorney General
Chief, Criminal Law Division

ATTORNEY GENERAL OPINION NO. 92-2

TO: Craig Mosman
Latah County Prosecuting Attorney
Courthouse
Moscow, ID 83843

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

You are currently the elected prosecuting attorney for Latah County. In addition, you have entered into a contract with the board of county commissioners for Benewah County to perform the duties of prosecuting attorney for that county. Two questions arise as a result of this contract:

1. Is your performance of the duties of prosecuting attorney for Benewah County consistent with the requirement of Idaho Code § 31-3113 that you devote full time to the discharge of your duties as prosecuting attorney for Latah County?

2. Is your performance of the duties of prosecuting attorney for Benewah County consistent with Idaho Code § 31-2601, which states that, with certain exceptions, "[n]o prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney . . . ."?

CONCLUSION:

1. Your contract to perform the duties of prosecuting attorney for Benewah County does violate the provision of Idaho Code § 31-3113 requiring you to devote "full time" to your duties as prosecuting attorney for Latah County because it represents the private practice of law.

2. In light of our answer to Question 1 above, we do not address the question whether your contract with Benewah County to perform the duties of prosecuting attorney violates the multiple-office holding prohibition of Idaho Code § 31-2601.

BACKGROUND:

The contract at issue here was entered into under Idaho Code § 59-907, enacted in 1988. The statute provides as follows:

> In the event a vacancy exists and there is no resident attorney in the county who is willing or qualified to perform the functions of prosecuting attorney as set forth in chapter 26, title 31, Idaho Code, *the board of county commissioners may apppoint and/or contract with an attorney from outside the county to perform the duties of prosecuting attorney* for the balance of the unexpired term or such shorter period as the board of county commissioners shall determine. (Emphasis added.)

The contract recites that Jack B. Britton, the elected prosecuting attorney for Benewah County, submitted his resignation on or about June 1, 1992, with an effective date of June 30, 1992. The commissioners then notified the Republican Central Committee of the resignation. The committee later notified the commissioners that it was unable to locate any interested candidates for appointment "and had no nominations to submit to the Commissioners for consideration pursuant to Idaho Code § 59-906." It appeared to the commissioners that "no resident attorney was interested, willing or available to perform the functions of Prosecuting Attorney in and for Benewah County."

Therefore, under the provisions of Idaho Code § 59-907, the commissioners entered into a contract with Craig Mosman and Roy Mosman "to perform the duties of Benewah County Prosecuting Attorney." The contract requires "Craig Mosman to serve in the capacity of Prosecuting Attorney . . . ." It provides for compensation to be paid jointly to Craig Mosman and Roy Mosman on a monthly basis. The contract runs through the second Monday of January, 1993 — Mr. Britton's unexpired term — "unless earlier terminated by mutual agreement of all parties."

ANALYSIS:

I. The "Full Time" Provision of Idaho Code § 31-3113

Idaho Code § 31-3113 requires the prosecuting attorneys of certain counties — including Latah County, but not including Benewah County — "to devote full time to the discharge of their duties." The first question to be addressed is whether the contract to perform the duties of prosecuting attorney for Benewah County violates the statute's requirement that you devote full time to the discharge of your duties as Latah County prosecuting attorney.

At the outset, we note that reasonable minds can differ on the answer to this question. The Idaho Legislature has not seen fit to couple the "full time" requirement of Idaho Code § 31-3113 with a clear prohibition against the outside practice of law by prosecutors. Idaho Code § 31-3113 is silent on the question of the outside or private practice of law. As the statutory provisions from other states amply illustrate, it is a

simple matter for a legislature to state, expressly and clearly, that a prosecutor shall not engage in the private practice of law. See, e.g., Ala. Code § 12-17-184; Colo. Rev. Stat. § 20-1-301; Conn. Gen. Stat. Ann. § 51-278; Ind. Code § 33-14-7-19.5; Kan. Stat. Ann. § 22a-106; Mass. Gen. L. ch. 12, § 15; Miss. Code Ann. § 25-31-37; N.Y. County Law § 700(8); N.C. Gen. Stat. § 7A-61; Okla. Stat. tit. 19, § 215.28; Pa. Stat. Ann. tit. 16, § 1401; Tenn. Code Ann. § 8-7-201; Wyo. Stat. § 9-1-802; see also, W. Va. Code § 7-7-4 (requiring prosecutor to devote "full time to his public duties to the exclusion of any other employment").

We note in this regard that two years before the adoption of the full-time requirement in 1976, the legislature had considered a bill providing that prosecuting attorneys making at least $18,500 per year "shall devote their entire time to the performance of their official duties, *and shall be prohibited from the private practice of law during their term of office as prosecuting attorney.*" (Emphasis added.) The bill passed in the house of representatives, but was never brought to a vote in the senate. 1974 Idaho House Journal, 104, 235; 1974 Idaho Senate Journal, 206.

We are also aware that at least one case supports the proposition that a "full time" requirement may be met while at the same time engaging in the outside practice of law. In *West Virginia Judicial Inquiry Commission v. Allamong,* 252 S.E.2d 159 (W. Va. 1979), it was alleged that a magistrate had engaged in misconduct by practicing law. It was asserted that such practice was prohibited by a statute that required the magistrate to "devote full time to his public duties." The court contrasted this language with the clear statutory requirement that the prosecuting attorney in certain West Virginia counties must "devote full time to his public duties *to the exclusion of any other employment.*" W. Va. Code § 7-7-4. In that statute, according to the West Virginia court, the legislature had "expressed its intent in clear and unequivocal language . . . ." 252 S.E.2d at 163, n.7. The court refused to read a similar limitation on outside activity, including the private practice of law, into the general "full time" requirement for magistrates.

Despite this authority to the contrary, we continue to adhere to the principles enunciated in previous opinions of this Office regarding the "full time" requirement of Idaho Code § 31-3113. In particular we draw upon an informal guideline letter of April 18, 1989. *Idaho Attorney General's Annual Report,* pp. 144-49 (1989). While your situation is different in significant respects, much of the analysis contained in that letter is applicable here.

The guideline noted that cases dealing with the outside practice of law by prosecutors have focused exclusively on statutory provisions expressly prohibiting the outside practice of law, not provisions dealing with "full time" performance of one's duties as a prosecutor. *See,* Annot., *Constitutionality and Construction of Statute Prohibiting a*

Prosecuting Attorney from Engaging in the Private Practice of Law, 6 A.L.R.3d 562 (1966). We therefore find it necessary to turn to cases interpreting a "full time" requirement in employment contracts.

In *Harrison v. Lustra Corporation*, 84 Idaho 320, 372 P.2d 397 (1962), the appellant was a traveling salesman who was seeking worker's compensation for injuries received in a fall in a motel bathroom. He relied in part on a clause in his employment contract that stated that he "shall devote his full time and efforts to the sale of the products of the company." The court affirmed the denial of compensation. In interpreting the contested clause, the Idaho Supreme Court said:

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

84 Idaho at 325.

Other courts have interpreted "full time" provisions in cases where it was alleged that an employee had violated the provision by engaging in outside activities. The language cited above from the *Harrison* case was drawn from the most often cited of these cases, *Johnson v. Stoughton Wagon Co.*, 95 N.W. 394 (Wis. 1903). There the court held that the plaintiff had not violated his contract by acting as vice president of a bank, or by taking care of his mother's investments and the finances of another company. The court observed that "[i]t would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions." 95 N.W. at 397. It went on to note that the plaintiff had "devoted more than ordinary business hours" to his employment, working nine hour days and about half of his evenings. *Id.*

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

In short, the term "full time" results in a rule of reasonableness, not a bright line test. As applied to the requirement in Idaho Code § 31-3113 that the prosecutors in the eight counties so identified must "devote full time to the discharge of their duties," it obviously does not mean that they must devote every waking minute to their job or that they are forbidden to devote some time to their personal affairs, community service or outside business interests.

On the other hand, the "full time" requirement of Idaho Code § 31-3113 does mean that the prosecuting attorney must make that job his business to the exclusion of any other business that would call for a substantial part of his time or attention, and must avoid any other duties that would interfere to any significant extent with the discharge of his duties as an elected prosecutor.

As noted earlier, this Office has construed the "full time" language of Idaho Code § 31-3113 on two previous occasions. In Attorney General Opinion No. 86-6, we addressed the question whether a prosecuting attorney could serve as a member of the Idaho Legislature. The question was answered by Idaho Code § 31-2601, which expressly forbids a prosecutor from holding any state office during his term of office as a prosecuting attorney. We went further, however, and took the additional step of stating that even if Idaho Code § 31-2601 had not been dispositive of the question:

> It is our opinion that a prosecutor required to devote full time to the position of prosecuting attorney pursuant to Idaho Code § 31-3113 could not serve as a legislator. That statute mandates that the Bannock County Prosecutor devote full time to the performance of his official duties. We do not believe that a "full time" prosecutor could also serve as a "part-time" legislator given the time requirements imposed upon an Idaho legislator.

Attorney General Opinion No. 86-6, 1986 *Annual Report* at 39.

The Office of the Attorney General again had occasion to construe the "full time" language of Idaho Code § 31-3113 in the guideline letter mentioned earlier. By the time that letter was issued on April 18, 1989, the Idaho Supreme Court had construed the same language in *Derting v. Walker,* 112 Idaho 1055, 739 P.2d 354 (1987). The issue in that case was whether the prosecutor could retain part of the money generated by his contract work in prosecuting city misdemeanors. The Court, in passing, noted:

> Until relatively recent times the office of county prosecutor has been part-time in nature. It is common knowledge, and we take judicial notice of the fact, that county prosecutors maintain private law practices in addition to their duties in prosecuting criminal offenses. When the legislature provided for "full time" prosecutors in certain counties, it made clear that in such counties the

> prosecutors were permitted to enter into contracts with municipalities for the prosecution of city misdemeanors.

112 Idaho at 1058.

The Court thus stopped short of expressly stating that the position of "full time" prosecutor completely forbade the private practice of law. But there would have been little reason for the Court to take judicial notice of the fact that until relatively recent times the office of county prosecutor had been part-time in nature, with prosecutors maintaining private law practices on the side, if it did not intend to contrast that situation with the one now in place once the Idaho Legislature saw fit to designate certain counties as requiring the services of "full time" prosecutors.

We therefore concluded that, "[i]mplicit in this language [of the Idaho Supreme Court in *Derting v. Walker*] appears to be an assumption that the 'full time' requirement of Idaho Code § 31-3113 ended the ability of the prosecuting attorneys in the designated counties to engage in private practice." 1989 *Annual Report* at 147.

The guideline letter noted yet a second basis for this conclusion. Idaho Code § 31-3113 contains one and only one exception[1] to the requirement that the designated prosecutors devote full time to the discharge of their duties:

> With the unanimous approval of the board of county commissioners, and with the consent of the prosecuting attorney, the prosecuting attorney may contract with any city within the county to prosecute nonconflicting misdemeanors . . .

We noted that under the ordinary principles of statutory construction, the legislature's decision to expressly provide for only one such exception to the "full time" requirement implies a legislative intent to exclude all others — *"expressio unius est exclusio alterius."* *See,* 2A Sands, *Sutherland Statutory Construction,* 47.23 (4th ed. 1984). We therefore concluded:

> The provision that a prosecuting attorney may agree to prosecute city misdemeanors with the unanimous approval of the county commissioners may be viewed as excluding entirely any other outside practice of law. Although the statute is unclear in this regard, it is the better practice for full-time prosecutors to avoid the private practice of law.

1989 *Annual Report* at 148.

Any other interpretation would lead to odd results. The full time county prosecuting attorney would have to gain unanimous approval of the county commissioners to prosecute misdemeanors for cities in his or her own county, but would neeed no approval at all to engage in potentially far more demanding, time-consuming and conflicting duties as a private practitioner, as a prosecutor in another county or as a prosecutor of misdemeanors in cities in another county. We do not believe the Idaho Legislature could have intended this result when it created the narrow exception of city misdemeanor practice to the otherwise "full time" requirement for prosecutors in those counties designated in Idaho Code § 31-3113.

We note further that the legislature has seen fit to limit a full-time prosecuting attorney's city practice to city misdemeanors. We find it significant that this exception is in the criminal, not the civil arena, where conflicts between a city and a county might more easily arise.

Finally, we note that the majority opinion in *Derting v. Walker* took pains to point out that the prosecutor in that case had reimbursed the county for the inevitable use of county facilities in prosecuting city misdemeanors, had reimbursed his own deputies for the inevitable workload increase they sustained as a result of the city misdemeanor practice, and had turned over to the county general fund a percentage of the contract monies received. *Id.,* 112 Idaho at 1058. Again, it would be odd to allow county commissioners to impose such tight controls on the case of city misdemeanor practice within the prosecutor's own county and to allow them no voice whatsoever if the prosecutor chooses to prosecute misdemeanors in another county or to perform the duties of prosecuting attorney in another county.

Our 1989 guideline letter concluded that the prosecutor could engage in occasional public speeches, mediations and instruction without impinging on the requirement that he devote full time to the discharge of his duties as a prosecuting attorney. We cautioned, however, that even a commitment that he work a minimum of 40 hours per week would not always suffice to fulfill the "full time" requirement as a prosecutor:

> And as I am sure you know only too well, investigations and trials will sometimes require much more than 40 hours in a given week; it should not be assumed that the performance of a specified number of hours of work will always constitute compliance. A full-time prosecutor should avoid activities that would interfere with his devoting a normal work week of approximately 40 hours to his job, or such additional hours as may be necessary to the performance of his duties.

We concluded the guideline letter with the following summary:

> A prosecuting attorney who is required to devote full time to the discharge of his duties under Idaho Code § 31-3113 may safely comply with the statute by (1) avoiding outside activities that would interfere with his working a full workweek of approximately 40 hours, and such additional hours as his duties may require, and (2) refraining from the private practice of law.

We do not have sufficient information to determine "in fact" whether the performance of your duties for Benewah County will interfere with your full-time responsibilities as Latah County Prosecuting Attorney. Benewah County is not among the largest counties in Idaho; neither is it among the smallest. The county seat in Benewah County is not the most far flung from the Latah County Seat; neither is it the most conveniently located. The criminal responsibilities of a prosecuting attorney are relatively unpredictable since it is not possible to determine the occurrence of the next murder case, or the number and complexity of other criminal cases that may demand prosecution in either Benewah or Latah County. Although normally more predictable, even the time commitment to fulfill the civil responsibilities of the county prosecuting attorney's office can vary substantially.

Therefore, we cannot state with factual certainty that your contractual duties for Benewah County will or will not interfere with your full-time responsibilities with Latah County. However, we do believe there is a strong likelihood that the duties in Benewah County would interfere with your ability to provide full-time service in Latah County.

The second admonition contained in the 1989 guideline is that a full-time prosecuting attorney should refrain from the private practice of law. This second admonition is more troublesome in your context. Although we do not have the factual information to determine whether your contract with Benewah County will interfere with your full-time duties as Latah County Prosecutor, it is clear that your agreement with Benewah County represents the private practice of law. Your contract with Benewah County is in your capacity as a private attorney and has no relationship to your position as the elected prosecutor for Latah County. The compensation you receive from Benewah County is paid to you as a private individual and does not constitute payment or reimbursement to Latah County.[2] Based upon our analysis, it is our opinion that the legislature intended to prohibit the private practice of law on the part of those prosecutors who are required by Idaho Code § 31-3113 to devote their full time to their elected office.

We therefore conclude that your contract to perform the duties of the Benewah County Prosecuting Attorney does violate the requirement of Idaho Code § 31-3113 that you devote full time to the discharge of your duties as the elected prosecuting attorney of Latah County because it represents the private practice of law.

II. **The Prohibition of Multiple-Office Holding of Idaho Code § 31-2601.**

The second question asks whether your contract to perform the duties of prosecuting attorney in Benewah County would violate the provision of Idaho Code § 31-2601, which states: "No prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney . . . ." A resolution to this question would require a determination of whether you are now *holding office* as prosecuting attorney of Benewah County or are *merely contracting to perform the duties* of prosecuting attorney for that county.

In light of our answer to the first question regarding the "full time" requirement of Idaho Code § 31-3113, we do not reach this question. Suffice it to say that we are aware of Idaho Code § 59-907 and its provision that upon a vacancy in the office of the prosecuting attorney, where no resident attorney is willing to "perform the functions of prosecuting attorney . . . the board of county commissioners may *appoint and/or contract* with an attorney from outside the county . . . ." (Emphasis added.) We read that statute as providing the general mechanisms whereby county commissioners may fill a vacancy, not as overriding the specific requirement of Idaho Code § 31-3113 that certain designated prosecutors must devote full time to their duties as county prosecutors.

SUMMARY:

In sum, it is our conclusion that the "full time" requirement of Idaho Code § 31-3113 prevents a full-time prosecuting attorney to contract as a private attorney to perform the ongoing statutory duties of prosecuting attorney in a second county.

AUTHORITIES CONSIDERED:

1. *State Statutes*

Ala. Code § 12-17-184.

Colo. Rev. Stat. § 20-1-301.

Conn. Gen. Stat. Ann. § 51-278.

Idaho Code ch. 26, tit. 31.

Idaho Code § 31-2601.

Idaho Code § 31-2603.

Idaho Code § 31-3113.

Idaho Code § 59-906.

Idaho Code § 59-907.

Ind. Code § 33-14-7-19.5.

Kan. Stat. Ann. § 22a-106.

Mass. Gen. L. ch. 12, § 15.

Miss. Code Ann. § 25-31-37.

N.C. Gen. Stat. § 7A-61.

N.Y. County Law § 700(8).

Okla. Stat. tit. 19, § 215.28.

Pa. Stat. Ann. tit. 16, § 1401.

Tenn. Code Ann. § 8-7-201.

W. Va. Code § 7-7-4.

Wyo. Stat. § 9-1-802.

2. *Idaho Cases*

Derting v. Walker, 112 Idaho 1055, 739 P.2d 354 (1987).

Harrison v. Lustra Corporation, 84 Idaho 320, 372 P.2d 397 (1962).

3. *Other Cases*

Johnson v. Stoughton Wagon Co., 95 N.W. 294 (Wis. 1903).

Long v. Forbes, 136 P.2d 242 (Wyo. 1943).

Transamerica Insurance v. Frost National Bank, 501 S.W.2d 418 (Tex. Civ. App. 1973).

West Virginia Judicial Inquiry Commission v. Allamong, 252 S.E.2d 159 (W. Va. 1979).

4. *Other Authorities*

Informal Guideline Letter (April 18, 1989), 1989 *Annual Report* at 147-148.

Attorney General Opinion No. 86-6, 1986 *Annual Report* at 39.

Constitutionality and Construction of Statute Prohibiting a Prosecuting Attorney from Engaging in the Private Practice of Law, 6 A.L.R. 3d 562 (1966).

1974 Idaho House Journal, 104, 235.

1974 Idaho Senate Journal, 206.

2A Sands, *Sutherland Statutory Construction*, 47.23 (4th ed. 1984).

DATED this 14th day of October, 1992.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

John J. McMahon
Chief Deputy Attorney General
Michael Henderson
Deputy Attorney General

[1] Idaho Code § 31-2603 does mention situations in which the district court may appoint "some suitable person" to perform the duties of prosecuting attorney or, with the concurrence of the attorney general, to serve as a special assistant attorney general. In practice, the person chosen is frequently another prosecuting attorney, sometimes one who holds office in a "full time" prosecutor county. The full-time prosecutor may assist in emergency situations when another prosecutor has a conflict or is otherwise absent from his office. It should not be undertaken, however, if the temporary appointment interferes with the prosecutor's full-time commitment to his own elected office.

[2] This is contrasted with the existing practice of prosecutorial assistance under Idaho Code § 31-2603. That statute provides the legal authority to an elected prosecutor to provide prosecutorial assistance, either as a special prosecuting attorney or special deputy attorney general, to another county. Traditionally these appointments have been for a specific criminal case and no private remuneration is paid by the requesting county to the special prosecuting attorney or special deputy attorney general. The normal practice is for the requesting county to pay out-of-pocket expenses to either the state or county as the employer of the attorney providing the prosecutorial assistance.

ATTORNEY GENERAL OPINION NO. 92-3

TO: Mr. David Curtis
Board of Professional Engineers and Professional Land Surveyors
600 South Orchard, Suite A
Boise, Idaho 83705

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does the existence of an original Government Land Office (GLO) or Bureau of Land Management (BLM) survey, a properly recorded corner perpetuation and filing form, a properly recorded subdivision plat or a properly recorded record of survey indicating the presence of the land survey monument, either with or without visual presence, constitute "adequate evidence" of a public land survey corner monument under Idaho Code § 55-1613?

2. In the event that the land survey monuments are not depicted on the plans, could the engineer who prepared and sealed the plans or someone else acting in reliance upon the engineer's plans be held liable for their destruction?

3. In the event that the land survey monuments are depicted on the plans, could the owner of the project, the contractor, or someone else acting in reliance upon the engineer's plans be held liable for their destruction?

4. Assuming the ability to prove identification of the responsible party, could that party be held liable for damages for the accidental or unintended destruction of land survey monuments?

5. Would the Board of Professional Engineers and Land Surveyors have standing and authority to institute legal action to cause land survey monuments to be replaced and to recover damages and costs incurred in prosecuting such actions from a party accidentally or unintentionally damaging said land survey monuments?

CONCLUSION:

1. The existence of an original GLO or BLM survey, a properly recorded corner perpetuation and filing form, a properly recorded subdivision plat, or a properly recorded record of survey indicating the presence of a monument — together with visual presence of that monument — would constitute "adequate evidence" of a public land survey corner monument as defined by Idaho Code § 55-1613. Such monuments must

therefore be referenced by a surveyor prior to the time construction or other activities disturb them and must subsequently be reestablished and remonumented under the supervision of a surveyor.

2. An engineer who prepares and places his or her seal on plans where land survey monuments set by a professional land surveyor are not depicted may be statutorily liable, pursuant to Idaho Code § 54-1234, if the engineer or the engineer's agent willfully defaces, injures, or removes a monument. The potential liability created by the statute is not exclusive and extends to any person who willfully defaces, injures or removes a monument set by a professional land surveyor.

3. A project owner, contractor or other party may be statutorily liable for the willful defacement, injury or removal of a land survey monument set by a professional land surveyor. A civil action for resulting damages suffered by an affected party is also authorized by the statute.

4. A party responsible for the accidental or unintended destruction of a land survey monument cannot be held statutorily liable pursuant to Idaho Code § 54-1234.

5. The Board does not have standing or authority to institute legal action to cause land survey monuments to be replaced and to recover costs and damages incurred in prosecuting such actions from a party damaging land survey monuments.

ANALYSIS:

As a preliminary matter, it is useful to reference several statutory definitions used throughout this opinion that are terms of art in the surveying and engineering profession.

A "property corner" is a geographic point on the surface of the earth, and is on, a part of, and controls a property line. Idaho Code § 55-1603(a).

A "public land survey corner" is any corner actually established and monumented in an original survey or resurvey used as a basis of legal description for issuing a patent for the land from the United States government to a private person. Idaho Code § 55-1603(c).

A "monument" is a physical structure that occupies the exact position of a corner. Idaho Code § 55-1603(f).

"Survey" means the locating and monumenting of points of lines which define the exterior boundary or boundaries common to two (2) or more ownerships, except those boundaries defining ownership in established and ongoing mineral extraction opera-

tions, or that reestablish or restore public land survey corners in accordance with established principles of land surveying by or under the supervision of a surveyor. Idaho Code § 55-1902(3).

It is also important to note that Idaho follows the Rectangular System of survey, which divides land into a series of rectangles. See Idaho Code § 55-1701, et seq. A surveyor cannot survey land accurately unless the monuments, from which corners are located, are preserved, protected and perpetuated.[1]

I.

In 1967, the Idaho Legislature enacted the Corner Perpetuation and Filing Act. The purpose of the Act, to paraphrase the declaration of policy in Idaho Code § 55-1602, is to protect, perpetuate and locate in a systematic fashion public land survey corners. The Act grants to the Board of Professional Engineers and Professional Land Surveyors (Board) authority to promulgate rules concerning how to file the information necessary for a proper "corner record." See Idaho Code § 55-1606.

In 1978, in conjunction with a recodification of the organic statute establishing the Board set forth in chapter 12, title 54, Idaho Code, the legislature enacted Idaho Code § 55-1613, which provides:

> **Monuments disturbed by construction activities — Procedure — Requirements.** *When adequate evidence exists* as to the location of a public land survey corner, subdivision, tract, or other land corners, such monuments shall be referenced by or under the direction of a surveyor prior to the time when construction or other activities may disturb them. Such corners shall be reestablished and remonumented under the supervision of a surveyor.

(Emphasis added.) Your first question asks what constitutes "adequate evidence" of a public land survey corner or similar monument for purposes of Idaho Code § 55-1613. The significance of the question is that such monuments must be referenced by a surveyor prior to the time construction or other activities may disturb them and must thereafter be reestablished and remonumented under the supervision of a surveyor.

You ask, in particular, whether the existence of an original Government Land Office (GLO) or Bureau of Land Management (BLM) survey, a properly recorded corner perpetuation and filing form, a properly recorded subdivision plat or a properly recorded record of survey indicating the presence of the land survey monument, either with or without visual presence, constitutes "adequate evidence" of a public land survey corner under Idaho Code § 55-1613.

No Idaho appellate court has directly addressed this section of the code. However, several cases have held that surveys conducted in accordance with the United States Manual of Surveying Instructions (Manual) constitute legally admissible evidence in court proceedings. *See Hook v. Horner*, 95 Idaho 657, 517 P.2d 554 (1973).

Further, since 1967, Idaho law has required the public filing for record of all surveys that establish or restore a corner. *See* Idaho Code § 55-1604 and § 55-1904, *et seq.* Similarly, subdivision plats referenced in your question have also been required by law to be recorded since 1967. *See* Idaho Code § 50-1301, *et seq.* One of the purposes of requiring public recording of land survey monuments is to put the world on notice as to the existence and location of land survey monuments.

While what constitutes "adequate evidence" can only be determined upon a case-by-case review, it is our opinion that a court would conclude that if "visual presence" of a monument was present, along with GLO or BLM surveys or any of the recorded items listed above, the requirements of Idaho Code § 55-1613 would be triggered. As explained in *Hook, supra,* public recordings of such surveys and visual evidence of a monument should suffice to put a reasonable person on notice that a land survey monument is present. Therefore, it is our opinion that public recording of a survey performed in accordance with the manual, in conjunction with visual presence of a land survey monument, constitutes "adequate evidence" as referenced in Idaho Code § 55-1613.

A more difficult question is presented where there is not sufficient *indicia* of "visual presence." Neither "adequate evidence" nor "visual presence" is statutorily defined. For this reason, the Board, with its expertise and knowledge, may want to draft legislation that would define minimal standards to establish what constitutes "adequate evidence" in the context of Idaho Code § 55-1613. Absent sufficient *indicia* of visual presence it is unlikely that a court would find "adequate evidence" sufficient to trigger the requirement of remonumentation. The Board should also consider adopting administrative rules pursuant to the Idaho Administrative Procedure Act. These rules could cover practice before the Board and provide guidance to a court required to enforce the laws with which the Board is concerned. In these rules, the Board could also coordinate the application of the several different chapters in titles 54 and 55 of the Idaho Code covering these matters. This procedure would bring uniformity and clarity to this matter.

II.

Your second question addresses the situation where land survey monuments are *not* depicted on plans. You ask whether the engineer who prepared and sealed the plans or someone else acting in reliance upon the engineer's plans could be held liable for the resulting destruction of a land survey monument. The answer to this question is controlled by Idaho Code § 54-1234, which states:

> **54-1234. Monumentation — Penalty and liability for defacing.** If any person shall wilfully deface, injure or remove any signal, monument, building or other object set as a permanent boundary survey marker by a registered, professional land surveyor, he shall forfeit a sum not exceeding five hundred dollars ($500) for each offense, and *shall be liable for damages sustained by the affected parties* in consequence of such defacing, injury or removal, to be recovered in a civil action in any court of competent jurisdiction.

(Emphasis added.) It is our opinion that the language of the statute is clear and unambiguous and would be applied literally by a reviewing court. *See Frazier v. Nielsen & Co.*, 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

Thus, if a design engineer or any other person acting at his direction willfully defaces, injures or removes a land survey monument, he or she will be subject to the penalties provided in the statute: first, a civil penalty of $500 may be assessed by the court; second, the party willfully defacing, injuring or removing the monument faces a statutory claim for damages caused by his or her acts; finally, if the person involved is licensed by the Board as a surveyor, disciplinary action can be initiated by the Board. *See* Idaho Code § 55-1612.

What is less clear, and in our opinion requires future statutory clarification, is where the engineer inadequately or negligently prepares and seals his plans without depicting existing land survey monuments. For the reasons set forth below, we conclude that such conduct does not amount to willful commission of an act defacing, injuring, or removing a land survey monument.

Our analysis begins with the "willful" requirement set forth in the statute. The word "willful" is defined differently depending on whether it is used in a civil or criminal context:

> In civil actions, the word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But where used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S. Ct. 223, 225, 78 L. Ed. 381 (_____).

Black's Law Dictionary (6th ed. 1991).

In *Burgess v. New Hampshire Inc. Group,* 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), the Idaho Court of Appeals appeared to follow this distinction when construing an insurance contract. The court held that "willful" conduct in the civil context could be found if damages resulted from an intentional act from which damage was reasonably expected to result. Using this standard, an engineer might meet the "willful" conduct requirement of Idaho Code § 54-1234 by negligently preparing and sealing plans without depicting existing land survey monuments.

However, under Idaho Code § 54-1234, it is also required that the engineer or the engineer's agent actually deface, injure or remove the monument. Thus, if an engineer negligently fails to depict a land survey monument upon plans prepared, it is unlikely that he or she would be found to meet the requirements of the statute and be responsible for the land survey monument's destruction. In the situation you describe, the engineer has not actually injured, defaced, or removed the land survey monument.

In appropriate circumstances, the negligent failure to provide protection to a land survey monument where such failure later caused the destruction of the land survey monument might justify disciplinary proceedings. Once again, the Board should propose legislation or define through regulation a set of rules to establish minimal standards in this area. Such standards would eliminate current uncertainty and help avoid future controversy and litigation.

III.

Your third question asks whether it is possible that the requirements specified in Idaho Code § 54-1234 could be met by those who have a legal duty to review the plans an engineer has prepared depicting land survey monuments. It would be reasonable to assume, in appropriate cases, that project owners, contractors or other parties involved in the project who examine the plans and who would, with reasonable care, be aware of the land survey monument's existence (because of their knowledge and background) might meet the "willful" standard of Idaho Code § 54-1234. Once again, however, the statute places liability only on those who "wilfully deface, injure or remove" a monument. Absent an affirmative act defacing, injuring or removing the monument, project owners, contractors and other parties would not face statutory liability for their failure to exercise reasonable care in reviewing an engineer's plans.

IV.

Your fourth question concerns liability for the accidental or unintended destruction of land survey monuments where the responsible party can be identified. As noted in the previous sections, Idaho Code § 54-1234 creates liability only for damages that result from the willful defacing, injury or removal of a land survey monument. Thus, there is

no liability for the accidental or unintended destruction of a land survey monument pursuant to this section of the code. A landowner may, of course, have other remedies pursuant to the civil and criminal laws of trespass. See Idaho Code § 6-201, et seq. and Idaho Code § 18-7011.

V.

Your final question concerns the authority of the Board to institute legal action to cause land survey monuments to be replaced where accidentally or unintentionally damaged. As noted in section IV above, Idaho Code § 54-1234 provides no civil liability where accidental or unintended injury to or destruction of a monument has occurred. Moreover, even when civil liability exists for willful destruction of a monument, that remedy is available only for damages sustained by "affected parties."

It is unlikely that a court would find the Board to be an "affected" party who has sustained damages as required by the statute. Affected parties are those directly impacted by a person's actions. Further, the Board's statutory duties primarily relate to regulation and licensing of the practice of professional engineering and professional land surveying, not protecting land survey monuments.

A related issue is whether the Board could use its disciplinary powers to require one of its licensees to restore or repair land survey monuments damaged, injured, or destroyed by the licensee. The Board's powers defined by Idaho Code § 54-1220 do not specifically include the power to require restitution or repair of a monument. Nonetheless, the Board, in making its decision in a disciplinary proceeding, could take into account a licensee's voluntary cooperation in correcting damage to monuments.

AUTHORITIES CONSIDERED:

1. *Statutes*

Idaho Code § 6-201, *et seq.*

Idaho Code § 18-7011.

Idaho Code § 50-1301, *et seq.*

Idaho Code § 54-1220.

Idaho Code § 54-1234.

Idaho Code § 55-1602.

Idaho Code § 55-1603(a).

Idaho Code § 55-1603(c).

Idaho Code § 55-1603(f).

Idaho Code § 55-1604.

Idaho Code § 55-1606.

Idaho Code § 55-1612.

Idaho Code § 55-1613.

Idaho Code § 55-1701, *et seq.*

Idaho Code § 55-1902(3).

Idaho Code § 55-1904, *et seq.*

2. *Cases*

Burgess v. New Hampshire Inc. Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985).

Frazier v. Nielsen & Co., 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

Hook v. Horner, 95 Idaho 657, 517 P.2d 554 (1973).

United States v. Murdock, 290 U.S.389, 54 S. Ct. 223, 78 L. Ed. 381 (_____).

3. *Other Authorities*

BLACK'S LAW DICTIONARY (6th ed. 1991).

JOHN S. HOAG, FUNDAMENTALS OF LAND MEASUREMENT.

DATED this 30th day of October, 1992.

LARRY ECHOHAWK
Attorney General
State of Idaho

ANALYSIS BY:

John J. McMahon
Chief, Deputy Attorney General

[1] For a history and explanation of the Rectangular System, *see Fundamentals of Land Measurement* by John S. Hoag, furnished and redistributed by Stewart Title of Idaho, Inc.

ATTORNEY GENERAL OPINION NO. 92-4

TO: Charles Bolles
State Librarian
Idaho State Library
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Do Idaho Code §§ 33-2737 through 33-2740 provide that the four school-community libraries that existed on June 30, 1992, are now, in fact, "school-community library districts" and therefore are governed by boards that are separate from the school districts and that have their own authority to levy taxes separate from the school districts?

CONCLUSION:

Yes. The record of legislative history shows that the Idaho Legislature intended to make school-community libraries into school-community library districts with their own taxing authority.

ANALYSIS:

Legislative History:

At the outset, it is helpful to trace the evolution of what we now know as school-community library districts. In 1901, the Idaho Legislature enacted Senate Bill No. 6,

which authorized the establishment and maintenance of public libraries in school districts where no incorporated town or village was situated. When at least 20 electors in a school district petitioned for an election, school district voters decided whether to establish a school district public library. Once such a public library was approved, the trustees of those school districts had the authority, annually, to levy a tax not in excess of one mill. In effect, the school trustees had the same powers, duties, and authority granted to a city or village, and the treasurer of the board of trustees performed the duties of the treasurer for the public library. Act of Feb. 27, 1901, p. 3, 1901 Idaho Sess. Laws (public libraries).

In 1943 the statute was amended to provide that the unincorporated town or village was required to have a population in excess of one thousand within which no public library and reading room was established or maintained. The taxing authority was increased from one mill to two mills. Act of Mar. 8, 1943, C.170, p. 358, 1943 Idaho Sess. Laws (school district public libraries).

In 1955 the statute was further amended to provide that the trustees of every school district had the power to contract for specified library services with an existing library district, and/or become a part of an existing library district by majority vote of the qualified electors of the school district. Act of Mar. 11, 1955, C.128, p. 266, 1955 Idaho Sess. Laws (school district libraries).

In 1963 the Idaho Legislature recodified the statutes dealing with public libraries, adopting Idaho Code § 33-2601, which pertained to school-community libraries. However, the provisions for petition, election, governance, and taxing authority remained the same. Act of Feb. 15, 1963, C.13, p. 27, 1963 Idaho Sess. Laws (recodification of education statutes).

In 1975 the authorized levy was increased from two mills to three mills. The statement of purpose attached to the bill indicates that six school districts had school-community library boards. Act of Mar. 24, 1975, C.105, p. 215, 1975 Idaho Sess. Laws (school community libraries).

In 1992 the Idaho Legislature significantly altered statutory references to school-community libraries (now referred to as school-community library districts). Section 33-2601, Idaho Code, was re-numbered as § 33-2737, and was amended to change the reference from "school-community libraries" to "school-community library districts." Several sections of the original statute were eliminated and three new sections were added to provide for school-community library district boards of trustees (§ 33-2738), the trustees' powers and duties (§ 33-2739), and consolidation and reorganization of the school-community library districts into library districts (§ 33-2740). Act of Apr. 8, 1992, C.275, p. 848, 1992 Idaho Sess. Laws (school community library districts).

On June 30, 1992, there were four school districts with school-community libraries: namely, Snake River School District No. 52, since 1951; Sugar-Salem School District No. 322, since 1952; Kuna Joint School District No. 3, since 1964; and Rockland School District No. 382, since 1974.

Discussion:

The issue that is unclear on the face of the statute is whether the four school-community libraries became school-community library districts on July 1, 1992, or whether the former school-community libraries ceased to exist.

The statement of purpose for the 1992 legislation states:

> This legislation clarifies that a school-community library district is a type of library district and not a subdivision of the school district. The legislation requires that the levy funds of the library district be kept separate from the school district accounts, and audited separately from the school district funds. The legislation clarifies that school-community library district assessments are for establishing and maintaining public library services. This legislation also provides clear procedures for an existing school-community library to either join an existing library district or become a library district. The legislation provides for a sunset date of June 30, 1994, for the establishment of new school-community library districts.

Second Regular Session of the 51st Idaho Legislature of 1992, House Bill No. 785, Statement of Purpose/Fiscal Impact.

The minutes of the discussion of the House Education Committee on March 4, 1992, set forth the statement of Representative Duncan:

> He stated that the present problem with the school-community libraries is that it is not clear in their legislation whether they are a library district, although they do have levy authority. Some of the school-community libraries are actually operating to the line item on the school district budget, and there's no audit authority for the school-community libraries. Most people don't see the school-community library idea going too much farther in our history because the two do not fit well together, except in the four situations where it currently exists.

Idaho House Education Committee Minutes, Mar. 4, 1992, at 2 (statement of Representative Duncan).

During a meeting of the Senate Education Committee on March 27, 1992, Senator Twiggs spoke in support of the bill:

> *Senator Twiggs* spoke in support of the bill and said he would not be in support if he felt it would destroy the relationships of the existing school-community libraries. He stated that the Superintendent Association has no problem with the bill. He also stated that this bill addresses the concerns expressed by the Sugar-Salem school district about the use of tax dollars meant for the libraries.

Senate Education Committee Minutes, Mar. 27, 1992, at 1 (statements of Senator Twiggs). After a motion was made and seconded on March 27, 1992, in the Senate Education Committee, the following discussion took place:

> *Senator Larsen* talked with the Rockland School District (see Appendix A) and the Sugar-Salem School District. *Adrien Taylor,* Idaho Library Association, supports the bill. *Ezra Moore,* Idaho School District Council, provided background for the bill. He said that it may ease the minds of the four school-community libraries if a letter were written requesting an amicable transition. *Senator Osborne* likes the concept of school-community libraries and is concerned about the clause that bans future ones. *Charles Bolles,* State Library, said that library boards can contract with schools. There are not many locations which share facilities, although there are some areas where there is strong cooperation. *Senator Noh* understands the intent of the language is to move school-community libraries to another section of the Code, but he fears the chilling effect of the wording. *Senator Osborne* stated he was not against the bill but is concerned with areas of the state that do not have library facilities. *Senator Burkett* has attended too many meetings where an attorney has stopped action by noting specific wording in the Statutes. On a voice vote, the motion was approved.

Senate Education Committee Minutes, Mar. 27, 1992, at 1, 2 (statements of Senator Larsen, Adrien Taylor, Ezra Moore, Senator Osborne, Charles Bolles, Senator Noh, Senator Burkett).

In construing statutes, the Idaho Supreme Court has enunciated the following principles:

> In construing a statute, this Court attempts to discern and implement the intent of the legislature. In performing this function, courts variously seek edification from the statute's legislative history, examine the statute's evolution through a number of amendments, and perhaps seek enlightenment in the decisions of sister courts which have resolved the same or similar issues. [Citations omitted.]

> Another method, (sic) we have employed is to examine the purposes of the act and its structure as a whole in an attempt to discern the legislative intent behind the statute. [Citations omitted.]

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

> In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, "such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construct, and the like." [Citation omitted.]

Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963). See also *State v. Hoch,* 102 Idaho 351, 352, 630 P.2d 143, 144 (1981).

> Principles of statutory interpretation require this Court to ascertain and give effect to the legislative intent. [Citations omitted.] "The intent of the legislature may be implied from the language used, or inferred on grounds of policy or reasonableness." [Citation omitted.] In effectuating the legislative intent behind an ambiguous statute, the Court should, if possible, avoid indulging in a statutory construction which would cause absurd or unduly harsh results. [Citations omitted.]

Gavica v. Hanson, 101 Idaho 58, 60, 608 P.2d 861, 863 (1980).

If a latent ambiguity arises, the purpose of the statute should be used for guidance to resolve the ambiguity. As stated in *University of Connecticut v. Freedom of Information Commission,* 585 A.2d 690 (1991):

> If the language of a statute is clear and unambiguous, its meaning is not subject to construction. [Citation omitted.] When application of the statute to a particular situation reveals a latent ambiguity in seemingly unambiguous language, however, we turn for guidance to the purpose of the statute and its legislative history to resolve that ambiguity. [Citation omitted.]

585 A.2d at 693. *See also Sutherland, Statutory Construction* § 46.04 (5th Ed.); *West v. Kerr-McGee Corp.,* 765 F.2d 526 (1985).

The 1992 legislation dealing with school-community libraries is ambiguous. When the statutes are reviewed, it is not clear whether "school-community libraries" were automatically grandfathered and became "school-community library districts" on July

1, 1992, or whether the school-community libraries ceased to exist and were required to commence anew if they wished to retain the status now referred to as "school-community library districts." If the four school-community libraries ceased to exist, those four communities no longer have library services. The newly enacted statutes do not address what becomes of the library inventory and the employees of those libraries. Statements of legislative intent make it apparent that the legislature never intended the school-community libraries to cease to exist, resulting in the elimination of public library services to those communities. Applying such an interpretation to the school-community libraries would be an absurd and unduly harsh result.

Nowhere in the legislative history is there any discussion whatsoever that the patrons of the prior school-community libraries would need to vote to establish school-community library *districts*. On the contrary, Senator Noh understood "the intent of the language" was simply "to move school-community libraries to another section of the Code, . . ." The legislature did not repeal Idaho Code § 33-2601, but, rather, changed the numbering to § 33-2737. The only plausible interpretation of such action is that the legislature intended to grandfather the preexisting school-community libraries and confer upon them the new status of "school-community library districts," effective July 1, 1992.

The school-community libraries existing prior to July 1, 1992, had complied with the election process at the time of their formation. If the school-community libraries now cease to exist, and the electors of those districts are required to again go through the election process, the legislature has placed an unnecessary and surely unintended burden on those electors and has nullified the electors' prior actions. The testimony before the Idaho Senate Education Committee stressed the need for an "amicable transition." Legislators spoke about the concerns of specific existing school-community libraries. Senator Twiggs said he would not be in support if he felt the bill would destroy the relationships of the existing school-community libraries. On the basis of this legislative history, it cannot be seriously suggested that the legislature intended to dissolve the existing school-community libraries and force them to go through an election to reconstitute themselves as school-community library districts.

Furthermore, if the patrons of the four school districts that had school-community libraries are required to go through the election process, those patrons would effectively be without library services for approximately fifteen months, if not longer, because, as new taxing districts, they would not be permitted to levy any taxes or collect any revenue for that period of time. See Idaho Code § 63-921. Again, it is inconceivable that the Idaho Legislature could have intended that the existing school-community libraries would be deprived of revenue for an entire year. It is clear the legislature intended them to have uninterrupted taxing authority.

The intent of the 1992 Idaho Legislature, in enacting Idaho Code §§ 33-2740 through 33-2737, was to provide a method for auditing public libraries contained in the four school districts' buildings, and to ensure that funds raised for school-community libraries were actually used for this purpose; to provide for an independent board of trustees, separate from the board of trustees of school districts; and to continue library services to the four school districts that already had school-community libraries. The legislature also intended to provide for the least disruptive means available to make the transition from a school-community library to a school-community library district.

SUMMARY:

The principles of statutory construction make it clear that if there is an ambiguity in a statute, the courts look to the legislative intent and should avoid applying a statutory construction that would cause absurd or unduly harsh results. A review of the legislative history makes it apparent that the Idaho Legislature intended to provide that the four school-community libraries that existed on June 30, 1992, became school-community library districts with continuous taxing authority on July 1, 1992, and without the need for the patrons of those school districts to determine anew that issue by election.

AUTHORITIES CONSIDERED:

1. *Idaho Statutes*

   Idaho Code § 33-2737.

   Idaho Code § 33-2738.

   Idaho Code § 33-2739.

   Idaho Code § 33-2740.

2. *Idaho Session Laws*

   Act of Feb. 27, 1901, p. 3, 1901 Idaho Sess. Laws (public libraries).

   Act of Mar. 8, 1943, C.170, p. 358, 1943 Idaho Sess. Laws (school district public libraries).

   Act of Mar. 11, 1955, C.128, p. 266, 1955 Idaho Sess. Laws (school district libraries).

   Act of Feb. 15, 1963, C.13, p. 27, 1963 Idaho Sess. Laws (recodification of education statutes).

Act of Mar. 24, 1975, C.105, p. 215, 1975 Idaho Sess. Laws (school community libraries).

Act of Apr. 8, 1992, C.275, p. 848, 1992 Idaho Sess. Laws (school community libraries).

Second Regular Session of the 51st Idaho Legislature of 1992, House Bill No. 785, Statement of Purpose/Fiscal Impact.

3. *Idaho Cases*

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

Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963).

State v. Hoch, 102 Idaho 351, 352, 630 P.2d 143, 144 (1981).

Gavica v. Hanson, 101 Idaho 58, 60, 608 P.2d 861, 863 (1980).

4. *Cases From Other Jurisdictions*

University of Connecticut v. Freedom of Information Commission, 585 A.2d 690, 65 Ed. Law 786 (1991).

West v. Kerr-McGee Corp., 765 F.2d 526 (1985).

5. *Other Authorities*

Idaho House Education Committee Minutes, Mar. 4, 1992, at 2 (statement of Representative Duncan).

Senate Education Committee Minutes, Mar. 27, 1992, at 1 (statements of Senator Twiggs).

Senate Education Committee Minutes, Mar. 27, 1992, at 1,2 (statements of Senator Larsen, Adrien Taylor, Ezra Moore, Senator Osborne, Charles Bolles, Senator Noh, Senator Burkett).

Sutherland, Statutory Construction, § 46.04 (5th Ed).

DATED this 3rd day of November, 1992.

LARRY ECHOHAWK
Attorney General
State of Idaho

ANALYSIS BY:

Elaine Eberharter-Maki
Deputy Attorney General
Department of Education

ATTORNEY GENERAL OPINION NO. 92-5

TO: Richard Bass
George Hyer
Chester Sellman
Board of Commissioners, Owyhee County
Courthouse, P.O. Box 128
Murphy, Idaho 83650

QUESTION PRESENTED:

Are lands under the jurisdiction of the various executive agencies of the State of Idaho subject to zoning laws enacted by a county?

CONCLUSION:

A state agency must comply with valid county ordinances[1] enacted pursuant to the Local Planning Act, Idaho Code §§ 67-6501 to 67-6537, unless a statutory or constitutional provision provides an express exemption for the agency or impliedly preempts the application of the ordinance. Whether the activities of a particular state agency are exempt from regulation or whether the application of a particular ordinance to an agency is preempted by other provisions of law must be determined on a case-by-case basis.

ANALYSIS:

The Local Planning Act of 1975 allows cities and counties to enact planning and zoning laws pursuant to the terms of the Act. These terms include the preparation by

each city or county of a comprehensive plan. Idaho Code § 67-6508. The purpose of such plans is to "promote the health, safety, and general welfare of the people," by protecting natural resources, promoting the best use of available lands and enhancing the economy. *See* Idaho Code § 67-6502.

The Local Planning Act has been construed as a delegation of broad planning and zoning powers to local governing boards. *Worley Highway District v. Kootenai County,* 104 Idaho 833, 633 P.2d 1135 (Ct. App. 1983). This delegation of authority to local governments, however, must be carefully applied when a local government attempts to regulate properties owned or controlled by the state. "[A] municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it." *Sandpoint Water & Light Co. v. City of Sandpoint,* 31 Idaho 498, 503, 173 P. 972, 977 (1918). Since the authority of local governments is derived from the state, it necessarily follows that local governments may not exercise control over the activities of the state, absent a delegation of such authority in a statutory or constitutional provision.

Such a delegation does occur in the Local Planning Act. "The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter *unless otherwise provided by law.*" Idaho Code § 67-6528 (emphasis added). This section expresses a legislative policy that state agencies should comply with local zoning ordinances, but reserves the right to exempt state agencies from compliance where necessary to fulfill state policies. Thus, if the constitution or statutes of the state of Idaho exempt a state agency from compliance, local governments may not apply zoning ordinances to that agency. In some cases, an exemption may be express on the face of a statute. An example of express preemption is found in the Local Planning Act itself, which exempts "transportation systems of statewide importance," and certain public utility projects, from the Act's provisions. Idaho Code § 67-6528.

The legislature is not required, however, to expressly provide that a particular state activity is exempt from the provisions of the Local Planning Act. Legislative intent to preempt local zoning authority may be implied if there is a direct conflict between a general statute or regulation and a local ordinance. *See Caesar v. State,* 101 Idaho 158, 161, 610 P.2d 515, 518 (1980). The doctrine of state preemption of conflicting local ordinances is grounded in the Idaho Constitution:

> 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 the general laws.*

Idaho Constitution, art. 12, § 2 (emphasis added).

Preemption is also inferred if a statutory scheme indicates the legislature's intent to completely regulate a particular subject matter:

> 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.

Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987), quoting *Caesar v. State,* 101 Idaho 158, 161, 610 P.2d 517, 520 (1980) (alterations in original).

Several examples of implicit preemption of the Local Planning Act have been addressed previously by this office. In Attorney General Opinion 91-3, we reviewed the constitutional and statutory provisions vesting the State Board of Land Commissioners ("Land Board") with authority to decide the best use or uses of state lands. We concluded that such provisions impliedly exempted the Land Board from compliance with the Local Planning Act. Idaho Attorney General's Annual Report for 1991, at 41. Similarly, in Attorney General Opinion 83-6, we addressed the preemptive effect of the Lake Protection Act, which vests the Land Board with comprehensive authority to control encroachments on navigable lakes. We concluded that the enactment of the Lake Protection Act's pervasive and comprehensive regulatory scheme manifested the legislature's intent that the Land Board's regulations would be exclusive. Idaho Attorney General's Annual Report for 1983, at 74.

Additionally, it should be noted that in enacting the Local Planning Act, it was the legislature's intent that local governments must take steps to minimize conflicts between local zoning ordinances and the land use plans of state agencies, as shown by the following provision:

> In adoption and implementation of the plan and ordinances, the governing board or commission *shall take into account the plans and needs of the state* of Idaho and all agencies, boards, institutions, and local special purpose districts.

Idaho Code § 67-6528 (emphasis added). This provision, in conjunction with the provision requiring state agencies to comply with local zoning ordinances, promotes cooperation between state and local governments in determining the best uses of lands owned or possessed by state agencies. In fact, the mandatory language of the above provision suggests that it is a condition that must be fulfilled before local zoning ordinances are applied to state lands. Thus, in order to ensure compliance with the authorities delegated under the Local Planning Act, local governments should work closely with state agencies when enacting zoning ordinances that apply to lands under state control.

AUTHORITIES CONSIDERED:

1. *Idaho Constitutional Provisions*

   Idaho Constitution art. 12, § 2.

2. *Idaho Statutes*

   Idaho Code §§ 67-6502 to 6528.

3. *Idaho Cases*

   Sandpoint Water & Light Co. v. City of Sandpoint, 31 Idaho 498, 173 P.2d 972 (1918).

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

   Worley Highway District v. Kootenai County, 104 Idaho 833, 633 P.2d 1135 (Ct. App. 1983).

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

4. *Other Authorities*

   Idaho Attorney General Op. No. 83-6, Annual Report, at 74 (1983).

   Idaho Attorney General Op. No. 91-3, Annual Report, at 41 (1991).

DATED this 1st day of December, 1992.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

Steven W. Strack
Deputy Attorney General
Natural Resources Division

[1] For purposes of this opinion, we have assumed that any zoning ordinances have been enacted in accordance with the requirements of the Local Planning Act. Additionally, we have assumed that the Local Planning Act itself is constitutional.

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1992

Larry EchoHawk
Attorney General
State of Idaho

January 30, 1992

Hon. Stan Hawkins
State Senator
Idaho State Senate
STATEHOUSE MAIL

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

Re: 1991 House Bill 206

Dear Senator Hawkins:

This letter is in response to your question concerning the constitutionality of House Bill No. 206, approved by the legislature in 1991. House Bill 206 added new sections 67-4721-67-4724 to the Idaho Code. With reference to your question, the pertinent portions of House Bill 206 are as follows:

> GRANTS — STANDARDS AND ADMINISTRATION. The department of commerce shall administer a program of grants prorated to private capital raised to establish financing programs for new, emerging, and expanding business enterprises. Grants shall only be made to business and industrial development corporations (BIDCOs) licensed and regulated pursuant to the provisions of chapter 27, title 26, Idaho Code. It is recognized that BIDCOs, in compliance with section 26-2716, Idaho Code, administer a program of professional consulting and financing of new, emerging and expanding business enterprises. Such financings may take the form of loans or equity participation or a combination thereof. BIDCOs must report annually to the legislature, in compliance with section 27-2707, Idaho Code, information on the impact of grants in promoting economic development in the state.
>
> . . . .

Idaho Code § 67-4722

> RETURN TO THE STATE. It is hereby recognized that the principal return to the state shall be in the form of increased tax revenues and increased job growth. A further return to the state is hereby provided as follows. Grants shall require the applicant to retain within its financing program all funds representing a return on principal until initial capitalization is doubled. Upon doubling capitalization and upon the approval of the department of finance, grantees shall distribute up to fifty per cent (50%) of profits on a pro rata basis to

> the state of Idaho. Any addiitional returns shall be governed by the terms of the grant. In the event of dissolution of a grantee, distribution shall be made to the state and stockholders on a pro rata basis. The director of the department of commerce shall preside over liquidation proceedings in accordance with chapter 27, title 26, Idaho Code.

Idaho Code § 67-4723

In addressing whether the above-delineated statutory provisions violate the constitution, the two preclusions contained in art. 8, § 2, will be discussed. In addition, your question also requires an analysis of the general principle of law that public funds cannot be expended for private purposes.

Constitutionality of the Act Pursuant to Art. 8, § 2

> Art. 8, § 2, reads in pertinent part as follows:
>
> 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.

Art. 8, § 2, contains two preclusions on the power of the legislature to authorize aid to private enterprise. First, the lending of the state's credit in aid of private enterprise is precluded. Second, the state is precluded from directly or indirectly becoming a stockholder in a private enterprise.

a. Lending of Credit

Pursuant to § 67-4722, the legislature may appropriate money to the Department of Commerce for the administration of grants to BIDCOs pursuant to the provisions contained in § 67-4721, et seq. The issue presented is whether the appropriation of money by the legislature is giving or loaning "state credit" as the clause is used in art. 8, § 2. In *Engelking v. Investment Board,* 93 Idaho 217, 459 P.2d 213 (1969), the Idaho Supreme Court held:

> . . . The word "credit" as used in this provision implies the imposition of some new financial liability upon the State which in effect results in the creation of State debt for the benefit of private enterprises. This was the evil intended to be remedied by Idaho Const., art. 8, § 2, and similar provisions in other state constitutions. Yet that particular evil is not presented by the

> investment of existing funds of the State, for no new State debts are created by such action. . . *id.* at 221-222.

See also *Nelson v. Marshall,* 94 Idaho 726, 731, 497 P.2d 47, (1972). Since the credit clause only prohibits the loaning or giving of state credit and not the loaning or giving of state funds, an appropriation to fund the provisions of § 67-4721, *et seq.* would not offend this portion of the constitution.

b. Subscription of Stock

Art. 8, § 2, precludes the state from directly or indirectly becoming a stockholder in a private enterprise. Two provisions of House Bill 206 require analysis to determine if there is a potential violation of this section of the constitution. First, § 67-4723 provides:

> . . . It is recognized that BIDCOs, in compliance with § 23-2716, Idaho Code, administer a program of professional consulting and financing of new, emerging and expanding business enterprises. Such financings may take the form of loans or *equity participation* or a combination thereof. . . .

(Emphasis added.) Second, § 67-4724 provides:

> Grants shall require the applicant to retain within its financing program all funds representing a return on principal until initial capitalization is doubled. Upon doubling capitalization and upon the approval of the department of finance, *grantees shall distribute up to fifty per cent (50%) of profits on a pro rata basis to the state of Idaho.* Any additional returns shall be governed by the terms of the grant. . . .

(Emphasis added.)

In the first provision, a BIDCO is provided with the authority to become an equity participant in business enterprises it is helping to finance. The question is whether BIDCOs are public corporations and, as such, equity participation by a BIDCO would in essence be participation by the state.

BIDCOs are regulated pursuant to chapter 27, title 26, of the Banks and Banking provisions of the Idaho Code. To be a licensed BIDCO in Idaho, a company must meet the following qualifications:

> Requirements for licensure. — (1) An Idaho corporation may apply to the director for licensure as a BIDCO. A person other than an Idaho corporation shall not apply for a license.

(2) After a review of information regarding the directors, officers, and controlling persons of the applicant, a review of the applicant's business plan, including at least three (3) years of detailed financial projections and other relevant information, and a review of additional information considered relevant by the director, the director shall approve an application for a license if, and only if, the director determines all of the following:

(a) The applicant has a net worth, or firm financing commitments which demonstrate that the applicant will have a net worth when the applicant begins transacting business as a BIDCO, in liquid form available to provide financing assistance, that is adequate for the applicant to transact business as a BIDCO as determined under subsection (3).

(b) Each director, officer, and controlling person of the applicant is of good character and sound financial standing: each director and officer of the applicant is competent to perform his or her functions with respect to the applicant; and the directors and officers of the applicant are collectively adequate to manage the business of the applicant as a BIDCO.

(c) It is reasonable to believe that the applicant, if licensed, will comply with this chapter.

(d) The applicant has reasonable promise of being a viable, ongoing BIDCO and of satisfying the basic objectives of its business plan.

Idaho Code § 26-2709.

A BIDCO is not by definition a public corporation; BIDCOs can clearly be private corporations created to further business enterprises. As such, a BIDCO's equity participation in an emerging business which it is helping to fund would not violate the provisions of art. 8, § 2.

In *Utah Technology Finance Corporation v. Wilkinson,* 723 P.2d 406 (Utah 1986), a provision of a statute allowing Utah Technology Financing Corporation to use money appropriated by the legislature to make equity investments in developing technical businesses was held by the Utah Supreme Court to be an unconstitutional subscription to stock by the state. The Utah case is distinguishable from the provisions of § 67-4721, *et seq.* Utah Technology Financing Corporation was created by the Utah Legislature as a public corporation; whereas, HB 206 did not create one public business and industrial development company. As previously discussed, chapter 27, title 26, of the Idaho Code allows any Idaho corporation meeting the previously delineated licensing requirements to operate as a BIDCO in the state of Idaho.

However, the provision of § 67-4724 which requires statutory disgorgement of profits to the state is an apparent violation of art. 8, § 2. The statutory requirement that a BIDCO share its profits with the state would, in our opinion, result in the state becoming, at the very least, an indirect equity participant in a private corporation in violation of the provisions of art. 8, § 2.

Since a portion of § 67-4724 may be found to be unconstitutional by the courts, the question arises whether the unconstitutional portion of the Act is severable from the remainder. The general rule for determining severability is whether the unsevered portion of the Act can stand alone and serve a legislative purpose. *Voyles v. City of Nampa,* 97 Idaho 597, 548 P.2d 1217 (1976). Striking that portion of § 67-4724 which is unconstitutional would not destroy the legislative intent of the Act; the remaining portions of the Act could be implemented standing alone.

Public Purpose Doctrine

Closely aligned to, but distinct from, the issue of constitutionality pursuant to art. 8, § 2, is the fundamental principle that expenditures of public funds must be for a public purpose. The courts have held that the provisions of the constitution embody this fundamental principle. Although the courts have also recognized that states have broad discretion in determining what kind of activity constitutes a "public purpose." *Loan Association v. Topeka,* 87 U.S. 655, 22 L. Ed. 455 (1874); *Green v. Frazier,* 253 U.S. 233, 40 Supreme Court 499, 64 L. Ed. 878 (1920); *Fallbrook Board of County Commissioners v. Idaho Health Facility Authority,* 96 Idaho 498, 531 P.2d 588 (1975); *State v. Idaho Power Company,* 81 Idaho 437, 346 P.2d 596 (1959).

The legislature passed House Bill 206 which, if money is appropriated by the legislature, will provide public funding for grants exclusively available to BIDCOs for the purpose of establishing financing programs for new, emerging, and expanding business enterprises in Idaho. The public purpose as stated in the legislation is to promote economic development and improve the state's economic health through the financing of new businesses which, it is anticipated, will result in an expanded tax revenue base and increased job growth in Idaho. §§ 67-4721, 67-4724.

The Idaho Supreme Court has held that the mere fact that the expenditure would benefit the public does not in and of itself make it a "public purpose." The expenditure must also be directly related to some governmental function or purpose. *Idaho Resource Board v. Kramer,* 97 Idaho 535, 559, 548 P.2d 35 (1976). Even a finding or declaration by the legislature that a particular venture constitutes a public purpose (as denoted in the statute reviewed here), while entitled to considerable weight, is not determinative; "public purpose" is ultimately a judicial question. *Bevis v. Wright,* 31 Idaho 676, 175 P. 815 (1918); *Village of Moyie Springs v. Aurora Manufacturing Company,* 82 Idaho

337, 353 P.2d 767 (1960). It is constructive to note that the Idaho Supreme Court has found development of the state's water resources to be of benefit to the public and a function of the government, *Nelson v. Marshall, supra; Idaho Water Resource Board v. Kramer, supra;* and the court has also found expenditures of public funds on urban renewal to benefit a broad public purpose directly related to government, *Boise Redevelopment Agency v. Yick Kong Corporation,* 94 Idaho 876, 499 P.2d 575 (1972).

Based upon a review of more recent decisions by the court, it is likely that the fundamental purpose behind the statute may be found to meet the two-pronged public purpose test. However, the narrow focus of the grant program as provided by the statute may cause the court concern. The statute provides that grants of public money will go only to business and industrial development companies. Grants cannot be obtained by banks or other lending institutions for the purposes delineated in § 67-4721, *et seq.* In determining whether the "public purpose" test has been met, the courts have previously looked for evidence that no particular private interest will be discriminated for or against in the provision for public funding. See *Boise Redevelopment Agency v. Yick Kong Corporation, supra.* In the situation before us, the statute's narrow provision allowing receipt of grant money only by BIDCOs may not be looked at favorably by a court.

I hope this adequately addresses the questions raised in your correspondence. If I can be of further assistance, please contact me.

Very truly yours,

TERRY B. ANDERSON
Deputy Attorney General
Chief, Business Regulation
and State Finance Division

February 7, 1992

The Honorable Myron Jones
Idaho House of Representatives
STATEHOUSE MAIL

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

Re: Proposed Amendment to the Idaho Constitution, art. 9, sec. 5

Dear Representative Jones:

This letter addresses your inquiry concerning whether legislation authorizing vouchers or tax credits to parents whose children attend private schools violates the Idaho Constitution. It is my opinion that the Idaho Constitution, art. 9, sec. 5, as written, prohibits such legislation. Your proposed amendment to art. 9, sec. 5 appears to overcome this prohibition, at least as to vouchers. There may be additional concerns under art. 9, sec. 6. Moreover, the analysis does not end here. Legislation authorizing tax credits or vouchers to parents whose children attend private schools also raises questions under the first amendment of the United States Constitution. Each of these issues will be discussed.

Aid to Church-Affiliated Schools

The first issue to be addressed is whether a statutory voucher or tax credit system for parents of schoolchildren attending private schools would violate the Idaho Constitution. The clearest constitutional prohibition against such a statutory system is art. 9, sec. 5, which states:

> § 5. Sectarian appropriations prohibited. — Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

The Idaho Supreme Court reads this provision to require a stricter separation between church and state than does the United States Constitution. *Epeldi v. Engelking*, 94 Idaho 390, 395, 488 P.2d 860, 865 (1971), *cert. denied* 406 U.S. 957 (1972). The Idaho Supreme Court has determined that the provision absolutely prohibits legislative appropriations which help "support or sustain" any church affiliated school. *Id.*

In determining whether a statutory tax credit or voucher system violates this standard, a threshold issue is whether it is significant that the system is available to parents of

"private" schoolchildren as opposed to "parochial" schoolchildren. Under *Epeldi,* if the vouchers or tax credits are, in practice, given to parents of parochial school students, they violate art. 9, sec. 5. In *Epeldi,* the supreme court addressed a statute which authorized the board of trustees of each district to provide transportation for "public" and "private" school pupils. The supreme court held that providing such transportation services to parochial schools violated the state constitution. Thus, a statute which, on its face, provides vouchers or tax credits to parents of private schoolchildren will be deemed unconstitutional if those vouchers or tax credits are available to parents whose children attend private schools affiliated with a church.

A second issue is whether there is any constitutional significance if the aid takes the form of a tax credit as opposed to a voucher. Art. 9, sec. 5, prohibits any appropriation or payment "from any public fund or moneys whatever" to aid a church-affiliated school. A voucher system would require an appropriation or payment from a public fund. But what of tax credits? It is clear that a tax credit falls within the terms of art. 9, sec. 5. It has long been recognized that tax deductions or credits can be the equivalent of direct expenditures of public funds. *See Regan v. Taxation with Representation of Wash.,* 461 U.S. 540 (1983); *Comm. for Public Education v. Nyquist,* 413 U.S. 756 (1973) (money involved in tax benefit is a charge made against the state treasury). The Massachusetts Supreme Court recently addressed this issue when it held that a tax deduction for parents of children attending private schools violates the Massachusetts Constitution. *Opinion of the Justices of the Senate,* 514 N.E.2d 353 (Mass. 1987). The court stated:

> [T]he fact that the expenditure here takes the form of a tax deduction rather than a direct payment out of the Commonwealth's treasury does not alter the result . . . . Tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants.

Id. at 355. Thus, like a voucher, a tax credit will violate the terms of art. 9, sec. 5.

Another question implicated is if there is any legal significance, under art. 9, sec. 5, that the public monies are paid to the parents rather than directly to the parochial school. Again, the answer is "no." The Idaho Supreme Court has reasoned that aid need not be given directly to a church-affiliated school to pose a constitutional problem. Rather, aid given to the students' families will be held to violate art. 9, sec. 5, if that aid ultimately has the effect of assisting the school. Thus, for example, in *Epeldi, supra,* the court concluded that art. 9, sec. 5, prohibits the state from providing bus services to parochial school students, as these services eventually benefit parochial schools "by bringing to them those very students for whom the parochial schools were established." *Id.* at 396, 488 P.2d at 866. Thus, even though vouchers and tax credits are given to parents rather than directly to a parochial school, they violate art. 9, sec. 5, because they will ultimately aid the school.

Proposed Amendment

Anticipating that a statute providing tax credits or vouchers to parents of children in private schools might violate art. 9, sec. 5, you have prepared an amendment to this constitutional provision which states:

> Nothing in this section shall prohibit the legislature from creating and funding an educational voucher system for Idaho students.

You ask whether this amendment is sufficient to override constitutional concerns under art. 9, sec. 5.

As a preliminary matter, your amendment only addresses vouchers. Thus tax credits would still be suspect. If it is a tax credit system you are proposing, I recommend you mention tax credits in your amendment to art. 9, sec. 5.

Additionally, your amendment does not expressly state that a voucher system could be used for parochial schools. Thus, in interpreting this new language, a court would have to decide whether to construe the amendment so as to essentially nullify the core of art. 9, sec. 5, or try to reconcile the amendment with art. 9, sec. 5, by allowing a voucher system for public and nonchurch-affiliated private schools while disallowing vouchers for church-affiliated private schools. If your intent is to enact a voucher system which can be used by parents of parochial school pupils, I recommend that you clarify your amendment so that church-affiliated schools, as well as other types of schools, clearly fall within its provisions.

Finally, you must consider art. 9, sec. 6, of the Idaho Constitution, which essentially prohibits religious instruction in publicly funded schools. It further states that no teacher or district can receive public school monies if their schools are not conducted "in accordance with the provisions of this article." There can be little doubt that parochial or church-affiliated schools provide religious instruction. Consequently, if you are proposing a voucher or tax credit system for parents of children attending parochial schools, you will have to amend art. 9, sec. 6, as well as art. 9, sec. 5.

In sum, a voucher or tax credit system violates art. 9, sec. 5, of the Idaho Constitution. Your proposed amendment alleviates some of the concerns under this article. However, your amendment should be clarified in the ways mentioned. In addition, you may also need to amend art. 9, sec. 6.

Establishment Clause

While your proposed amendment to art. 9, sec. 5, of the Idaho Constitution alleviates

some problems posed by the Idaho Constitution, your efforts to establish a voucher or tax credit system will nevertheless remain futile if such a system violates the first amendment of the United States Constitution. Thus, although you have not requested it, an examination of the first amendment is necessary.

The first amendment prohibits the government from establishing or promoting religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973). The United States Supreme Court presently applies a three-part test to determine whether legislation violates the establishment clause of the first amendment. To be upheld, legislation must reflect a clearly secular legislative purpose, it must have a *primary* effect that neither advances nor inhibits religion, and it must avoid excessive government entanglement with religion. *Id.* at 773.

The United States Supreme Court has applied this test to several legislatively enacted education funding schemes challenged under the establishment clause. In *Nyquist, supra,* the Court considered a program that gave a partial tax credit to parents of children in private schools. The program also provided an outright tuition reimbursement for poor parents whose children attended private schools. The Court struck down the program, holding that its primary effect was to aid religion. In reaching its decision, the Court noted that the majority of private schools which stood to benefit from the program were parochial and that the state could not avoid first amendment restrictions by funnelling the aid through the parents to the parochial school. The *Nyquist* Court viewed the program as an "ingenious" plan for authorizing the government to pick up bills for religious schools. *Id.* at 784.

A decade later, in *Mueller v. Allen,* 463 U.S. 388 (1983), the Court addressed a similar issue when it considered tax deductions for educational expenses, including tuition, transportation and textbooks, which were available to parents of children attending both public and nonpublic schools. This time the Court reached a different result, upholding the tax deduction plan.

The Court distinguished *Nyquist* on two grounds. First, the Court reasoned that a tax deduction was different from a tax credit or outright grant, noting that deductions for charitable contributions to churches are routinely allowed. More importantly, the Court asserted that the statute at issue in *Mueller* was facially neutral because, unlike the *Nyquist* statute, it applied to parents of children attending public as well as private schools. The Court concluded that as the assistance was for a broad class of beneficiaries, the primary effect was not to advance religion. In reaching this conclusion, the Court appeared unconcerned that 96 percent of the tax deductions were taken by parents of children attending parochial schools. Also of little concern to the Court was that most of the deductible expenses, such as tuition, transportation and textbooks, were provided free by public schools and therefore these deductions were not, in practice, available to

parents of children attending public schools. Finally, contrary to its position in *Nyquist*, the Court in *Mueller* appeared impressed that the aid went to the parents as opposed to directly to the school. The Court, through Justice Rehnquist, concluded that because the aid went first to the parents, their individual choice was required before the aid reached a parochial school and, therefore, the state was not placing its imprimatur on religion. *Id.* at 399.

The *Nyquist* and *Mueller* opinions are difficult to reconcile. Added to this is *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986), the most recent Supreme Court opinion considering the validity of educational funding schemes under the establishment clause. *Witters* involved what were essentially vouchers. The vocational educational program at issue provided direct aid to visually handicapped persons attending a vocational school for the blind. The petitioner was attending a Christian college to be trained as a pastor and he sought to take advantage of the assistance program. Despite the distinction drawn in *Mueller* between deductions and direct grants, the Supreme Court unanimously ruled that the state's direct payment to the petitioner for his education at the Christian college would not advance religion in a manner inconsistent with the establishment clause.

Justice Marshall authored the opinion and, in an extremely narrow holding, reasoned that the aid in this particular instance was valid as the vast majority of state aid provided overall under the challenged program did not go to church-affiliated schools. There were also a number of broader concurring opinions which relied heavily on *Mueller.* For example, giving *Mueller* a sweeping reading, Justice Powell concluded that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [establishment clause] because any aid to religion results from the private choices of individual beneficiaries." *Witters* at 490-91 (J. Powell concurring).

With this in mind, we now address your proposed voucher and tax credit system. In your letter, you state the vouchers and tax credit would be available to parents of children attending private schools. If your system is not available to *all* parents, including those of children attending public schools, it will fall directly within the *Nyquist* holding and probably be deemed unconstitutional. To avoid this problem, you can propose a tax credit or voucher system available to all parents.

However, even this will not guarantee success. The Supreme Court has yet to uphold a tax credit or voucher system where the majority or even a substantial portion of the state aid eventually goes to church-affiliated schools. As noted, *Mueller* drew a distinction between tax deductions versus tax credits or direct payments. Granted, this distinction was largely ignored in *Witters.* However, *Witters* involved a narrow set of facts in which only an inconsequential portion of the state aid eventually went to

church-affiliated schools. Thus, whether the Court would allow a voucher or tax credit system, even one available to all parents, in which a substantial portion of the funds is eventually funnelled to church-affiliated schools remains an open question. Certainly, the line-up on the Court has changed and the Court appears now to take a less stringent stand on the establishment clause than in the past. Nevertheless, legislation such as yours, at the very minimum, invites a court challenge and bears a chance of being held invalid.

If you intend to pursue this legislation, I suggest that you weigh the possibility that it could be held unconstitutional. I further recommend that your legislation encompass the following. First, any voucher or tax credit system should be available to *all* parents of schoolchildren, including parents whose children attend public schools. Second, the system should be as broad based as possible, including expenses which parents of children attending public schools might encounter, such as tutoring or summer school. While these recommendations will not guarantee the constitutionality of a voucher or tax credit system, they will at least enhance the likelihood that such a system could withstand judicial scrutiny.[1]

Conclusion

A statute enacting a voucher or tax credit system for parents of children attending private schools violates art. 9, sec. 5, of the Idaho Constitution. It may also violate art. 9, sec. 6. Your proposed amendment to art. 9, sec. 5, overcomes some of the concerns under this provision. However, as discussed above, you may want to clarify your amendment so that it expressly covers a tax credit system as well as aid to parochial schools. In addition, art. 9, sec. 6, may also have to be amended before a statutory voucher or tax credit system is valid under our state constitution.

The establishment clause contained in the first amendment of the United States Constitution is also a concern. Presently, it is an open question whether an educational tax credit or voucher system violates the federal establishment clause. To help avoid federal constitutional concerns, I recommend that your voucher or tax credit system be available to all parents. In addition, I recommend that it be broad based and encompass expenses likely to be encountered by parents of children attending public schools. Such expenses might include, for example, private tutoring or summer school.

If you have any questions, please let me know.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General

[1] Worth noting is that Idaho has its own establishment clause which states that no person shall be required to support any religious denomination. *See* art. 1, sec. 4. The Idaho Supreme Court is free to conclude that Idaho's establishment clause is more protective than the federal establishment clause. If construed more strictly, the court might have difficulty reconciling art. 1, sec. 4, with your proposed amendment.

February 28, 1992

The Hon. Kitty Gurnsey
Chairman of House Appropriations Committee
Co-Chairperson Joint Finance Appropriations Committee
House of Representatives

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

Re: (1) Non-Cognizable Funds Pursuant to I.C. § 67-3516, and (2) Transfer of Appropriations Between Departments

Dear Representative Gurnsey:

You have asked our office to address two issues. First, you have asked for a legal interpretation of the status of non-cognizable funds under Idaho Code § 67-3516. Second, you have asked a series of questions concerning the statutory authority of inter-departmental transfers of money.

1. Non-Cognizable Funds

Section 67-3516 states in pertinent part as follows:

> (1) Appropriation acts when passed by the legislature of the state of Idaho, and allotments made thereunder, whether the appropriation is fixed or continuing, are fixed budgets beyond which state officers, departments, bureaus and institutions may not expend. It is assumed that the rate of expenditure from said appropriations, as a general rule, should not exceed approximately fifty percent (50%) of such appropriations each six (6) months of the fiscal year.
>
> (2) *Funds available to any agency from sources other than state funds, if not cognizable at the time when appropriations were made* whether state fiscal liability is increased or not, must have prior approval of the administrator of the division of financial management and the board of examiners in order that

> funds may be expended, except those funds received under such conditions that preclude approval by the administrator of the division and/or the board of examiners.

(Emphasis added.)

Sub-paragraph (1) of the above-quoted section clearly delineates that appropriations when passed by the legislature of the state and allotments made pursuant to the appropriation are fixed budgets from which officers, departments or bureaus may not overspend. There are certain statutorily provided exceptions to the requirements of § 67-3516(1). One of those exceptions is provided in sub-paragraph (2) of the same section. This section allows an agency to spend funds which were not appropriated or allotted to it if the following three-part test is met:

1) The funds are from other than state funds;

2) The funds were not cognizable at the time when the appropriation to the agency was made;

3) The agency has the prior approval of the administrator of the Division of Financial Management and the Board of Examiners, unless the funds are received under a condition which precludes approval by the administrator of the Division of Financial Management and/or the Board of Examiners.

Meeting the first step requires a determination that the source of the money is from other than state funds. State funds are not specifically defined in the Idaho Code, however, other jurisdictions have defined state funds as funds in which the equitable as well as the legal title are vested with the state. See *Navajo Tribe v. Arizona Department of Administration,* 111 Ariz 279, 528 P.2d 623 (1974); *Button's Estate v. Anderson,* 112 Vt. 531, 28 A.2d 404 (1942). Therefore, to meet the first prong of this test, the agency must establish that the equitable and legal title to the funds did not rest with the state.

If the funds come directly to the agency fromm other than a state source, as defined above, it must be established that these funds were "not cognizable" when the legislature made its appropriations. By this, it must be established that the existence of these funds was not known at the time of the appropriation.

Once the first two requirements have been met prior to using the funds, the agency must seek approval from the administrator of the Division of Financial Management and the Board of Examiners unless the agency can prove that the funds were received under such conditions that approval of the administrator of the Division of Financial Management and/or the Board of Examiners was impossible.

If an agency is in need of additional money and does not have funds available to it which would meet the requirements provided in § 67-3516(2), the agency must seek approval for the supplemental allotment from the State Board of Examiners pursuant to the requirements of Idaho Code § 67-3522 or seek a supplemental appropriation from the legislature.

In addition to addressing the general requirements of § 67-3516(2), you also asked me to address specifically an issue related to an *additional allotment over the appropriation of the legislature made by DFM from the dedicated plumbing board account to the Department of Labor and Industrial Services.* It would appear that money contained within the dedicated plumbing board account would be "state funds" as defined above. In Attorney General Opinion 85-7, this office previously opined that the amount of revenue which may be expended from the dedicated plumbing board account is controlled by the legislature through the annual appropriation process. The money that comes into the dedicated account would meet the definition of state funds and, as such, the funds within that account would not be available for disbursement pursuant to the provisions of § 67-3516(2).

2. Transfer of Appropriation Between Departments

In the 1991 legislative session, the legislature passed the "Idaho State Council on the Deaf and Hard of Hearing Act." This act provided for the creation of a state council comprised of nine (9) members appointed by the governor to be the "interdepartmental and interagency planning and advisory body for the . . . state for programs and services affecting people with a hearing impairment." Idaho Code § 67-7303(1). The governor was given the authority to assign the council to a department or office within the state for budgetary and administrative support purposes. Idaho Code § 67-7303(2). In addition, the council was given statutory authority to "employ such personnel as may be necessary" subject to the provisions of chapter 53, title 67, Idaho Code.

In the same session, the legislature passed an appropriation bill, House Bill 398, which provided a $6,793,100 appropriation for the Office on Aging. Although not specifically delineated within the body of the appropriation bill, $51,100 was apparently earmarked as one-time money for operating expenditures for a hearing impaired task force. With reference to the appropriation for the "task force," the appropriation bill states as follows:

> SECTION 2. It is legislative intent that, of those moneys appropriated in Section 1 of this act for the Hearing Impaired Task Force, the Office on Aging contract for assistance in planning program development.

In August of 1991, the Division of Financial Management (DFM) transferred the

appropriation for the "task force" from the Office on Aging to the Department of Health & Welfare. DFM based its authority to transfer the funds on the previously delineated provision of § 67-7303(2) providing the governor with discretion to place the council for the deaf and hard of hearing within an office or department of the state.

With reference to the transfer, you have asked three questions. First, in light of the constitutional and statutory authority to appropriate funds granted to the Idaho legislature, did DFM have the authority to transfer an appropriation from the Office on Aging to the Department of Health and Welfare for the purpose of providing budgetary support to the Council for the Deaf? Second, did the executive branch have the authority to place the council created pursuant to chapter 73, title 67, under the Department of Health and Welfare? Third, if the Department of Health and Welfare legally received funding for the council, could some or all of the appropriation be used for personnel costs for support of the purpose of the council?

Addressing the first question, it is clear that the legislature's power to make appropriations is plenary, limited only by the state constitution. *David v. Moon,* 77 Id. 146, 289 P.2d 614 (1955). Article 7, § 13, of the Idaho Constitution provides that "no money shall be drawn from the treasury but in pursuance of appropriations made by law." An appropriation within the meaning of the above quoted section of the constitution has been defined as: 1) Authority from the legislature; 2) expressly given; 3) in legal form; 4) to proper officers; 5) to pay from public moneys; 6) a specified sum and no more, and 7) for a specified purpose and no other. *Jackson v. Gallet,* 39 Idaho 382, 228 P. 1068 (1924); *McConnel v. Gallet,* 51 Idaho 386, 6 P.2d 143 (1931). *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969).

House Bill 398 meets the required tenets of the definition of appropriation. The first six requirements of the definition need no discussion because they are clearly met. As to requirement no. 7, i.e., for a specified purpose and no other, the purpose of the appropriation was to fund the Office on Aging for the amount specified according to the expenditure classes designated in the bill. Not specifically broken out in the bill, but apparently contained within the appropriation, was an amount for the "Hearing Impaired Task Force." Pursuant to section 2 of House Bill 398, the legislature directed the Office on Aging to expend this portion of the appropriation in a "contract for assistance in planning program development."

The transfer of the appropriation from the Office on Aging to the Department of Health and Welfare was a transfer from one appropriation to another. It has been recognized as a general rule of law that, in the absence of constitutional or statutory authorization, the executive branch is not vested with the right to make or to alter appropriations. Pursuant to the provisions of § 67-3511, officers and agencies within the three branches of state government are allowed a limited amount of authority to transfer

money between standard classes and between programs within the same appropriation. However, there is no authority for any officer or agency, including the governor, to transfer funds from one appropriation to another appropriation.

With reference to the second question, it is clear that pursuant to § 67-7303(2), the governor had the authority to assign the council created by chapter 73, title 67, to any department or office within the state. However, the power to assign the council to a department does not carry with it the concomitant power to direct the appropriation. As previously noted, the appropriation power rests with the legislature.

Finally, in answer to the third question, if an appropriation including an expense classification for personnel had been legally granted to Health and Welfare to fund the provisions of chapter 73, title 67, Idaho Code, staff could be hired to assist the council. Pursuant to § 67-7306, the council has the authority to employ personnel, however, this authority is contingent upon an appropriation to fund those positions. If an appropriation is made, but there is no classification for personnel, the department may seek to transfer appropriations from another expenditure classification within the department pursuant to the requirements delineated in § 67-3511.

I hope this adequately addresses your concerns. If you have any additional questions or concerns, please contact me.

Sincerely,

TERRY B. ANDERSON
Deputy Attorney General
Chief, Business Regulation and State Finance Division

February 28, 1992

The Honorable Herb Carlson
Idaho State Senate

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

Re: House Bill 593; Product Disparagement

Dear Senator Carlson:

You have requested our opinion concerning the constitutionality of H.B. 593, which

creates a statutory cause of action for agricultural food product disparagement. It is the opinion of this office that H.B. 593 probably violates the first amendment of the United States Constitution. The bill's negligence standard, its broad terms and its provision for treble damages all raise serious constitutional concerns.

This letter will first address the elements of H.B. 593 and how the bill relates to traditional product disparagement law. The relevant constitutional principles will then be examined to provide a framework for a first amendment analysis. Finally, this letter will discuss some specific constitutional vulnerabilities of H.B. 593.

I. H.B. 593 AND PRODUCT DISPARAGEMENT LAW

H.B. 593 creates a statutory action for agricultural food product disparagement. Such an action already exists at common law. H.B. 593 codifies this action, but significantly alters certain elements of the common law tort.

Traditional product disparagement is a tort in which the plaintiff must prove that a false statement concerning the nature or quality of plaintiff's product was made by the defendant. The tort of product disparagement is closely associated with the more familiar tort of defamation. *See Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404 (E.D. Penn. 1983). However, the two torts protect different interests. An action for defamation protects reputation or character from false statements directed at the moral character of an individual. *Zerpol* at 408. The cause of action for product disparagement, on the other hand, "protects economic interests by providing a remedy to one who suffers pecuniary loss from slurs affecting the marketability of his goods." *Id.*

The two torts, while closely aligned, contain different elements. One who publishes a defamatory statement "of and concerning" another person can be held liable in damages if: (1) the statement is false; (2) the publication is not privileged; and (3) the publication results from fault which at least amounts to negligence. *RESTATEMENT (SECOND) OF TORTS § 588. In contrast, the elements for common law product disparagement are stricter. The publication of a disparaging statement "of and concerning" the product of another is only actionablle where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize the publication will result in pecuniary loss; (3) the statement is not privileged; (4) measurable pecuniary loss does in fact occur; and (5) the statement is made with malice; that is, the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity. Zerpol* at 409.

H.B. 593 modifies the common law tort of product disparagement. Under the bill, a defendant may be liable for civil damages if he disseminates to the public, in any manner, "false information" not based upon "reliable" scientific facts and data "which

the disseminator knows or should have known to be false, and which casts doubt upon the safety of any perishable agricultural food product . . . ." Additionally, if the statement was made with the intent to harm the producer, treble damages are available.

The most obvious modification is that the traditional malice standard has been replaced with the lower standard of negligence. As noted, at common law, the plaintiff has to show the defendant knew the statement was false or acted with reckless disregard of its falsity — a malice requirement. Under H.B. 593, the plaintiff now need only demonstrate negligence; that is, the defendant "should have known" the statement was false. Additionally, the statute contains no express provision that the false statement be "of and concerning" the particular plaintiff's product. Finally, the statute includes a treble damage scheme not found in common law disparagement suits. Thus, while H.B. 593 is, in essence, a codification of the common law disparagement action, a number of the stringent common law requirements have either been relaxed or omitted altogether.

II. RELEVANT CONSTITUTIONAL BACKGROUND

Having discussed the elements of H.B. 593, we now turn to the relevant constitutional doctrines against which this bill must be measured. It is important, at this point, to bear in mind that H.B. 593 affects speech — generally considered both the most valuable and the most fragile of our constitutional rights. Consequently, unlike the deference accorded most statutes, this bill will not be presumed to be constitutional if it is challenged. Rather, it will be held invalid if it either (1) encompasses within its scope protected speech or (2) is so vague that it has a chilling effect on expression shielded by the first amendment. *See NAACP v. Button,* 371 U.S. 415 (1963).

With this heightened level of judicial scrutiny in mind, there are two bodies of first amendment case law which are directly implicated by H.B. 593. Because the bill creates a statutory disparagement action so closely aligned with defamation, the first amendment restrictions imposed by the United States Supreme Court on defamation suits must be examined. Moreover, as product disparagement actions may arise in the commercial setting, the Court's commercial speech doctrine is also relevant. Each of these bodies of law will be discussed before being applied to H.B. 593.

A. Defamation and the First Amendment

In the last 20 years, the United States Supreme Court has placed significant first amendment restrictions on the law of defamation and has established a complex set of rules governing when defamatory false speech is actionable. In its leading opinion, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Court determined that public figures cannot prevail on a defamation action without proving "actual malice," defined as intentional falsity or reckless disregard for the truth. The Court reasoned that, in open

public discussion, false statements about public figures are inevitable and that worthwhile contributions to the flow of information might be deterred without the insulation from liability provided by the actual malice rule.

Subsequently, in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), the Court declined to extend the malice requirement to defamation suits brought by private figures. The Court did, however, require that private figures prove some degree of fault, at least negligence, to recover actual damages. The Court went on to hold that malice would be required for private parties to recover presumed or punitive damages. Id. at 349-50. While the Court has not directly addressed the issue, the prevailing view is that, under the Court's reasoning, public figures can never recover punitive damages. Moreover, the Court also concluded in *Gertz* that a private party could, in some instances, become a "limited purpose" public figure and subject to the malice standard for any recovery. *Id.* at 351.

The United States Supreme Court has also provided other first amendment protections in the defamation area. For example, only factual assertions or opinions which "imply an assertion of objective fact" are actionable. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990). Pure opinions, statements that do not imply facts capable of being true or false, remain absolutely protected. *Milkovich* at 2708 (Brennan, J., dissenting).

Additionally, lower courts have displayed an increased unwillingness to entertain defamation actions when the defamatory statement is addressed to a large group rather than an individual. Again, the concern has been avoiding interference with "public discussion of issues, or groups, which are in the public eye." *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), aff'd, 665 F.2d 110 (6th Cir. 1981).

These are some of the constitutional limits imposed on defamation suits in the struggle to balance the interest in open discussion against the interest in compensating defamation plaintiffs for their injury. These restrictions are beginning to be applied by a handful of courts as they address product disparagement cases raising similar concerns.

B. Commercial Speech

While the United States Supreme Court has jealously guarded the first amendment in the area of defamation law, the same is not true when commercial speech is examined. Commercial speech is generally profit-motivated speech contained in advertisements. *See Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983). In other words, it is the speech which businesses or individuals use to sell their products.

For many years, commercial speech was wholly unprotected under the first amendment. *See Valentine v. Chrestensen,* 316 U.S. 52 (1942). Today, the Court grants commercial speech some protection on the basis that society has a "strong interest in the free flow of commercial information" and that consumers' decisions should be "intelligent and well informed." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 764-65 (1976). Nevertheless, the protection is limited and the Court has consistently emphasized that false or misleading commercial speech enjoys no right to first amendment protection. *Id.*

III. APPLYING CONSTITUTIONAL DOCTRINES TO H.B. 593

Because H.B. 593 implicates both the constitutional body of law surrounding defamation and the commercial speech doctrine, the first step in addressing the bill's constitutionality is distinguishing between the potential defendants who fall within its scope. Noncommercial defendants will be entitled to the heightened protections provided by *New York Times.* For example, their disparaging statements may not be actionable unless "actual malice" is proved. Commercial defendants will enjoy only minimal first amendment protection under the commercial speech doctrine.

A. Commercial Defendants

H.B. 593 is likely constitutional as applied to commercial defendants. As noted, commercial speech must be true before it is accorded any first amendment protection. *Virginia State Bd., supra.* Consequently, H.B. 593's threshold requirement that the disseminated information be false before it is actionable appears to preclude commercial defendants who disparage their competitors' products from successfully raising a first amendment shield. Certainly, there is a push now, at least by academics, to increase the protection granted commercial speech and even perhaps shield some misleading statements. *See* M.H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech,* 43 Vand. L. Rev. 1433 (1990). Regardless, under current United States Supreme Court precedent requiring that commercial speech be truthful before it is protected, it appears that if a commercial defendant falsely disparages a competitor within the terms of H.B. 593, the defendant will not be protected by the Constitution. *See People ex rel. Dunbar v. Gym of America, Inc.,* 493 P.2d 660 (Colo. 1972) (holding that product disparagement provisions in the state's Consumer Protection Act do not violate the first amendment); and *Dairy Stores, Inc. v. Sentinel Publishing Co., Inc.,* 465 A.2d 953, 960 n.4 (N.J. Super. Ct. Law Div. 1983), *aff'd on other grounds,* 516 A.2d 220 (N.J. 1986) (noting that the *New York Times* privilege may not apply to disparagement actions arising in the commercial context).

B. Noncommercial Defendants

While H.B. 593 may be constitutional if applied solely to commercial speech, the analysis does not end here. H.B. 593, by its terms, addresses any false disparaging information. Therefore, it encompasses statements made by nonbusiness defendants. These statements do not constitute commercial speech, and a higher standard of first amendment protection is given to them.

Because product disparagement is so closely linked to defamation, the few courts that have addressed the constitutional implications of noncommercial disparaging speech have routinely applied the first amendment protections surrounding defamation law. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3rd Cir. 1980); *Dairy Stores, Inc.*, 465 A.2d at 953. The two torts are not identical and, consequently, the overlay of defamation case law onto disparagement suits is sometimes a rough fit. The remaining question, then, is: What protections are applicable when comparing defamation and disparagement, and how are these protections likely to affect the constitutionality of H.B. 593?

1. *Malice.* The primary first amendment protection which needs to be addressed is the *New York Times* malice standard. As noted, malice is traditionally required to prove a claim of common law product disparagement. However, H.B. 593 has created only a negligence requirement. This departure from the traditional malice standard probably renders the bill unconstitutional.

The United States Supreme Court has only examined product disparagement and the first amendment once. In *Bose, supra*, the Court addressed a critic's disparaging review of loudspeakers. On appeal to the Court, the producer did not challenge the trial court's characterization of him as a "public figure" for first amendment purposes. Consequently, the Court was not called upon to determine whether malice was in fact the proper standard to apply. Nevertheless, the Court did apply the malice standard as it analyzed its only product disparagement suit. *Id.* at 513.

Lower courts have addressed the malice issue head-on. While there is not complete accord, a number of courts have concluded that product disparagement requires malice. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3rd Cir. 1980); *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 446 U.S. 485 (1984); *F & J Enterprises, Inc. v. Columbia Broadcasting Sys. Inc.*, 373 F. Supp. 292 (N.D. Ohio 1974); and *Steak Bit of Westbury, Inc. v. Newsday Inc.*, 334 N.Y.S.2d 325 (N.Y. App. Div. 1972). *But see Golden Bear Distr. Systems v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983) (protections depend upon the circumstances of each case). These courts' reasoning is usually premised upon the need for public discussion and free information regarding consumer products.

Perhaps the most cogent analysis of this issue can be found in *Dairy Stores, supra,* which involved a newspaper's critical remarks about the quality of springwater. The court examined the societal values requiring malice in certain individual defamation suits and determined these same values demanded a malice standard in product defamation suits as well.

Relying on United States Supreme Court precedent, the court in *Dairy Stores* initially recognized that consumers have a first amendment interest in obtaining information regarding products and services they purchase and that this interest "is comparable . . . to being informed about political and social issues." *Id.* Second, the court emphasized that a producer voluntarily exposes its products to public criticism, much in the same fashion as does a public figure, by placing its product into the marketplace. *Id.* at 960. The court noted that "a business which makes representations about the content, quality or safety of its products . . . invites attention and comment." *Id.* Finally, the court stressed that like public figures, businesses have greater access to channels of effective communication and "hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* The court concluded that when a consumer product has been placed into the public marketplace, a malice standard must be applied.

First amendment scholars generally support judicial determinations that information regarding the health and safety of consumer products deserves a high level of constitutional protection. *See Product Health Claims, supra,* and Note, *The Tort of Disparagement and the Developing First Amendment,* 1987 Duke L.J. 727 (1987). For example, M.H. Redish, in *Product Health Claims,* emphasizes the urgent need to release emerging scientific theories to the public without chilling scientific and health debates with the threat of litigation. In his article, Redish points out that early studies on cigarettes indicated they were healthy, and that if emerging scientific theory revealing the hazards of smoking had been excessively burdened during that period, the consequences could have been devastating. *Id.* at 1443.

In sum, there is little case law on whether disparagement suits require malice and courts are not in complete accord on the issue. Nevertheless, it appears that a significant portion, if not all, noncommercial disparaging speech will not be actionable unless it is based on "actual malice." This judicial position has received wide support by legal scholars. Moreover, because of the underlying public concerns, if speech involves health or safety issues, the likelihood that malice will be required is enhanced. H.B. 593 directly burdens speech addressing safety, yet contains only a negligence standard. Consequently, this portion of H.B. 593 is probably unconstitutional.

2. *Opinion v. Fact.* The next issue involves the protection of pure opinion. As noted, false factual assertions or opinions premised upon facts are actionable. *Milkovich, supra.*

However, expressions of theories and ideas have generally been held to be protected by the first amendment.

H.B. 593 provides no express protection of theories and ideas. Rather, the bill makes actionable disparaging "information." This term is broader than that contained, for example, in the product disparagement provision of Idaho's Consumer Protection Act. That provision restricts only false assertions of "fact." Idaho Code § 48-603(8). The issue then is whether "information" is either so broad or so vague that it potentially chills protected expression.

Perhaps the most sensitive area here is, again, emerging scientific information regarding the health and safety of products. In *Product Health Claims, supra,* Redish convincingly argues that scientific expression and debate should be granted the same constitutional protections as political discourse. He draws a distinction between "basic fact" and assertions of scientific fact; the latter, he argues, should be treated as protected expressions of ideas. *Product Health Claims* at 1435. Redish emphasizes the changing nature of scientific belief, arguing that any attempt by the government to impose "a national scientific orthodoxy would undermine or inhibit the advance of scientific knowledge, thus undermining a key value of the first amendment." *Id. See also Moore v. Gaston County Board of Education,* 357 F. Supp. 1037 (W.D. N.C. 1973) for an interesting discussion on stifling scientific inquiry.

Our research has not disclosed a recent disparagement opinion directly addressing scientific expression and the first amendment; thus, it is speculative to attempt to discern precisely what protections a court might provide scientific expression. However, because emerging scientific inquiry and debate is so clearly essential to public health concerns, a court reviewing H.B. 593's broad language would likely conclude the terms of H.B. 593 excessively burden open debate on important public issues and thus are unconstitutional.

3. *The "Of and Concerning" Requirement.* The next issue to be analyzed is the traditional requirement in both defamation and disparagement that the false statement be "of and concerning" the individual or product. H.B. 593 does not expressly contain this requirement. Consequently, a disparaging statement not directly aimed at a particular producer, but rather at a generic product at large, is conceivably actionable under H.B. 593 if the producer is damaged. Under recent case law constitutionally limiting group defamation and disparagement suits, this may pose another constitutional hurdle for the bill.

As mentioned earlier, a number of courts have constitutionalized the "of and concerning" element of defamation by limiting group defamation actions. The interest protected by these decisions is open discourse on issues or groups "which are in the

public eye." *Michigan United Conservation Clubs v. CBS News,* 485 F. Supp. 893, 900 (W.D. Mich. 1980). Moreover, the California Supreme Court has held that in product disparagement suits, just as in defamation suits, the first amendment requires that the falsehood specifically refer to or be "of and concerning" the plaintiff. *Blatty v. New York Times Co.,* 728 P.2d 1177 (Cal. 1986). *Blatty* was not a group disparagement case per se, but rather involved the omission of plaintiff's product from a best-seller list. Nevertheless, the California Supreme Court concluded that because the plaintiff was not specifically referred to, the first amendment precluded recovery.

The same public policy concerns that limit group defamation suits also apply to group disparagement actions. The larger and more general the group involved — whether it be a group of individuals or a group of products — the more likely an issue of public concern is implicated, and the less likely the falsehood was intended to harm a particular individual or producer. The reputation of an individual or the pecuniary interest of a producer can, of course, be harmed by a general falsehood directed at a group. However, at some point, group defamation or disparagement suits must be limited so that the public discourse so essential to the core of the first amendment can be protected.

By failing to expressly include an "of and concerning" element, H.B. 593 allows little accommodation for this concern. Rather, under this bill, general health assertions about widely used food products which do not name a particular producer could be actionable if the statements were ultimately deemed false and producers were damaged by the credibility initially given the assertions. It is likely that a court would find this potentially broad and chilling sweep of H.B. 593 troubling.

4. *Punitive Damages.* H.B. 593 provides treble damages if a falsehood was made with the intent to harm the producer. This treble damage scheme far surpasses the damages provided at common law. At common law, malice as to falsehood and intent to harm the producer must be demonstrated simply to recover proven pecuniary loss. *Zerpol, supra,* at 409. While punitive damages are not precluded under common law theory, there is certainly no set automatic treble damage scheme.

More importantly, due to first amendment concerns, punitive damages are now disfavored in defamation lawsuits. While the case law is again unclear, the United States Supreme Court has concluded a private figure must show actual malice to recover punitive damages. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349 (1974). Because this is also the standard a public figure must prove just to recover actual damages, it is generally believed that public figures simply cannot recover punitive damages.

> Although the court has not yet explicitly ruled that a public official or public figure could not collect punitive damages, a contrary conclusion would be surprising. The court has condemned the inhibiting effect of damage awards in

> excess of an actual injury, so one should expect it to hold that any punitive damage awards for libels against public officials or public persons interfere with the "breathing space" required in the exercise of robust first amendment debate.

R.D. Rotunda, J.E. Nowak, J.N. Young, Volume 3, *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE, AND PROCEDURE,* ch. 20 § 20.33(e) (1986).

By analogy, if a court determines that a producer has so inserted himself or his product into public discourse that a malice standard applies for recovery of mere pecuniary loss, it is unlikely the producer could also recover punitive damages. *See* Note, *The Tort of Disparagement* at 756. For these producers, H.B. 593's entitlement to treble damages upon a showing of intent probably violates the first amendment.

IV. CONCLUSION

House Bill 593 is designed to protect agricultural food producers from the harm caused by negligent falsehoods which disparage their products. The goal of this bill is understandable. Agriculture is important to Idaho and deserving of protection. However, because this bill affects speech, it will have to meet stringent requirements if it is challenged. While the body of case law applicable to a bill such as this is only now emerging, what precedent exists reveals some shortcomings in this proposed legislation. The absence of a malice requirement, coupled with broad terms which conceivably encompass protected expression and discourse, create serious first amendment concerns. The punitive damage scheme is also of concern. It is our opinion that these concerns are of sufficient magnitude that a reviewing court would likely find H.B. 593 unconstitutional.

Important to note, however, is that the constitutional vulnerability of this bill does not foreclose legal protection for agricultural producers. Idaho Code § 48-603(8) already protects producers from product disparagement by competitors. Moreover, a common law tort claim may be brought if a noncommercial defendant disparages a product. Thus, there are already legal protections in place for agricultural producers. To the extent the legislature determines more protection is necessary, this office recommends that H.B. 593 be more narrowly tailored to account for the constitutional concerns discussed above.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General

March 18, 1992

The Honorable Herm Steger
Idaho House of Representatives

The Honorable Pamela Bengson Ahrens
Idaho House of Representatives

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

Re: Senate Bill 1336; State Board of Education

Dear Representatives Steger and Ahrens:

You have asked whether the provisions of Senate Bill 1336, which envisions the statutory creation of two panels to the State Board of Education (one for higher education and one for public schools), conflicts with art. 9, secs. 2 and 10, of the Idaho Constitution, and whether the creation of two panels of the State Board of Education would require an amendment to that section.

Art. 9, sec. 2, of the Idaho Constitution states:

> The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

(Emphasis added.)

Because the Idaho Constitution speaks in terms of a single board governing all the educational institutions of the state and because the historical record supports an intent to have educational affairs in this state governed by a single board, the present Board of Education cannot be divided into two panels absent an amendment to art. 9, sec. 2, of the Idaho Constitution.

RULES FOR CONSTITUTIONAL INTERPRETATION

There are no cases interpreting art. 9, sec. 2, of the Idaho Constitution. In addition, a constitutional provision placing the entire supervision of all educational institutions in a state under one board appears to be unique to Idaho. Consequently, it is not possible to simply look at cases from other jurisdictions which have interpreted provisions similar to art. 9, sec. 2.

In interpreting art. 9, sec. 2, or for that matter any provision of the Idaho Constitution, one should follow well-established rules of construction of state constitutions. These rules are, by and large, the same as those used for statutory construction and interpretation. *Sweeney v. Otter,* 119 Idaho 135, 804 P.2d 308 (1990). The first rule of interpretation is to apply the plain language of the constitution:

> When called upon to review legislation, this court has stated: "The most fundamental premise underlying judicial review . . . is that, unless the result is palpably absurd, the courts must assume the legislature meant what it said. Where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect." [Citations omitted.] Where the language is unambiguous, there is no occasion for the application of rules of construction.

119 Idaho at 138.

However, in interpreting the language used in the Idaho Constitution, one should interpret it in its historical context. This will necessarily involve an examination of the history of the development of art. 9, sec. 2. In *Girard v. Diefendorf,* 54 Idaho 467, 34 P.2d 48 (1934), the Idaho Supreme Court quoted 1 Cooley's Const. Lim. (8th ed.):

> A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inures in the principle of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular and pervading in their prosecution; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action affect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is

> adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

54 Idaho at 474-75.

INTERPRETATION OF ART. 9, SEC. 2, UNDER THE PLAIN LANGUAGE RULE

Art. 9, sec. 2, speaks in the singular of "*a* state board" having supervisory powers over all of "the state educational institutions *and* the public school system of the state of Idaho." (Emphasis added.) If this board is split into two councils, then it is effectively no longer functioning as a single board. The plain language of the constitution indicates that the supervision of education in this state shall be governed by a single board. To divide this board or to divide its tasks is to violate the plain language of art. 9, sec. 2.

The term "a" in sec. 2 indicates an intent of a singular board governing educational matters. According to *Webster's Ninth New Collegiate Dictionary,* "a" is:

> Used as a function word before singular nouns when the referent is unspecified <*a* man overboard> and before number collectives and some numbers <*a* dozen>.

The use of the word "a" in the sentence indicates that a single board was intended.

Similarly, the last sentence states that the State Superintendent of Public Instruction shall be an *ex officio* member of the Board of Education. The legislative proposal contained in Senate Bill 1336 makes the State Superintendent of Public Instruction an *ex officio* member of the council governing public schools, but not that portion of the board governing higher education. Thus, Senate Bill 1336 only allows the superintendent a voice in elementary and secondary school matters and excludes the superintendent entirely from any discussion or voice in higher education issues. This, too, appears to violate the plain language of art. 9, sec. 2.

HISTORICAL CONTEXT OF ART. 9, SEC. 2

As originally written, art. 9, sec. 2, provided:

> The general supervision of the public schools of the state shall be vested in a board of education, whose powers and duties shall be prescribed by law; the superintendent of public instruction, the secretary of state and attorney general, shall constitute the board of which the superintendent of public instruction shall be president.

Thus, as the Idaho Constitution was originally written, the supervision of education in Idaho was divided between public instruction and higher education. Public schools were supervised by the Board of Education, and higher education, consisting at that time only of the University of Idaho, was governed by a separate board of regents.

During the constitutional debates of 1889, the discussion over art. 9, sec. 2, primarily centered on whether there was any need for a board of public instruction or even the need to require the creation of a board by the constitution. Delegate Morgan asked Delegate McConnell why it was even necessary to take supervision of public schools out of the hands of the State Superintendent and to hamper him by association with the Secretary of State and Attorney General. McConnell and Delegate Pinkham were unable to answer the question and indicated that art. 9, sec. 2, as originally written was borrowed from art. 9, sec. 7, of the Colorado Constitution with little thought. Delegate Morgan made a motion to pass the section, but indicated that he wished additional time in which to prepare a substitute presumably which would vest the Superintendent of Public Instruction with exclusive supervisory powers over public schools in the state. Morgan's substitute was never adopted.

Regarding art. 9, sec. 10, which is the provision dealing with the University of Idaho, a number of delegates stated that the primary goal was to confirm the location, management and powers of the University of Idaho in Moscow. Sec. 10 to the Idaho Constitution was sec. 14 in the original draft. There were several other sections which dealt specifically with the University of Idaho, but the delegates struck most of them and also modified sec. 10 with the apparent goal of confirming the actions of the territorial legislature relating to the university.

Shortly after statehood, problems arose in the system established in the constitution for governing education within the state. For all practical purposes, the Board of Education was the superintendent, and the superintendent's ability to supervise and direct public schools was hampered by the lack of support from the Secretary of State and the Attorney General who had little time or inclination to assume that task. The disjointed system of education had little unity or coordination. The various educational institutions of the state and of local governments viewed one another with distrust and as competitors for limited state money.

As early as 1898, these structural weaknesses were noted by State Superintendent Louis N. B. Anderson:

> A general view of the Idaho system shows at once its strength and weakness. The county district schools, the independent district schools, the normal schools and the state university are the component parts of the state system. Some of these parts taken separately are doing strong and efficient work, but

> the weakness of the system is manifest when we come to study the articulation of its elements. The country schools are not in touch with the graded schools of the independent districts, nor are the graded schools yet in touch with the university. . . . The teachers of the state have worked well, but each in his own separate field with hardly a definite idea as to the general condition of the schools round about him and with hardly a thought as to his relation to the general trend of education in the state or his place in the state system. After two years' time taken to survey the educational field in this state, it is my opinion that the best lines of progress possible for our schools lie in an effort tending to centralize and unify the educational forces of the state.

Anderson, *Biennial Report of State Superintendent of Public Instruction,* 1898.

Superintendent Anderson was stating his belief that education would best be served in Idaho if it was governed as a unit with the various institutions thought of as component parts of a larger educational system rather than separate institutions. His proposal was to unify education under the leadership of the University of Idaho. The ideas of Superintendent Anderson stated in 1898 may be the seed from which our present art. 9, sec. 2, has grown.

In 1899, Governor Steunenberg, in his biennial address, also noted growing problems in the state school system and proposed integrating the supervision of the various educational institutions of the state with the public schools. Regarding this plan, the Governor stated:

> The advantages of thoroughly articulating the University work with the high school work of the State will, I trust, engage your favorable consideration. The two should be brought into close and harmonious relationship to the end that the standard of secondary school work throughout the State be raised and an opportunity to prepare for the University courses afforded in every place where a high school is in operation. Aside from local advantages thus afforded, the University will in time be relieved of much of its preparatory work and can devote its energies to college work proper. The inability to employ means with which to effectuate this articulation, to which reference is made in the Regents' report, should be removed, and the committee of the faculty made operative.

Steunenberg, *Biennial Message of the Governor of Idaho, 1899* at 9-10.

Thus, by the end of its first decade, Idaho was recognizing weaknesses in its fragmented approach to education. By the beginning of its third decade, the solution seemed to be a unified approach in which one board would govern all of the educational affairs of the state and where all institutions, whether public schools or universities,

would be treated as component parts in a statewide system. It was felt that such an approach would put the interests of education and students first and make rivalry between institutions a thing of the past. The mood in 1911 favored radical change to the structure of state education. Former State Superintendent of Public Instruction Bernice McCoy, in writing on the history of public education in Idaho, noted:

> By 1911 conditions in the educational work of the State had become so acute as to command the attention of the Legislature, the Governor and the public generally. Editorials [on] the educational situation and the necessity of a change appeared in the leading papers. All thinking persons were beginning to feel that something must be done to remedy the situation.

McCoy, *Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923,* University of Idaho, Master's Thesis at 52 (1923).

Another historian has described the situation existing on the eve of the 1912 constitutional amendment to art. 9, sec. 2:

> The various elements of rivalry in the educational system of the state distressed early educators; and these relationships did not improve as time passed. By 1911 the higher institutions were fighting for the tax dollar. Long after the need existed, the normal schools maintained large preparatory programs to compete in numbers with the University. They were also duplicating offerings of the University. The separate boards of the higher institutions and their presidents spent considerable time at legislative sessions to secure appropriations.
>
> The State Academy at Pocatello was functioning as a State high school. The Pocatello High School was finding it quite impossible to maintain a good school. Students preferred to attend a State institution. Their education was at the State's expense.
>
> The city school systems developed independently from the State Department of Education. Functions of the Department of Education became related only to the common schools through the various county superintendents. The attitude of the city schools toward the State also extended toward each other. Students transferring from one school or another, or coming from outside the State, were caught in this "web of distrust," and usually found they had less credits or had classes to take over after they transferred. The situation was compounding itself due to the law providing for the organization of independent school districts. The State Superintendent was unable to secure support for controlling laws from a State Board whose members were already extremely busy with their regular duties as elected State officials.

Farley, *AN UNPUBLISHED HISTORY OF IDAHO EDUCATION* (1974) at p. 20.

Governor Hawley, in his address to the legislature on January 3, 1911, recognized the problems with the state's educational system. Hawley spoke of the need for fixing an appropriation and creating a tax specifically to support the state's educational institutions. Although the Governor did not call for a constitutional amendment creating a single Board of Education, the legislature followed that course of action. House Joint Resolution No. 12 proposed to amend art. 9, sec. 2, by creating a state commissioner of education and a board of regents. This resolution was rejected by the Senate. House Joint Resolution No. 30, substituted in its place, called for the amendment of art. 9, sec. 2, by creating the State Board of Education. It is House Joint Resolution No. 30 which placed the constitutional amendment on the ballot and resulted in the amendment of art. 9, sec. 2, to its present form.

The problems which occurred in education prior to 1911 are evidence that the legislature and the public intended the constitutional amendment to art. 9, sec. 2, to create a single board governing all the educational affairs of the state. Comments made by superintendents, historians and governors following the adoption of the amendment are further evidence that the intent was for a single board to be created.

Governor Haines, in his address to the legislature, stated:

> At the last general election there was also adopted a proposed amendment to the constitution of our state, which provides for the general supervision of state educational institutions and the public school system of the state of Idaho by a state board of education, the membership, powers and duties of which shall be prescribed by law. It is entirely clear to my mind that the legislative enactment which is necessary to give this constitutional amendment force and effect should be promptly considered by you.
>
> * * * *
>
> The duties of this board should include the general management and control of all our state educational institutions.

Message of Governor Haines to the Twelfth Legislature of the State of Idaho at 26-27 (1913).

Similarly, the first Commissioner of Education, Edward O. Sisson, in reporting to the legislature, stated:

> The plan of *a single State Board of Education to direct all the educational*

> *affairs of the State* was ordered by a constitutional amendment, proposed by the Eleventh Session of the State Legislature in 1911, and approved by popular vote in November, 1912. The Twelfth Session of the Legislature in 1913 enacted a law to put the amendment into effect.
>
> * * * *
>
> The characteristic feature of the new system is that the six state institutions and the public schools are all to be considered in relation to each other, and with a view to the welfare of the State. The State Board of Education has only the welfare of the children and young people as its aim and purpose.
>
> * * * *
>
> The essence of the plan is that we should get together in the interests of our schools and our children; that we should think educationally for the whole State, and not for any one institution or any one community or any one section. This means more attention to education, and constant vigilance.

Sisson, *Report of the Commissioner of Education* at 1 (1914). (Emphasis added.)

The interpretation of the constitutional amendment as requiring a single board to govern all the educational affairs of the state is further strengthened by the report of the State Superintendent of Public Instruction contained in the Biennial Report of 1913-14:

> The State Legislature in 1911 passed a resolution calling for a Constitutional Amendment providing for a State Board of Education to have control of all schools, public and State, whose membership, duties and powers should be prescribed by law. . . . The law made many striking changes in the educational system of the State, yet it is one of the wisest and best laws ever placed on our statutes.

Sisson, *Biennial Report of the State Superintendent of Public Instruction, 1913-14* at 191.

Bernice McCoy was Assistant State Superintendent for the years immediately preceding 1914. In 1914, she was elected to Superintendent of Public Instruction. For this reason, her master's thesis is particularly enlightening as to this period in history. Regarding the changes to the educational system of the state as a result of the amendment to the constitution in 1912, McCoy writes:

> As has already been indicated, this period is separated from the first period in

> Education under Statehood by the change in the system of administration of the public school system of the State, through the establishment by legislative enactment of "The State Board of Education and Board of Regents of the University of Idaho," thus placing the control of the entire educational system of the State, consisting of the various parallel movements described in a previous section of this thesis, under *one board of control.*
>
> Viewed from one standpoint this law was the most unique piece of school legislation ever enacted by any State legislature; viewed from another standpoint it was the most natural and logical step for a legislature to take, the establishment of a system of administration which would unify and coordinate the various public educational movements had long been the dream of intelligent educators and laymen, and considered from the standpoint of the Idaho situation the wisdom of the step was doubly true. It grew quite naturally out of the experiences and problems which had arisen in the educational work of the State. Problems and situations not unlike those which had arisen in other States; but which were more acute in Idaho because of the topography, its sparse population, its pioneer conditions, its magnificent distances, together with its lack of transportation facilities and other mediums of communication, all of which made unity and coordination in the State educational work impossible even in a slight degree.

McCoy, *Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923,* University of Idaho, Master's Thesis at 44 (1923). (Emphasis added.)

The interpretation of art. 9, sec. 2, as requiring a single board of education to govern all of the educational affairs of the state continued through the ensuing decades. In 1921, the Commissioner of Education, in addressing the State Teachers' Association, stated:

> The Constitutional Amendment of 1911 provided very simply that there should be established a State Board of Education in this State which should have charge of both higher institutions and the public schools of the State. Unity seemed to be the thing primarily aimed at. Unity of thought, unity of effort, on the part of all of these, but besides that — and never quite so clear, I think, to the general public — was the further thought of control of education in all its branches and parts, not by the teachers, superintendents, professors and presidents, by the great public itself. . . . If there is one thing that would indicate the highest ideal of the educational system, it is that the board so constituted stands not as the representative of the teachers and educators of the State primarily — for the schools do not exist for the teachers, but the teachers for the schools — not primarily as representatives of the institutions of the

> State, but primarily as representatives of the great public which thus takes charge of education in all of its branches.

Commissioner of Education Address to the State Teachers' Association, November, 1921, as quoted by McCoy, *Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923,* University of Idaho, Master's Thesis at 68-69 (1923).

In 1946, the educational system of the State of Idaho was described:

> The basic feature of the Idaho plan which makes it worthy of high commendation is the integration of the control of all public education under a single board of representative citizens.

Public Education in Idaho: A Report of the Idaho Education Survey Commission (1946).

CONCLUSION

It is clear that the plain language of art. 9, sec. 2, of the Idaho Constitution, as well as history, requires that the educational affairs of the state be governed by a single Board of Education. Dividing the Board of Education into separate bodies for higher education and for public instruction violates art. 9, sec. 2. In order to accomplish the goal of two boards, the constitution must be amended. In addition, the fact that the proposal set forth does not provide the State Superintendent of Public Instruction with a voice in the higher education affairs of the state also appears to violate the plain language of art. 9, sec. 2.

Respectfully,

WILLIAM A. von TAGEN
Deputy Attorney General

April 1, 1992

Gary G. Fay
Anderson, Blake & Fay
Box 1826
529 Main Avenue E.
Twin Falls, ID 83303

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

Dear Mr. Fay:

You recently requested an opinion from this office regarding your activities in conjunction with your insurance agency, Anderson, Blake & Fay, and your previous role as a member of the Idaho State Board of Education. Your insurance agency provides insurance services to the College of Southern Idaho (CSI) and did so while you were a member of the State Board of Education. Your concern is whether your business relationship with CSI while a member of the State Board of Education constituted a "conflict of interest" within the meaning of the Ethics in Government Act of 1990, Idaho Code § 59-701, *et seq.*

Background Information

In order to analyze this question, it is important to understand the relative roles of the College of Southern Idaho, the State Board of Education and your role as CSI's insurance agent. From the description you provided, it is my understanding that your insurance agency has provided property and casualty insurance to CSI from the establishment of CSI as a junior college district in the 1960s. This relationship was established prior to your joining the firm in 1971. You were assigned this account in 1971 and, in this capacity, you answer questions and make recommendations to CSI concerning their insurance needs. In 1987 you were appointed to the State Board of Education for a five-year term; however, in November of 1991 you resigned from the board.

CSI is a two-year community college, originally established pursuant to an election in 1965. CSI first received state funds for academic programs in the 1967-68 state biennium budget. The day-to-day governance of community colleges rests with a five-member board of trustees whose members are elected to serve six-year terms. Idaho Code § 33-2101, *et seq.* The local board of trustees has the specific authority to enter into contracts, employ various professionals, and to hold and dispose of real and personal property. Idaho Code § 33-2101. In short, the CSI Board of Trustees is the entity authorized to enter into insurance agreements between CSI and your agency.

The State Board of Eduction has general supervisory authority "of all entities of public education supported in whole or in part by state funds." Idaho Code § 33-107(3). CSI generates its annual operating budget through a combination of taxes and fees generated locally and through state appropriations. The State Board of Education conducts budget hearings in which all the public institutions, including CSI, are afforded an opportunity to propose an amount for the board's consideration. However, although

CSI and North Idaho College (NIC), the two public community colleges in this state, are allowed to make separate presentations at these hearings, the board makes a combined lump sum budget recommendation for these institutions to the Division of Financial Management (DFM) and the Legislative Budget Office. DFM makes recommendations to the governor who, in turn, submits his annual budget request to the legislature. The legislative budget office transmits the board's recommendations to the Joint Finance and Appropriations Committee. The Joint Finance and Appropriations Committee has the authority to reject or modify either the board's recommendations or the governor's recommendations. Additionally, the legislature as a whole may approve or reject the appropriation bill offered by the Joint Finance and Appropriation Committee.

Appropriation bills for the community colleges are passed as a lump sum with CSI and NIC combined. For example, community colleges were appropriated a total $8,823,100.00 for fiscal year 1992 to be allocated by the State Board. S.B. 1199, Session Laws. The actual allocation is then made pursuant to an agreement between CSI and NIC that is based upon historical factors. For the fiscal year 1992 NIC received $4,528,550.00 and CSI received $4,294,550.00. It is my understanding that the agreement to divide the lump sum appropriation was devised in an effort to avoid uncertainty and lobbying before you joined the State Board of Education. It is my understanding that this agreement was worked out between the presidents of CSI and NIC and that the State Board of Education did not play a significant role in this process.

In addition to the budget recommendations described above, the State Board of Education also assembles a list of project priorities for the institutions of higher education, including the community colleges and other agencies under the board's jurisdiction. This list is submitted to the Permanent Building Fund Advisory Council and the Joint Finance and Appropriations Committee. Whether a particular project is funded in any given year is decided by the legislature.

Another area in which the State Board has authority with respect to community colleges is in the approval of new academic courses and programs, if the credits from such courses and programs are intended to be transferable to other state institutions and counted toward a baccalaureate degree. Idaho Code § 33-107(8).

Ethics in Government Act

Initially, we note that the Ethics in Government Act applies to members of the State Board of Education. Idaho Code § 59-703(10) defines "public official" for purposes of the act. Idaho Code § 59-703(10)(c) provides:

> "Public official" means any person holding public office in the following capacity: . . .

> c) As an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law; . . .

Public office is defined as "any position in which the normal and usual duties are conducted on behalf of a governmental entity." Idaho Code § 59-703(9). Clearly, a member of the board that supervises "all entities of public education" must be considered a public officer within the scope of this act. The Ethics in Government Act of 1990 was enacted well after the creation of your firm's business relationship with CSI and your appointment to the State Board of Education. Nonetheless, the act would have had application to you as a public official from July 1, 1990, until your resignation in November, 1991.

The scope of the Ethics in Government Act is set forth in Idaho Code § 59-704:

> A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. . . .

The operative term for the act is "conflict of interest" as 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 publicc 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, . . .

The issue that must be addressed is whether as a member of the State Board of Education you took any action, or made any recommendation or decision that created a pecuniary benefit for you or your business. There is no question that your business's contract with CSI for insurance coverage provides a pecuniary benefit to you and your business. However, from our understanding of the mechanics of financing CSI, your role as a member of the State Board of Education provided no opportunity for you to take any action or make any recommendation that would have created the contract or pecuniary benefit. The State Board of Education does recommend a level of funding for both Idaho's junior colleges. That recommendation, however, does not determine whether CSI will insure and, more importantly, with whom. The decision to carry insurance and to contract with a particular agency to provide the coverage is made on a local level by CSI's board of trustees without input or oversight by the State Board of Education.

In our opinion, the State Board of Education's role in the budgeting process for junior

colleges is too remote to be able to conclude that the action of one board member had any impact on the independent judgment of CSI's board of trustees in making contractual decisions. The Ethics in Government Act of 1990 provides no real guidance in determining the prohibitive degree of causal relationship between the action taken and the actual benefit; and, no court in Idaho has had the opportunity to construe the act. There must be, however, some identifiable and reasonable link between the official action and the benefit derived before it can be said that a conflict of interest exists. In this instance, it is important that there was no real link between the State Board of Education and the board of trustees for CSI in relation to CSI service contracts. Without such a link, there can be no conflict of interest as defined by Idaho Code § 59-703(4).

Idaho Code § 59-201

The same analysis would apply to an Idaho statute that forbids a public official from entering into a private contract with the public body served. Idaho Code § 59-201 provides:

> 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.

Contracts made in violation of this section are voidable and the party violating Idaho Code § 59-201 could be criminally punished. Idaho Code §§ 59-203, 59-208.

The relationships described above between Anderson, Blake & Fay and CSI, and between CSI and the State Board of Education clearly indicate that the State Board of Education plays no part in the contractual relationship between CSI and its insurance carrier. It therefore follows that, as a member of the State Board of Education, you were not entering into a contract in your official capacity when providing insurance coverage for the College of Southern Idaho and Idaho Code § 59-701 was not violated.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

April 23, 1992

William Miller
811 Indiana
Coeur d'Alene, ID 83814

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

Dear Mr. Miller:

You have requested an opinion from this office regarding advertisements you placed in a local newspaper promoting your name and the applicability of Idaho's campaign finance disclosure laws as applied to county officials. Chapter 66, title 67, Idaho Code, and Idaho Code § 31-2012. According to your letter, at the time of the events in question you were not a declared candidate for the office of Kootenai County Sheriff. You also state in your letter that you had personally decided to seek the position. During November and December, 1991, you took out several advertisements in the local newspaper expressing messages such as "Bill Miller wishes you, your family and friends a Happy Thanksgiving." These ads made no mention of your political intentions nor linked you to any campaign. Nonetheless, the question has arisen whether your conduct in placing these ads violated Idaho's "sunshine" laws.

As of July 1, 1991, all candidates seeking election to county office must comply with Idaho's campaign disclosure laws. Idaho Code § 31-2012. Two code sections need to be considered in relation to your questions. Idaho Code § 67-6614A requires any person making an expenditure "for the purpose of financing communications *expressly* advocating the election or defeat of a candidate through any broadcasting station, newspaper, magazine, or advertising facility, direct mailing, or any other type of general public political advertising to clearly identify in the communication the person responsible for the communication." (Emphasis added.) This section was not violated by your advertisements since they were not expressly advocating your election to any office.

A more difficult question is raised by Idaho Code § 67-6603(c) which provides in pertinent part:

> No contribution shall be received or expenditure made by or on behalf of a candidate or political committee:
>
> (1) until the candidate or political committee appoints a political treasurer and certifies the name and address of the political treasurer to the [clerk of the district court].

In this regard, the critical determination is whether you were a "candidate" for office at the time the advertisements ran. For purposes of ch. 66, title 67, Idaho Code, the term "candidate" is defined:

> "Candidate" means an individual who has taken affirmative action to seek nomination or election to public office. An individual shall be deemed to have taken affirmative action to seek such nomination or election to public office when he first:
>
> 1) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his candidacy for office; or
>
> 2) Announces publicly or files for office

Idaho Code § 67-6602(a).

Short of an announcement or clear statement of intent, determining whether a person is a candidate is a difficult task, particularly for the "potential candidate." In Attorney General Opinion No. 77-29, this office noted this difficulty:

> In many cases there may be a fine line between assessment of a potential candidacy and promotion of an existing candidacy. The determination of a person's purpose is a question of fact which must be determined from the surrounding circumstances. *Normally, it should be possible to determine whether a person is a "candidate" from the substance and the extent of his communications.* By inquiring as to the substance of the potential candidate's communications it should be possible to determine if the candidate is primarily soliciting advice or is primarily soliciting campaign staff or financing. *Similarly, whether one is a "candidate" can normally be determined by the extent of his communications.*

(Emphasis added.) Attorney General Opinion No. 77-29 concluded that expenditures made travelling throughout the state to assess the prospects of a candidacy did not make the person a "candidate" necessitating the appointment of a campaign treasurer.

Attorney General Opinion No. 77-29 points out that the proper determination whether a person is a candidate can be made by evaluating "the substance and the extent of his communications." This approach avoids subjective determinations. The determination of candidacy for purposes of enforcing ch. 66, title 67, Idaho Code, is made objectively from an observer's perspective. Essentially, could a reader or listener determine from the message that a candidacy for office was being promoted from the substance or extent of the communication?

In this instance, it appears that the messages did not objectively promote a candidacy, and the advertisements were not coupled with an expressed intent to run for office. Furthermore, from your letter you indicate that you did not make any public statements

or speeches regarding your intentions to run for office during the period when the advertisements appeared in the paper. You were obviously promoting your name, but to what end was not clear. At that time you could have decided to forego the race or run for a different office. To be required to appoint a treasurer for an inchoate campaign seems futile. Therefore, in our opinion, no violation of the law occurred. We recognize the likelihood that these particular advertisements were placed with some political motivation. Nonetheless, until the substance of the message can be objectively linked to a political campaign for a particular office or measure, compliance with ch. 66, title 67, Idaho Code, is not required. If this were not the case, every person who placed an advertisement in the newspaper could be subjectively scrutinized for an improper and unlawful political intention.

If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

April 27, 1992

J.D. Hancock
Rexburg City Attorney
Smith & Hancock
P.O. Box 427
Rexburg, ID 83440

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

Re: Requests for Prosecution of Insufficient Funds Checks by Local Credit Bureau

Dear Mr. Hancock:

The Attorney General has asked me to respond to your letter of January 9, 1992, regarding requests for prosecution of insufficient funds checks by a local credit bureau. You have asked whether the credit bureau may stand in the shoes of the original receiver of the bad check for the purpose of pursuing criminal prosecution. Finally, you have asked whether a representative of the credit bureau can sign a criminal complaint against the utterer of a bad check.

Your letter raises several issues, both legal and practical. In responding to these questions, it is important to begin with the statute criminalizing the writing of insufficient funds checks. Idaho Code § 18-3106 does not criminalize the mere delivery of a bad check. Rather, a specific intent to defraud is required, as is the showing that there were insufficient funds to cover the check at the time it was written. Further, it has been held that no crime has been committed if the party passing the check informs the payee at the time the check was tendered that the deliverer did not have funds on hand to meet the check. *State v. Eikelberger,* 72 Idaho 245, 239 P.2d 1069 (1951). It has further been held that § 18-3106(d), which creates a virtual presumption of intent to defraud upon the making of a check with insufficient funds, is unconstitutional. *State v. Hebner,* 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985).

Given the law, from a practical standpoint it is unlikely that any private entity would have the necessary information to show probable cause that a crime has been committed. A proper police investigation and records showing the status of the account on the day the check was written would be required. In the absence of such information, it would be improper for the credit bureau to attempt to initiate a criminal filing.

Assuming that probable cause to believe that a crime occurred does exist, any private party, including a representative of a credit bureau, may file a criminal complaint:

> [U]pon proper proceedings before a magistrate a complaint may be filed by someone other than the prosecutor. It is immaterial whether that person is acting as a private citizen or on behalf of a public officer.

Clark v. Meehl, 98 Idaho 641, 642, 570 P.2d 1331 (1977); reaff'd in *State v. Bacon,* 117 Idaho 679, 791 P.2d 429 (1990).

However, this does not end the analysis. It is one thing to file a criminal complaint. It is quite another to prosecute someone for a crime. The legislature has placed the sole duty of prosecuting criminal actions in the hands of the county prosecuting attorney, Idaho Code § 31-2604, and, in cases of misdemeanors committed within municipal limits, the city attorney. Idaho Code § 15-208A. Clearly, a credit bureau cannot attempt to prosecute an individual, nor can it direct the prosecutor or city attorney as to how he or she should proceed in a given case.

Hence, it can readily be seen that even if a credit bureau does file a criminal complaint against someone, the prosecutor or city attorney, in his or her sole discretion, may move to dismiss the complaint immediately. Assuming that such a dismissal is granted by the court, it would be an absolute bar to further criminal proceedings. Idaho Code § 19-3506.

Nor can a credit bureau be considered a "victim" under the Victims Rights Act. Those rights are reserved for persons who suffer economic loss or injury as a result of the defendant's criminal conduct who are named in the criminal complaint as the original victim. Idaho Code § 19-5304. Hence, a credit bureau may not act to influence a criminal proceeding in the guise of a successor in interest.

In summary, any private citizen, including a representative of a credit bureau, may file a criminal complaint. However, such a person can have no control over the ensuing prosecution. Because of this, it would be entirely fruitless for the private citizen to file the criminal complaint without the complete cooperation of the county prosecutor or the city attorney.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

May 6, 1992

Hon. Pete T. Cenarrusa
Secretary of State
State of Idaho
STATEHOUSE MAIL

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

Dear Mr. Cenarrusa:

You have asked the Attorney General's Office to provide a written opinion pertaining to the powers of the Board of Examiners pursuant to Idaho Code § 67-3512. Specifically, you ask whether the State Board of Examiners has the authority to reduce appropriations as a means of balancing the state budget in the current fiscal year when there is a specific statute in place which would remedy current budgetary problems. The reference is to section 47 of SB 1464 which was enacted by the 1992 Idaho Legislature and which provides an appropriation of $5.4 million from the "rainy day account" to balance the state's budget.

This question was raised as a result of a presentation by the administrator of the Department of Financial Management ("DFM") to the Board of Examiners ("Board")

at the April 22, 1992, meeting. Mr. Charles Moss presented the Board with DFM's revised revenue projection for fiscal year 1992 and recommended a $1.4 million holdback from the legislative appropriation provided to the executive branch pursuant to Idaho Code § 67-3512. DFM's recommendation to the Board, if adopted, would require an expenditure of only $2.2 million from the rainy day fund in order to balance the budget in the current fiscal year.

Analysis

An analysis of the question initially requires a review and discussion of the appropriation powers vested in state government. Art. 7, § 13, of the Idaho Constitution, provides:

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

Although the constitution does not define the term "appropriation," or specify when or how an appropriation shall be made, the Idaho Supreme Court has consistently held that appropriation authority is exclusively vested with the legislative branch of government. *McConnell v. Gallet,* 31 Idaho 386 6 P.2d 142 (1931); *Jackson v. Gallet,* 39 Idaho 382, 228 P. 1068 (1924); *Herrick v. Gallet,* 35 Idaho 13, 204 P. 477 (1922); *In re Huston,* 23 Idaho 231, 147 P. 1064 (1915); "Appropriation" has been defined by the court as: "1) authority from the Legislature, 2) expressly given, 3) in legal form, 4) to public officers, 5) to pay from public moneys, 6) a specified sum and no more, 7) for a specified purpose, and no other." *Leonardson v. Moon,* 92 Idaho 796, 804, 451 P.2d 542, 550 (1969).

The doctrine of separation of powers contained in Idaho Constitution, art. 2, § 1, precludes one branch of government from exercising the powers vested with another branch. This gives rise to the question whether reduction of appropriations by the Board of Examiners results in an unconstitutional usurpation of a legislative function.

The constitution provides for the creation of the State Board of Examiners:

> The governor, secretary of state, and attorney general shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, *and perform such other duties as may be prescribed by law:* provided, that in the administration of moneys in cooperation with the federal government the legislature may prescribe any method of disbursement required to obtain the benefits of federal laws. And no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board.

Art. 4, § 18, Idaho Constitution (emphasis added). The authors of the constitution provided for the powers of the Board to be expanded by statute. The power to reduce appropriations is provided pursuant to § 67-3512, Idaho Code, which states:

> Reduction of appropriations. — Any appropriation made for any department, office or institution of the state may be reduced in amount by the state board of examiners upon investigation and report of the administrator of the division of financial management; provided, that before such reduction is ordered the head of such department, office or institution shall be allowed a hearing before said state board of examiners and may at such hearing present such evidence as he may see fit. No reduction of appropriations made to executive department agencies shall be made without hearing unless and until the head of such department, office or institution shall file his consent in writing thereto. No reduction of appropriations for the elective officers in the executive department shall be made to a level which prohibits the discharge of constitutional duties. No reduction of appropriations for the legislative and judicial departments shall be made without the permission in writing of the head of such department.

As previously noted, the doctrine of separation of powers contained in the Idaho Constitution, art. 2, § 1, precludes one branch of government from exercising the powers vested with another branch. However, as articulately stated by Justice Oliver Wendell Holmes in *Springer v. Phillipine Islands*, 277 U.S. 189, 209, 211 (1928):

> [G]reat ordinances of the Constitution do not establish and divide fields of black and white . . . however we may disguise it by veiling words, we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into water tight compartments . . . .

The powers provided to each branch of government are not neatly compartmentalized and a discussion of separation of powers often delves into grey areas of the law. To aid in the discussion, it is helpful to examine the parallel issues presented at the federal level by presidential impoundment of funds.

In its broadest sense, impoundment occurs whenever the President spends less than the Congress appropriates for a given period. Where the executive branch has been given statutory support for spending less than the appropriation allows, generally no constitutional issue emerges. Where the power provided to the executive to impound or reduce appropriations is provided by a general act — e.g., the Economic Stabilization Act of 1970 or the Anti-Deficiency Act of 1950 — the executive should be limited to reductions which do not thwart major policies of Congress. See Note, *Impoundment of*

Funds, 86 *Harv. L. Rev.,* 1505 (1973); Fisher, *Funds Impounded by the President; the Constitutional Issue,* 38 *Geo. Wash. L. Rev.,* 124 (1969). An example of thwarting the major policies of Congress would be an attempt on the part of the executive branch to use the power of impoundment to preclude going forward with a program the executive does not support. However, where the impoundment of funds is to effect economies and realize savings in times of economic hardship, and is done pursuant to the authority granted by Congress, the executive branch acts within the scope of its authority.

As presented here, the executive branch, through the Board of Examiners, is empowered to reduce appropriations pursuant to the statutory limitations provided by § 67-3512. This power is tempered by the doctrine of separation of powers which precludes each branch of government from interfering with the powers vested in another branch. *Miller v. Meredith,* 59 Idaho 385, 83 P.2d 206 (1938). Thus, the Board has authority to act during periods of economic hardship or where, in the opinion of the Board, there is a need to reduce spending. The constitutional soundness of the Board's actions may be called into question only if it selectively reduces appropriations for programs with which the Board does not agree or attempts to use its power to stymie the programs or policies of the legislature.

The action questioned here is the 1.4 million dollar or .3% holdback on executive budgets accepted by the Board pursuant to the report and recommendation of the administrator of DFM at the April 27, 1992, meeting. It is clear the Board has the power to reduce appropriations in light of the limitations previously discussed and pursuant to the limitations provided in § 67-3512. Neither statutory nor constitutional limitations prevent the Board from acting in situations where the legislature has provided its own budgetary solutions. Therefore, subject to the limitations previously discussed, the Board has broad discretion to exercise its power to reduce appropriations where, upon report of the administrator of the Division of Financial Management, the Board deems such action necessary.

Conclusion

Pursuant to Idaho Code § 67-3512, the State Board of Examiners has the authority to reduce appropriations made by the legislature to the executive branch of government. The statute provides the Board of Examiners with broad discretion to exercise its authority to reduce appropriations. This discretion is limited to the extent that reductions may not thwart the programs and policies of the legislature nor prevent constitutional officers from exercising their constitutional duties. However, the Board is not limited to budget remedies provided by the legislature.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation and State Finance Division

May 28, 1992

Patrick E. Miller
PAINE HAMBLEN COFFIN BROOKE & MILLER
P.O. Box "B"
Coeur d'Alene, ID 83816-0328

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

Dear Mr. Miller:

Your letter of May 7, 1992, requests an opinion from this office regarding legal issues stemming from a proposed joint venture between the Kootenai Hospital District and two separate private entities. According to your letter, the purpose of this joint venture is to start a radiology clinic near the Kootenai Medical Center. The joint venture will be structured so that the Kootenai Hospital District will own 40% of the business, a physician group will own another 40%, and the remaining 20% will be owned by the person(s) responsible for managing the clinic's business. In light of this proposed business venture, you have raised several issues regarding the legality of the joint venture. I will address each question in turn.

1. **Is the joint venture, as proposed, prohibited by Idaho Code §48-101 as a combination in restraint of trade?**

The Idaho Supreme Court has held that Idaho's antitrust laws do not apply to municipal corporations but only to private entities. *Alpert v. Boise Water Corporation et al.*, 118 Idaho 136, 141, 795 P.2d 298, 303 (1990); *Denman v. Idaho Falls*, 51 Idaho 188, 121-22, 4 P.2d 361, 362 (1931).

Hospital districts organized under title 39, chapter 13, are, in our opinion, municipal corporations. They are authorized, among other things, to levy and collect ad valorem taxes and exercise the power of eminent domain. Idaho Code section 39-1331. They hold elections and engage in other governmental functions. Idaho Code section 39-1330. The Idaho Supreme Court has held that irrigation districts are political subdivisions of the state and, at least for purposes of election laws, are quasi municipal corporations. *Pioneer Irrigation District v. Walker*, 20 Idaho 605, 613-16, 119 P. 304 (1911). There is no reason to believe that a court would rule differently in determining the status of a hospital district such as the Kootenai Hospital District. Accordingly, Idaho's antitrust laws are not applicable to it. The question remains, however, whether the physician group or the third investor would be violating the law.

Idaho Code section 48-101 is patterned after section 1 of the federal Antitrust Act. While federal precedent is not binding on an Idaho court, it does provide persuasive guidance. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 223 n.11, 646 P.2d 988 994 n.11 (1982). The United States Supreme Court has established that only *unreasonable* restraints are prohibited by section 1 of the Sherman Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-62 (1911). What is unreasonable is determined on a case-by-case approach after a fact-intensive review of the evidence. Justice Brandeis set forth one formulation of the inquiry necessary in a rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. United States, 246 U.S. 231, 244 (1918).

Joint venture arrangements are analyzed under the rule of reason doctrine. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984). A violation of section 1 under the rule of reason doctrine requires proof of "either an unlawful purpose or an anticompetitive effect." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

We do not have sufficient information to make an informed judgment here of the validity of the reasons for the joint venture, the possible anticompetitive effects of the venture, and the other relevant factors mentioned. Thus, we voice no conclusion on this issue.

2. Is the joint venture, as proposed, prohibited by Idaho Code § 48-102 — monopolies, attempts to monopolize, and combinations or conspiracies to monopolize?

To establish a monopolization claim, two elements must be established: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a

consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

To establish an attempted monopolization claim, two elements must also be established: "A specific intent by the defendant to monopolize, [citations omitted] and (2) overt acts by the defendant which create a dangerous probability that the intended monopoly will be achieved." *Pope v. Intermountain Gas Co.*, 103 Idaho at 224-25, 646 P.2d at 995-96. Establishing these elements requires proof of a relevant market, that the entity possesses monopoly power, and that this power has been employed so that an actual restraint on trade has occurred. *Id.* at 226-29, 646 P.2d at 997-1000.

Again, there is not sufficient information to make an informed judgment here of monopolization liability.

3. **Will the joint venture, as proposed, violate any of the provisions of the Idaho Consumer Protection Act?**

The third question is whether the joint venture, as proposed, would violate any provision of the Idaho Consumer Protection Act. The Consumer Protection Act prohibits acts or practices that have the tendency, capacity, or effect of misleading a consumer acting reasonably under the circumstances, IDAPA 04.01.3,1, or that are unconscionable. Idaho Code section 48-603(18). The Act is not violated simply because of the form in which a business chooses to operate.

4. **Does Idaho Constitution, art. 12, § 4, prohibit a hospital district from entering into a joint venture with one or more other private entities for the purpose of providing radiological medical services?**

It is the opinion of this office that the joint venture as described in your letter would violate art. 12, § 4, of the Idaho Constitution. Art. 12, § 4, states in full:

> No county, town, city or other municipal corporation, by vote of its citizens or otherwise, *shall ever become a stockholder in any joint stock company, corporation or association whatever* or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom, its proportion to the whole amount so invested.

(Emphasis added.)

The literal wording of art. 12, § 4, appears to prohibit a municipal corporation such as the Kootenai Hospital District from becoming a business partner or associate with private concerns, regardless of the debt structure. The Idaho Supreme Court addressed a similar situation in *School District No. 8 v. Twin Falls County Mutual Fire Insurance Co.*, 30 Idaho 400, 164 P. 1174 (1917). In that case, a school district joined a mutual fire insurance company which was comprised of private property owners and organized to provide insurance coverage for loss by fire or other natural disaster. The court found that the school district's membership in the company violated art. 12, § 4, of the Idaho Constitution as well as art. 8, § 4. In so finding, the court stated:

> The sections of the constitution referred to are self-operative. They are intended to prevent any county, city, town or other municipal corporation from lending credit to *or becoming interested in any private enterprise,* or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in sec. 4 of art. 12. It is true that sec. 4 of art. 12 does not specifically mention school districts, but when the other provisions of the constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said sec. 4.

30 Idaho at 404 (emphasis added).

The court then concluded:

> To permit the school district to become a member of a county mutual fire insurance company would be to indirectly sanction the use of public funds raised by taxation for a private as distinguished from a public purpose.

Id.

In *Atkinson v. Board of Commissioners,* 18 Idaho 282, 108 P. 1046 (1910), the Idaho Supreme Court declared legislation providing for the formation of railroad districts unconstitutional. The court viewed the formation of railroad districts, which allowed the expenditure of public moneys on track construction, as an improper subsidy to private railroad companies. In reaching its decision, the court quoted an Ohio case that construed a provision of the Ohio Constitution that was similar to art. 12, § 4, of the Idaho Constitution:

> The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals or private corporations or associations. *It forbids the union of public and private capital or credit in any enterprise whatever.* In no project originated by individuals, whether

> associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of parties interested therein. Though joint-stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from several persons associated together.

18 Idaho at 288 (emphasis in original), quoting *Walker v. Cincinnati,* 21 Ohio St. 54.

In prior correspondence, this office has concluded that a municipal corporation, such as a school district, cannot create or hold an interest in a private enterprise. I have enclosed a copy of Attorney General Opinion No. 86-13 for your review. Finally, dicta found in *Utah Power & Light Company v. Campbell,* 108 Idaho 950, 703 P.2d 714 (1985), may indicate the court is moving toward a less strict view of the prohibitions of art. 12, § 4, Idaho Constitution. However, until the earlier line of cases is modified, we remain of the opinion that a hospital district may not enter into a joint business enterprise with private parties.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

June 15, 1992

Honorable Pete T. Cenarrusa
Secretary of State
State of Idaho
STATEHOUSE MAIL

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

Re: SCIENTECH, Inc.

Dear Mr. Cenarrusa:

This is in response to your letter seeking guidance on an issue of corporate law. The question involves SCIENTECH, Inc., a minority small business and capital ownership

development company administered pursuant to § 8(a) of the Small Business Act (SBA) (15 U.S.C. § 637(a)).

SCIENTECH's eligibility under § 8(a) of the SBA is contingent upon the management and business operation of SCIENTECH being controlled by a socially and economically disadvantaged individual(s). *See* 13 CFR § 124.104(b). Larry Ybarrondo is the individual at SCIENTECH, Inc., who meets the "socially and economically disadvantaged" definition. To allow for continued participation in the § 8(a) program, Mr. Ybarrando must control SCIENTECH's Board of Directors.

SCIENTECH's Board of Directors currently consists of three members. Larry Ybarrondo is a member of the Board and his vote is weighted so, if necessary, his vote will constitute a majority vote controlling any decision made by the Board. SCIENTECH, Inc., would like to continue the weighted voting arrangement and retain its current Board members; however, continuation is contingent upon a determination of whether weighted voting arrangements comply with Idaho law.

CONCLUSION

A corporation is allowed to conduct its corporate business matters pursuant to its articles of incorporation and bylaws unless provisions of the articles or bylaws are in direct contravention of statutory provisions. A provision for a weighted vote by a board of directors is not precluded by the terms of Idaho's general business corporation statutes contained in chap. 1, title 30, of the Idaho Code.

ANALYSIS

The Small Business Administration has given an opinion that it believes weighted voting is precluded pursuant to Idaho statute. However, Idaho statutes provide a substantial amount of discretion to corporations to create their own internal governing mechanisms. Although there is a lack of judicial interpretation of these statutes in Idaho, courts in other jurisdictions looking to the same or similar statutes have found provisions in articles of incorporation and bylaws governing corporate management are enforceable if there is no injury or fraud to the public or to creditors and no applicable statutory or constitutional language is violated. *See Sommers v. AAA Temporary Services, Inc.*, 5 Ill. App. 3d 931, 284 N.E.2d 462 (1972); *see also* William Hochstetler and Mark Svejda, *Statutory Needs of Close Corporations — Clerical Study, JOURNAL OF CORPORATION LAW* (Summer, 1985), p. 849.

The provision upon which SBA relies to reach its opinion that weighted voting is precluded is Idaho Code § 30-1-40. This section states in pertinent part as follows:

> A majority of the number of directors fixed by or in the manner provided in the bylaws or in the absence of a bylaw fixing or providing for the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of the majority of the directors present at the meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

SBA's position is that Idaho Code § 30-1-40 mandates a "one man/one vote" majority. This interpretation is not clearly derived from the language of the statute. The statute defines "quorum" but allows the corporation discretion to determine through its bylaws the number of directors and the manner in which those directors' votes will constitute a majority. This flexibility is in keeping with the general tenor of Idaho corporate statutes.

Pursuant to Idaho Code §§ 30-1-27 and 30-1-54(h), a corporation is allowed the discretion to provide for regulation and management of the affairs of the corporation in its bylaws and articles of incorporation to the extent that those provisions are not inconsistent with the law. In *Insituform of North America v. Chandler,* 534 A.2d 257, 264-265 (1987), the Delaware Court of Chancery noted that similar general statutory provisions allowed a corporation, through its articles or bylaws, to determine and classify the voting rights of individual directors:

> That effort requires us to note first that the 1974 amendment to subsection (d) did not introduce an innovation in Delaware corporation law. Prior to that time, although there was no statute expressly authorizing the practice, it was not uncommon for corporate charters, under the general grant of Section 102(b)(1) to fix certain board positions, or a stated proportion of board seats, as being elected by a named class of stock.
>
> . . . .
>
> A more fitting interpretation of the words used, in my view, ascribes to the legislature the intention to make it clear that directors elected by a class of stock might have any term or such voting rights as the certificate of incorporation might fix. While Section 102(b) . . . arguably already authorized such provisions, the statute had not theretofore expressly acknowledged, for example, that weighted voted was permissible.

534 A.2d at 265 (citations omitted).

In conclusion, it is my opinion that Idaho Code § 30-1-40 does not require a "one

man/one vote" for board members of Idaho corporations. The language of the statute, as well as the language contained in §§ 30-1-27 and 30-1-54(h), provides for corporate discretion in such areas as weighted voting. Therefore, as long as the terms providing for weighted voting by the Board of Directors are properly disclosed in the articles and in the bylaws of the corporation, SCIENTECH, Inc., should be able to retain its current three-member Board of Directors with its weighted voting arrangement.

Please let me know if I can be of further assistance.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation and State Finance Division

June 17, 1992

James F. Fraley
Twin Falls County Commissioner
425 Shoshone Street North
Twin Falls, ID 83303-01236

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

Re: When A Public Defender May See A Newly Incarcerated Person; How And When A Prisoner's Indigency Is Determined

Dear Commissioner Fraley:

The Attorney General has asked me to respond to your letter dated January 14, 1992, which requests an interpretation of Idaho Code § 19-852, right to counsel of a needy person, and at what point a public defender would be legally entitled to visit a recently incarcerated individual.

Idaho Code § 19-852(a) provides that "[a] needy person who is being detained by a law enforcement officer . . . or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled . . . to be represented by an attorney to the same extent as a person having his own counsel is so entitled . . . ." In addition, subsection (b) of § 19-852 provides that a needy person who is entitled to be represented by an attorney under this statute is entitled "to be counseled and defended at all stages of the matter beginning with the earliest time when

a person providing his own counsel would be entitled to be represented by an attorney . . . ." In the comment to the corresponding provision in the Model Defense of Needy Persons Act, the commissioners stated: "This section does not undertake to spell out all the circumstances in which a criminal defendant is entitled to counsel. It provides only that, whenever a man of adequate means is legally entitled to counsel, the needy person is likewise entitled." *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS,* p.327 (1966).

Simply stated, any time you would allow another prisoner who has retained counsel to meet with his attorney, you must, under those same circumstances, allow an indigent person to meet with counsel. However, no reasonable interpretation of § 19-852 would allow a public defender, or any other defense attorney for that matter, free access to criminal defendants or other people properly seized under the laws of Idaho. In other words, whatever attorney access you provide to jail inmates should be equal whether they can afford their own counsel or are indigent.

Taking this analysis one step further and to its logical conclusion, the public defender has no right under Idaho law to go into the jail handing out his card and telling inmates not to talk to the police. Once appointed, a public defender will have the right to the same access to his client as is given any other defendant who has retained his own counsel.

You also need to be aware of the requirements under Idaho Code § 19-853. This statute requires that a person who is detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under conviction of, a serious crime, and "is not represented by an attorney under the conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing . . . *shall:* . . . clearly inform him of his right to counsel and of the right of a needy person to be represented by an attorney at public expense; *and. . . if the person detained or charged does not have an attorney, notify the public defender or trial court concerned . . . that he is not so represented.*" (Emphasis added.)

The Idaho Court of Appeals has directly addressed § 19-853 in *State v. Gord,* 118 Idaho 15, 794 P.2d 285 (Ct. App. 1990), *review denied,* 118 Idaho 168, 795 P.2d 867 (1990). Gord had been arrested and accused of first-degree burglary. Gord was taken to jail and, prior to questioning, the police informed him of his *Miranda* rights. Gord waived his *Miranda* rights and confessed to the police. Later the same day, Gord was formally charged with first-degree burglary. After a showing of indigency, the court appointed counsel to represent him. Gord moved to suppress his confession asserting that § 19-853(a)(2) imposed a mandatory duty on the state to inform the public defender when a suspect is in custody. The following analysis from *Gord* is instructive:

> Gord maintains that the word "shall" imposes an affirmative duty on the police to notify the public defender upon detention of a suspect. We need not intimate any view on that subject. The statute requires the police to fulfill this obligation only when the detained individual "is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented." This language clearly and unambiguously conditions the police obligation to situations where a suspect would be entitled to legal representation. Certainly Gord was entitled to an attorney during a custodial interrogation. The statute neither attempts to enlarge nor diminish that constitutional right. The police informed Gord of that right. However, in this case, Gord waived that right when he executed a written waiver of his *Miranda* rights.

Gord, 118 Idaho at 16.

The Idaho Court of Appeals' decision in *Gord* is consistent with *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). In *Edwards,* the U.S. Supreme Court stated that when an accused has specifically invoked his right to counsel, he is not subject to further interrogation until counsel has been made available to him, unless he himself initiates further communication, exchanges or conversations with the police. Thus, there are various "critical stages" during which an accused or detained individual has a right to consult with his attorney.

Section 19-853 has been recognized as a codification of the *Miranda* decision. *See State v. Culbertson,* 105 Idaho 128, 666 P.2d 1139 (1983). There is, thus, nothing under the mandate of §§ 19-852 and 19-853 which either requires the notification of the public defender or grants permission for the public defender on his own initiative to visit with a confined individual under any circumstances except those under which any other individual would be allowed to meet with his retained counsel.

Your letter also requests clarification regarding the procedure for determining indigency.

The determination of indigency is to be made at an accused's first court appearance, and indigency may be redetermined at each subsequent proceeding. Idaho Code § 19-854(a) states that "[t]he determination of whether a person covered by § 19-852 is a needy person shall be deferred until his first appearance in court. . . . Thereafter, the court concerned shall determine, *with respect to each proceeding,* whether he is a needy person." (Emphasis added.) Idaho Code § 19-851(c) defines "needy person" as "a person who at the time his need is determined is unable to provide for the full payment of an attorney and all other necessary expenses of representation."

Idaho Code § 19-853(c) provides that if a court determines that "a person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be." Idaho Code § 19-853(d) further provides that "[u]pon notification by the court or assignment under this section, the public defender or assigned attorney . . . shall represent the person with respect to whom the notification or assignment is made." It thus appears that it is the judge who determines at each and every judicial proceeding whether or not an individual is needy and merits appointment of a public defender. There is nothing in any of the statutes relating to appointment of a public defender which either requires or allows the public defender himself to make a determination of whether he is representing an individual. Yet, please note, that law enforcement officers will be precluded from further questioning of a suspect who has requested an attorney until an attorney is appropriately provided.

In summary, a needy person, who is either detained by law enforcement or under formal charge of a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel is so entitled. Further, the determination of whether a person has a right to representation by the public defender is made by the court at first appearance and with respect to each proceeding thereafter. Finally, the public defender does not have a right to access to inmates prior to his proper appointment as counsel; he most certainly does not have the right to contact an arrested individual and make his own determination of indigency.

If you have any other questions or require further clarification on these issues, please do not hesitate to contact me at any time.

Very truly yours,

KEVIN P. CASSIDY
Deputy Attorney General

August 14, 1992

Alan H. Winkle
Executive Director
PERSI
STATEHOUSE MAIL

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

Dear Mr. Winkle:

This letter is in response to your letter requesting legal guidance on the following questions:

1. May a person who would otherwise be a mandatory active member of PERSI by virtue of being an employee as defined in § 59-1302(14), Idaho Code, avoid mandatory membership in PERSI simply by waiving salary?

2. If an employer, as defined in § 59-1302(15), is required by either statute or ordinance to pay a salary to an employee, may the employer allow the employee to waive salary for the purpose of avoiding mandatory membership in PERSI?

The questions presented stem from concerns raised by some part-time board, council and commission members. These individuals typically receive recompense for their out-of-pocket expenses and a small stipend for their services, the amounts of which are set pursuant to § 59-509, Idaho Code. For the purpose of determining PERSI membership, the stipend paid to part-time board, council and commission members (hereinafter "part-time board members") has been deemed to be a "salary." As a result, these part-time board members are considered members of the Public Employee Retirement System of Idaho (PERSI).

Some of the part-time board members have questioned their mandatory membership in the PERSI system. Since the stipend they receive from their service to the state is very small, and their contribution to PERSI miniscule, the benefit derived by them from participation in PERSI is frequently not worth the disadvantages that participation brings. It appears the primary disadvantage to participation by otherwise self-employed individuals sitting as part-time board members is the loss of tax benefits on their independent retirement accounts. Thus, some have inquired whether they could voluntarily opt out of the system by waiving their right to payment as provided by § 59-509.

Analysis

The preliminary issue which must be addressed in this analysis is whether the PERSI statutes mandate inclusion of part-time board members. Pursuant to § 59-1302(2) an active member is defined as, "[a]ny *employee* who is not establishing the right to receive benefits through his or her employer's participation in any other retirement system established for Idaho public employees, . . ." (Emphasis added.) Idaho Code § 59-1302(14) defines "employee" as follows:

> (a) any person who normally works twenty (20) hours or more per week for an

> employer or a school teacher who works half-time or more for an employer and who receives salary for services rendered for such employer; or
>
> (b) elected officials or appointed officials of an employer who receive a salary.

(Emphasis added.) "Salary," for purposes of PERSI participation, is defined as follows:

> (31) "Salary" means the total salary or wages paid to a person who meets the definition of employee by an employer for *personal services currently performed,* including the cash value of all remuneration in any medium other than cash in the amount reported by the employer for income tax purposes and also including the amount of any voluntary reduction in salary agreed to by the member and employer where the reduction is used as an alternative form of remuneration to the member.

(Emphasis added.) Section 59-1302(31), Idaho Code. In addressing the issue of mandatory inclusion of part-time appointed board members in PERSI, it must be determined whether part-time board members meet the definition of "employee" as delineated above. For purposes of PERSI participation, an appointed part-time board member is an "employee" as long as he/she receives a salary. The issue then becomes whether the stipend received pursuant to § 59-509, Idaho Code, constitutes a "salary" for purposes of PERSI participation.

Idaho Code § 59-509 is entitled "Honorariums or compensation for members of boards, commissions and councils." In designating the compensation to be paid to part-time board members, the legislature did not designate it as a "salary." It is interesting to note that immediately following § 59-509, in § 59-510, the legislature uses the term "salary" to delineate payments for full-time commissioners of the Industrial Commission, the State Tax Commission and the Public Utilities Commission.

As a general rule, part-time board members provide experience and services in excess of the compensation provided pursuant to § 59-509. It does not appear that the compensation or honorarium, ranging from $15.00 per day to $75.00 per day, was intended to be a quid pro quo for services rendered by these board members. Pursuant to Black's Law Dictionary, "honorarium" is defined as:

> an honorary or free gift; a gratuitous payment, as distinguished from hire or compensation for service . . . .

BLACK'S LAW DICTIONARY, Revised 4th Ed. 1968. In light of the experience that part-time board members frequently bring to their position and the service they provide, the stipends paid pursuant to § 59-509 appear to fit more accurately within the

definition of "honorarium." Unfortunately, there is no Idaho case law on point discussing the issue of mandatory inclusion of part-time board members in the PERSI system, nor is there any case law in other jurisdictions with similar retirement systems which addresses this specific issue. As a result, it is helpful to analogize to other areas.

By regulation and revenue ruling, the IRS has concluded that directors of corporations and similarly situated individuals are not employees. Sections 31-3121(d)-1(b), 31-3306(i)-1(e) and 31-3401(c)-1(f) of the Employment Tax Regulations provide, in pertinent part, that the director of a corporation, in his capacity as the director, is not an employee of the corporation.

It appears that the position of a part-time appointed board member is analogous to a position on a board of directors in the corporate environment. Like directors of a corporation, part-time board members handle policy making, are not subject to control and supervision, and are not paid a regular salary. In addition, like directors, part-time board members frequently maintain full-time positions with other entities or are self-employed in their own businesses. As a result, the determination by the IRS that directors are not employees when acting in their capacity of directors is a helpful analogy for the analysis of the issue presented here. It would seem that the logic applied in making a determination that directors of corporations, acting as directors, are not employees is equally applicable when looking at the issue of whether part-time appointed board members receiving compensation pursuant to § 59-509 are employees of the state for purposes of mandatory participation in PERSI.

It is also helpful to look at the purpose behind the PERSI statutes. Section 59-1301, Idaho Code, defines the purpose of the Public Employee Retirement System as a means whereby "public employees in the state of Idaho. . . may be retired from active service *without prejudice* and without *inflicting a hardship* upon the employees retired, and to enable such employees to accumulate pension credits to provide for old age, disability, death and termination of employment . . . ." (Emphasis added.) It is apparent from the language contained in this section that the intent of the legislature in creating the Public Employee Retirement System was to provide a benefit to the employees of the state of Idaho. In the present circumstance, part-time appointed board members indicate that rather than providing a benefit, PERSI membership frequently results in a hardship to appointed board members providing their services to the state. Clearly, mandatory membership in PERSI resulting in a hardship to the individual member is the antithesis of the legislative purpose as expressed in § 59-1301.

Therefore, it would be my opinion that part-time appointed board members do not meet the definition of "employee" for purposes of mandatory PERSI participation. The compensation received by part-time board members appears to be more appropriately defined as an "honorarium" rather than a salary and, as such, one of the key elements of

the definition of "employee" would not be met. Further, forcing mandatory participation on part-time appointed board members which results in a hardship is contrary to the intent of the legislature as stated in § 59-1301, Idaho Code.

The questions asked in your letter deal specifically with individuals meeting the definition of "employee" pursuant to § 59-1302(14). If an individual meets this definition, your question would be whether that individual employee could avoid mandatory membership in PERSI by waiving his/her salary. An individual employee may waive his/her salary only if the state is given the discretion to pay or not to pay for the services provided in that position. In response to your second question, if an employer is required by statute or ordinance to pay a salary to the employee, the employer would not have authority to waive this requirement nor would the employer be able to allow the employee to waive his/her salary benefits. Where, as required by § 59-509, the state is required to pay the benefits delineated, the state would have the duty to make payment to the individual for the services rendered; however, these issues become irrelevant if the individual is not considered to be an "employee" pursuant to the definition provided in § 59-1302(14).

Conclusion

The intent of the statute creating PERSI was to provide benefits to the employees of the state; not to create hardship. Nonetheless, a hardship has apparently been created by the mandatory inclusion of part-time appointed board members in the retirement system. It would be my opinion that part-time appointed board members do not fall within the parameters of the definition of "employees" as provided by § 59-1302(14) and inclusion of the individuals would also be contrary to the purpose of the statute as stated in Idaho Code § 59-1301.

However, as I also indicated in the analysis, this issue has not been presented to a court in this jurisdiction for a determination, and the issue has not been decided by any courts of other jurisdictions with similar statutes. Without guidance from any court on this point, it is difficult to ascertain with any degree of certainty whether a court would agree with the opinion provided here. Therefore, in an effort to comport with the intent of the legislature in creating the PERSI system and to provide needed clarification to the statutes, it would be my recommendation that legislation be drafted to allow part-time appointed board members the opportunity to voluntarily opt out of participation in the retirement system . This has been done in a number of states, notably California. It would seem contrary to the legislative intent behind the PERSI statutes to continue to force mandatory participation on individuals when such participation creates a hardship to them.

I hope this adequately addresses the issues presented. If I can be of further assistance, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation and State Finance Division

September 3, 1992

Stanley F. Hamilton
Director
Idaho Department of Lands
STATEHOUSE MAIL

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

Dear Mr. Hamilton:

This letter is in response to your inquiry seeking legal clarification on the Department of Lands' use of interest-bearing accounts for receipts not immediately deposited with the state treasurer's office. Based upon the representation in your letter, approximately 90% of the money placed in the interest-bearing accounts is generated from state endowment lands. The interest on the funds contained in the accounts is ultimately credited to the public school improvement account.

The issues raised by your inquiry are as follows:

1) Is it appropriate to credit interest earned on endowment land receipts to the general account?

2) Does the Department of Lands have authority to place receipts earned from endowment accounts into interest-bearing accounts?

3) If receipts earned from endowment fund lands and placed in interest-bearing accounts are intermingled with other Department of Lands receipts, how is the interest to be distributed?

Conclusion

In response to your first question, crediting interest earned on endowment land receipts to the general account would be a violation of the terms of the school endowment grants in the Idaho Admission Bill and art. 9, § 8, of the Idaho Constitution.

With reference to the second question, the Board of Land Commissioners has a duty to maximize the profits which can be obtained from endowment lands. If money received from endowment lands would otherwise remain idle pending transfer to the state treasurer, it would be appropriate to place the money into interest-bearing accounts to secure better return on the investment pending transfer to the treasurer's office. However, with today's technology, in most, if not all, circumstances, transfer of receipts to the state treasurer can occur immediately. Finally, where receipts earned from endowment lands are placed in interest-bearing accounts which are intermingled with other Department of Lands receipts, the interest must be segregated for deposit into the general account or other appropriate account(s) as specified by statute.

Historical Analysis

The Organic Act of the Territory of Idaho and the Idaho Admissions Bill established grants of land to be used for the financing of public schools in Idaho. *See,* Organic Act of the Territory of Idaho, § 14; Idaho Admission Bill §§ 4, 5 and 7. The Idaho Admission Bill elaborated on the grants of land provided by the Organic Act of the Territory of Idaho, providing for certain sections in every township of the state to be set aside for support of the common schools with the proceeds of the sale of such sections to constitute a permanent school fund. It was also provided that the interest from such funds would only be expended for the support of the common schools. Art. 9, § 3, of the Idaho Constitution, incorporated the Idaho Admission Bill provisions into the constitution, providing as follows:

> Public school fund to remain intact. — The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur.

Thus, this provision of the constitution provides for the creation of one of two separate trusts managed by the state of Idaho for the benefit of the public schools. *See, Moon v. State Board of Land Commissioners,* 111 Idaho 389, 724 P.2d 125 (1986). The public school fund, as provided in art. 9, § 3, Idaho Constitution, consists of proceeds from the sale of endowment lands. These proceeds are invested by the Investment Board pursuant to the provisions of Idaho Code § 57-715, *et seq.*

The second trust managed by the state for the benefit of public schools consists of

school endowment lands managed by the Land Board. The endowment lands themselves form the res of this trust, and the state's constitutional duties regarding this trust and protection of the land corpus is found in Idaho Constitution, art. 9, § 8:

> Location and disposition of public lands. — It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor: provided, that no school lands shall be sold for less than ten dollars ($10) per acre. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such 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. 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 objects 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: provided, that not to exceed one hundred (100) sections of school lands shall be sold in any one (1) year, and to be sold in subdivisions of not to exceed three hundred and twenty (320) acres of land to any one (1) individual, company or corporation. The legislature shall have power to authorize the state board of land commissioners to exchange granted lands of the state for other lands under agreement with the United States.

In *Moon v. State Board of Land Commissioners, supra,* the Idaho Supreme Court found that where the endowment land continues to be owned by the state and held in trust for the use and benefit of the public schools, it remains a part of the trust res, and the State Land Board, as trustee, is constitutionally and statutorily required to provide for the protection of said land. 111 Idaho at 393. Thus, the state of Idaho manages two separate trusts for the benefit of the public schools; 1) the Public School Fund consisting of the proceeds from the sale of endowment fund lands which are invested by the Investment Board; and, 2) the endowment lands, which, as provided by art. 9, § 8, of the Idaho Constitution, are managed by the State Land Board, as trustee for the benefit of the public schools. The issues addressed by this opinion relate to the management of the second trust.

Legal Analysis

The first issue presented by your inquiry is whether it is proper to credit the interest earned on endowment land receipts to the public school improvement account. In *Moon v. State Board of Land Commissioners,* the Idaho Supreme Court considered whether it was proper to credit the general fund with interest earnings from a state account used for the management of school endowment lands. The funds in the account came from revenues from endowment lands. Idaho Constitution, art. 9, § 8, requires the legislature to provide for:

> [T]he faithful application of the proceeds therefore in accordance with the terms of said grants;

The state treasurer argued that she was statutorily required to credit the general account with interest earnings from the Land Board's account. The court disagreed, holding:

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

111 Idaho at 394 (emphasis added). See also, *Evans v. Van Dusen,* 31 Idaho 614, 174 P. 122 (1918); Opinion of the Attorney General, No. 85-3. Thus, interest earnings should be used exclusively for the protection of the trust res, i.e., the endowment lands, or for the benefit of public schools.

The second issue presented is whether it is appropriate for the Department of Lands to place endowment land receipts in an interest-bearing account. Idaho Code § 67-1302 requires that:

> [A]ll officers and employees of the state of Idaho receiving. . . money, bonds, debentures or other securities on behalf of the state shall, when not otherwise provided by law, deliver the same to the State Treasurer.

Thus, the receipts earned from endowment lands should be forwarded to the state treasurer for appropriate distribution to the proper program accounts. However, the Land Board, as trustee of the endowment lands, has a duty to secure the maximum possible returns on investment from the endowment lands. See, Idaho Constitution, art. 9, § 8. Therefore, it would appear appropriate to place endowment land receipts in interest-bearing accounts where receipts from endowment lands would otherwise

remain idle pending transfer to the state treasurer. However, in most, if not all circumstances, transfer to the state treasurer can be accomplished by immediate wire transfer, and particularly since investment by the state treasurer would typically yield a higher return on the receipts, the money should be transmitted to the treasurer's office in the most expeditious manner possible.

The final question presented is whether the interest earned on moneys placed in the interest-bearing accounts which were not from receipts on state endowment lands may be credited to the public school improvement account. Pursuant to § 67-1210, Idaho Code, "interest received . . . unless otherwise specifically required by law, shall be paid into the general account of the state of Idaho." Unless there is a specific statutory provision allowing for payment of the interest earned to the public school improvement account, the interest earned should be segregated for deposit into the general account or other appropriate account(s) as specified by statute.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation and State Finance Division

September 30, 1992

Mike Wetherell
HYDE WETHERELL BRAY & HAFF
Owyhee Plaza, Suite 500
1109 West Main Street
Boise, Idaho 83702

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

Dear Mr. Wetherell:

You recently requested an opinion from this office regarding the Underground Facilities Damage Prevention Act which was enacted by the Idaho Legislature in 1990, chap. 22, title 55, Idaho Code. The act is designed so that a centralized "one-number locator service" can be made available to simplify the process of locating all underground facilities. You represent a company that provides "one-number locator service" to excavators. According to your letter, some underground facility owners are not willing to cooperate with the one-number locator and provide the necessary information that would enable the locator to properly identify the location of all

underground facilities in the relevant area. This unwillingness to cooperate with the one-number locator service is frustrating your client's efforts to provide complete information to excavators. In light of this situation, you question what remedies are available to force cooperation by underground facility owners.

Idaho Code § 55-2201 cogently states the legislature's intent in enacting the Underground Facilities Damage Prevention Act:

> It is the intent of the legislature in enacting this chapter to assign responsibilities for locating and keeping accurate records of underground facility locations, for protecting and repairing damage to existing underground facilities, and for protecting the public health and safety from interruption in services caused by damage to existing underground facilities.

To this end, the act establishes a procedure requiring excavators to notify underground facility owners of intended excavations in order to obtain the location of all underground facilities. The act also provides for the creation of a centralized "one-number locator service" to simplify the notification process.

Once established, participation by underground facility owners in the one-number service is mandatory. For instance, before commencing excavation, the excavator shall:

> (b) Provide notice of the scheduled commencement of excavation to all owners of underground facilities through a one-number locator service. If no one-number locator service is available, notice shall be provided individually to those owners of underground facilities known to have or suspected of having underground facilities within the area of proposed excavation. The notice shall be communicated to the owners of underground facilities not less than two (2) business days nor more than ten (10) business days before the scheduled date for commencement of excavation, unless otherwise agreed by the parties.

The structure of this paragraph clearly indicates that the one-number locator service was intended to be the primary source of information for excavators. I.C. § 55-2204 is even more certain in its terms:

> Two (2) or more persons who own or operate underground facilities in a county may voluntarily establish or contract with a third person to provide a one-number locator service to maintain information concerning underground facilities within a county. *Upon the establishment of the first such one-number service, all others operating and maintaining underground facilities within said county shall participate and cooperate with the service, and no duplicative service shall be established pursuant to this chapter.* The activities of the

> one-number locator service shall be funded by all of the underground facility owners/operators required by the provisions of this section to participate in and cooperate with the service.

(Emphasis added.)

Finally, the legislative history of this act shows that the legislature intended mandatory participation by *all* underground facility owners in one-number locator services when service is available:

> The legislation would require all owners of underground facilities to participate in one-call systems if at least two owners agree to establish such systems within a county.

Statement of Purpose, HB 887, RS 24276 (1990 Session, Idaho Legislature). Thus, there is no room for doubt. An underground facility owner must participate in a one-number system if available.

Even though the act is absolutely clear that all underground facility owners must participate in one-number locator services, the question remains as to the remedies available for one-number locators to ensure compliance with the act. Unfortunately, there are no provisions in the act that specifically address non-compliance by underground facility owners in relation to the one-number locator service. The act does allocate damages generally against parties who refuse to comply with the terms of the act when such refusal causes damage to another. For example, Idaho Code § 55-2203(2)(a) provides:

> (a) Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this section.

Similarly, Idaho Code § 55-2203(4) provides:

> (4) If the excavator, while performing the excavation, discovers underground facilities which are not identified, the excavator shall cease excavating in the vicinity of the facility and immediately notify the owner or operator of such facilities, or the one-number locator service. The state, county, city or highway district public road agency shall have the right to receive compensation from the underground facility owner for standby cost (based on standby rates made publicly available) incurred as a result of waiting for the owner to arrive at the work site to identify facilities discovered after the owner has identified all known facilities . . . .

Thus, an underground facility owner could be liable to the excavator for damages caused by refusing to cooperate with a one-number locator service.

We note that the statutory remedies for excavators do not directly assist one-number locator services in forcing compliance by resistant underground facility owners. The last sentence in Idaho Code § 55-2204 does provide that the one-number locator service shall be funded by the underground facility owners. Although not expressly stated, a one-number locator service provider could probably bring an action against a non-cooperating underground facility owner for the cost incurred in obtaining the necessary information from other sources. A court could reasonably imply from Idaho Code § 55-2204 and the mandatory language in the act that the extraordinary efforts of a one-number locator service for its clients was compensable and that the non-complying underground facility owner should bear the extra costs.

Finally, it should be stated that Idaho Code § 55-2209(1) does provide a civil penalty for non-compliance:

> Any person who violates any provision of this chapter, and which violation results in damage to underground facilities, is subject to a civil penalty of not more than one thousand dollars ($1,000) for each violation. All penalties recovered in such actions shall be deposited in the state general account.

At a minimum, non-complying facility owners should be made aware of this provision and the risks run by refusing to cooperate with a one-number locator service.

If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

November 6, 1992

Barbara J. Layher
Elmore County Prosecuting Attorney
P.O. Box 607
Mountain Home, Idaho 83647-0607

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

Dear Ms. Layher:

You have requested an opinion from this office regarding the payment of witness fees pursuant to Idaho Code § 19-3008. You have raised several questions in this regard. I will address each question in turn.

1. **Does payment of witness fees from "District Court funds" violate any constitutional or statutory requirement for separation of powers? Further, are the Elmore County Commissioners obligated to comply with the Court's request to transfer or provide funds, historically provided under the Budget Line Item as district court funds, to another department or officer's budget?**

The answer to this question is found by analyzing Idaho Code § 31-867 and the nature of the district court fund. Idaho Code § 31-867 provides for the creation of a district court fund:

> (1) The board of county commissioners of each county in this state may levy annually upon all taxable property of its county, a special tax not to exceed four hundredths per cent (.04%) of market value for assessment purposes for the purpose of providing for the functions of the district court and the magistrate division of the district court within the county. All revenues collected from such special tax shall be paid into the "district court fund," which is hereby created, and the board may appropriate otherwise unappropriated moneys into the district court fund. Moneys in the district court fund shall be expended for all court expenditures other than courthouse construction or remodeling and for salaries of the deputies of the district court clerk, which salaries shall be expended from the current expense fund.
>
> (2) Balances in the district court fund may be accumulated from year to year sufficient to operate the court functions on a cash basis, but such balances shall not exceed sixty per cent (60%) of the total budget for court functions for the current year.

The fact that the district court fund provides for "the functions of the district court and the magistrate division of the district court," does not place the fund within the judicial branch of government. Similarly, because the funds are expended for judicial purposes does not exclude the expenditures from the constraints of title 31, Idaho Code, and, ultimately, the scrutiny of the board of county commissioners.

Previously, this office concluded that the district court fund came under the control of the board of county commissioners. In Attorney General Opinion No. 79-2, we stated:

> Section 31-867, *Idaho Code,* does not expressly state that the county commissioners shall have the control of expenditures from the district court fund, nor does it vest such control in the district court. However, since the statute gives the county commissioners the power to set the tax levy for and to appropriate to the district court fund, it appears to be the legislative intent that the commissioners also control the expenditures from it. No other statutes have been located which contradict this view. Indeed, the County Budget Law, (Idaho Code, §§ 31-1601 through 31-1612) and other statutes governing county fiscal matters, as well as §§ 1-1613 and 1-2217, Idaho Code, which require counties to provide facilities and personnel for courts, lend support to the conclusion that the counties, and not the courts, have control of expenditures from the district court fund.

In relation to the authority of the district court over the fund, this office concluded:

> Section 1-907, *Idaho Code,* does give the administrative judge in each judicial district certain administrative supervision and authority over the operation of the district courts and magistrates. These powers include, but are expressly not limited to, the functions enumerated in the statute, including supervision of the district courts in the discharge of the clerical functions of the district courts. However, nothing in the statute appears to grant the administrative judge any power to make expenditures from or to exercise direct control over the district court fund.
>
> Stated from a different perspective, it would appear that §§ 31-867 and 1-907, *Idaho Code,* are inadequate bases for concluding that the courts' inherent power is now unlimited or specifically that the District Court Fund is to be administered by the court rather than the county commissioners.

It has long been recognized that if the board of county commissioners fails to provide the necessary resources for the existence and operation of the courts, courts do have the inherent power to "incur and order paid all such expenses as are necessary for the holding of court and the administration of the duties of courts of justice." *Schmelzel v. Board of County Commissioners,* 16 Idaho 32, 35, 100 P. 106 (1909). Nonetheless, it is the opinion of this office that, so long as the county conducts its financial affairs in a manner that reasonably provides for the proper function and administration of the courts, the board of county commissioners has direct control over the district court fund.

In regard to witness fees, Idaho Code § 19-3008 provides for the payment of witness fees in criminal proceedings. This section states in relevant part:

> When a person shall attend before a grand jury, or the district court, as a

> witness, upon a subpoena, or pursuant to an undertaking, such person shall receive the same rate per mile as the state of Idaho pays for state employees pursuant to section 67-2008, Idaho Code, but no person can receive more than one (1) mileage under this section per day of attendance in court; such person shall also receive eight dollars ($8.00) per day for each day's actual attendance as such witness and reasonable lodging expense when approved in advance by the judge before whom the witness appears. Such mileage and per diem must be paid out of the county treasury of the county where such district court is held, upon the certificate of the clerk of said court: . . . .

The witness fees granted pursuant to this section are paid from the "county treasury." The statute does not designate the account to be charged. However, through the county budgeting process, chap. 16, title 31, Idaho Code, the board of county commissioners has the responsibility of reviewing estimates of all proposed expenses for the upcoming fiscal year, including witness fees, and specifying the fund to be charged for the expenditures. Idaho Code §§ 31-1603 through 31-1605. Thus, in light of the absence of the specific fund to be charged, it is reasonable to conclude that the board of county commissioners has the authority to designate the fund to be charged for witness fee expenditures made pursuant to Idaho Code § 19-3008. Conversely, the courts have no statutory authority to direct the county commissioners in the county budgeting process to provide for and make expenditures from one particular fund.

Turning to the specific questions presented, since the district court fund is administered by the board of county commissioners and not the courts, this executive function does not implicate or intrude upon the judicial function of the courts. Therefore, in administrating the district court fund, the board of county commissioners is merely following its statutory directive in providing a functional county court system within the county. Idaho Code §§ 1-1613 and 1-2217. This activity does not violate the separation of powers doctrine. Art. 2, § 1, Idaho Constitution; *State v. McCoy,* 94 Idaho 236, 486 P.2d 247 (1971).

Similarly, since the board of county commissioners sets the district court fund levy and controls expenditures from the fund, the Elmore County Board of Commissioners is not obligated to comply with the district court's directive to transfer the witness fee expense from the district court fund to another fund. Beyond offering its advice on the subject, the courts possess no authority to administer the county budgeting process. This is an executive function left to the discretion of the board of county commissioners.

Finally, this conclusion is buttressed by the language found in Idaho Code § 31-867 that states the fund "shall be expended for all court expenditures other than courthouse construction or remodelling and for salaries of the deputies of the district court clerk, ..." Arguably, the mandatory language used in Idaho Code § 31-867 requires that witness fees be paid from the district court fund.

2. **Does Idaho Code § 19-3008 require mandatory payment of fees and mileage to law enforcement officers whether the officer is on duty or off? When off-duty, is the officer entitled to mileage from residence (assuming they are using a private vehicle) or, as has been adopted by the District Court, from the Law Enforcement Building where the subpoena is served upon the officer?**

Idaho Code § 19-3008 makes no distinction between law enforcement witnesses and non-law enforcement witnesses. There appears to be no statutory basis to deny witness fees to law enforcement personnel — on duty or off duty. Of course, if the officer is on duty and being paid by a law enforcement agency, the agency would have the right to reduce his compensation accordingly so that the officer is not receiving additional compensation for performing duties of the job. If the officer is not on duty, there is no statutory basis to deny the fees and mileage to the law enforcement officer. Further, there is no legal authority for the district court to restrict the payment of mileage to one particular location.

Presumably, a law enforcement agency could, as a condition of employment, forbid law enforcement officers from accepting witness fees and mileage. The appearance in court by law enforcement personnel could be designated a job-related activity and compensated pursuant to the department's employment contract.

3. **If Law Enforcement Officers are always entitled to payment of fees and mileage, is it permissible for the District Court to pay such funds directly to the law enforcement agency (for disbursement to the officer pursuant to the agency's policy), or must such payments be made to the individual officers?**

Idaho Code § 19-3008 does not directly address this question. It does provide that witness fees shall be paid from the county treasury and that subpoenaed witnesses testifying at criminal proceedings have the statutory right to payment. If the law enforcement agency has no provision addressing witness fee and mileage payments within its personnel policy, the officer would have the right to the fees and mileage. Whether the law enforcement agency has the right to be paid directly for its officers' witness fees and mileage when on duty is not addressed in the statute and is a matter that should be resolved by the county, the law enforcement agency and its personnel.

If you have any further questions in this regard, please do not hesitate to contact me. I apologize for the delay in responding to your letter.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

November 12, 1992

Kay Sather
Benewah County Clerk/Auditor
County of Benewah
St. Maries, Idaho 83861

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

Dear Ms. Sather:

By letter dated November 4, 1992, you requested an opinion regarding the general election held last Tuesday, November 3, 1992, in Benewah County. According to your letter, the only candidate for the office of Benewah County Prosecuting Attorney, Jack Britton, officially withdrew from the race on October 1, 1992. You have provided this office a copy of Mr. Britton's letter in which he states:

> This letter is to inform you that I hereby withdraw from the election as Republican Nominee for the office of Prosecuting Attorney for the County of Benewah. The reason I am withdrawing from the election is that I have decided to make Boise, Idaho my permanent place of residence and therefore no longer legally qualify for the Office of Prosecuting Attorney of Benewah County.
>
> Please ensure that my name is removed from the November Ballot. Your assistance in this matter is greatly appreciated.

Mr. Britton's letter withdrawing from the race arrived subsequent to the printing of the general election ballot; and, on the advice of the county's attorney, the ballots were not reprinted nor was Mr. Britton's name stricken from the ballot.

On October 28, 1992, David Rogers filed a declaration of intent to be a write-in candidate for the office of Benewah County Prosecuting Attorney. In last Tuesday's election, Jack Britton received 1,313 votes for prosecuting attorney, and David Rogers received 251 write-in votes. In light of the circumstances, your question is who should be declared the duly elected Prosecuting Attorney for Benewah County.

The Canvass of the Election Results

As a prefatory comment, the board of county commissioners, in its capacity as the board of canvassers for Benewah County, must certify the votes as cast and counted on election day. The election canvass as described in Idaho Code § 34-1206 is ministerial in

nature and is not the proper forum in which to determine a candidate's eligibility. Similarly, Idaho Code § 34-1209 provides:

> Immediately after the general election canvass, the county clerk shall issue a certificate of election to the county candidates who received the highest number of votes for that particular office and they shall be considered duly elected to assume the duties of the office for the next ensuing term.

Thus, Mr. Britton should be declared the duly elected Prosecuting Attorney for Benewah County. The fact that Mr. Britton was not a candidate for that office at the time of the election raises other issues.

The Validity of the Election Outcome and Status of the Runner-Up

Initially, it must be determined whether Jack Britton's name should have appeared on the general election ballot. It is the opinion of this office that since Mr. Britton withdrew by letter on October 1, 1992, his name should not have appeared on the ballot. Idaho Code § 34-717 provides for the withdrawal of candidates prior to the election. This provision states in part:

> A candidate for nomination or candidate for election to an office may withdraw from the election by filing a notarized statement of withdrawal with the officer with whom his declaration of candidacy was filed. The statement must contain all information necessary to identify the candidate and the office sought and the reason for withdrawal. A candidate may not withdraw later than thirty (30) days before an election. Filing fees paid by the candidate shall not be refunded.

The last day to withdraw from the 1992 general election was October 5, 1992. Thus, Jack Britton was within the statutory timeframe for withdrawing from the race.

Idaho Code § 34-912 provides for correcting ballots due to vacancies or withdrawals after the ballots have been printed. This provision states:

> When any vacancy occurs after the printing of the ballots and is filled as provided by law, the county clerk shall thereupon have printed a sufficient number of stickers containing the name of the candidate designated to fill the vacancy and shall deliver them to the judge of elections of the precincts interested therein.
>
> The distributing clerk shall affix such stickers on the ballot before it is given to the elector. The sticker shall be placed over the name of the previous candidate.

> If the vacancy occurs after the deadline for filling the same, the distributing clerk shall cross the name of such candidate off the ballot and no votes shall be cast for the candidate. The county clerk shall notify the precincts of this authorization as soon as a vacancy occurs.

In this instance, the vacancy could have been filled by the Benewah County Republican Central Committee. However, since this did not occur, Mr. Britton's name should have been crossed off the ballot. Jack Britton had the statutory right to withdraw from the race (which he exercised in his letter of withdrawal of October 1, 1992) as well as have his name crossed off the ballot.

The next question is whether the error in having Mr. Britton's name remain on the ballot entitles David Rogers to be declared the elected Prosecuting Attorney for Benewah County. It is the opinion of this office that Mr. Rogers has no claim to the office simply because he ran second to an ineligible candidate. There is a large body of law to support this opinion. It is stated in 29 C.J.S. *Elections* § 243:

> Votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away but are to be counted in determining the result of the election as regards the other candidates. Accordingly, the general rule is that the fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected. In such case the electors have failed to make a choice and the election is a nullity.

Idaho adheres to this same rule. Idaho Code § 34-2024 provides that if a person is declared ineligible to hold office as the result of an election contest, "the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

Statutory Remedies

The fact that Mr. Rogers is not presently entitled to be declared the elected Prosecuting Attorney for Benewah County does not leave him without remedy. Since Jack Britton's name should not have appeared on the ballot, there is an issue as to whether the election in that race is valid. The determination of that issue is for a state district court. Idaho Code § 34-2001 sets forth grounds to contest an election. Relevant to this situation, Idaho Code § 34-2001 provides:

> The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested:

. . . .

2. When the incumbent was not eligible to the office at the time of the election.

For purposes of this section, once the board of county commissioners has canvassed the election results and declared Jack Britton elected, Jack Britton would be considered the "incumbent." Idaho Code § 34-2002. At that point, any elector in the county could challenge the election. Idaho Code § 34-2007.

If the challenge is brought and it is determined by the district court that Jack Britton was ineligible to be elected, Idaho Code § 34-2024 provides:

> When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void.

(Emphasis added.) Then, if the court declares the election void as to the contested race, the court in its discretion can either order a new election or have the position filled as a vacancy pursuant to chap. 9, title 59, Idaho Code. See Idaho Code § 34-2021.

If the election is not contested, the office would have to be declared vacant pursuant to Idaho Code § 59-901. This provision states in relevant part:

> Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office as follows:
>
> . . . .
>
> (5) His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected.

At this point, the vacancy would be filled by the board of county commissioners pursuant to Idaho Code § 59-906. Should this occur, the commission should be mindful of Idaho Code § 59-907 which provides:

> In the event a vacancy exists and there is no resident attorney in the county who is willing or qualified to perform the functions of prosecuting attorney as set forth in chap. 26, title 31, Idaho Code, the board of county commissioners may appoint and/or contract with an attorney from outside the county to perform the duties of prosecuting attorney for the balance of the unexpired term or such shorter period as the board of county commissioners shall determine.

Since David Rogers expressed interest in the position and presumably continues to want to serve, he has a statutory priority over attorneys from outside the county to fill the position of Benewah County Prosecuting Attorney.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

November 20, 1992

John M. Mason, CPA/CMA
Dean of Finance
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

Dear Mr. Mason:

In your letter dated October 27, 1992, you requested an opinion regarding the appropriate election date for trustee elections for your community college district.

Idaho Code § 33-2106, enacted in 1963 and entitled "Trustees of junior college districts," states in part:

> Elections of trustees of junior college districts shall be biennially in even-numbered years, and *shall be held on such uniform month as the board of trustees shall determine.*
>
> . . . .
>
> *Notice of the election, the conduct thereof, the qualification of electors and the canvass of returns shall be as prescribed for the election of school district trustees,* and the board of trustees shall have and perform the duties therein prescribed for the board of trustees of school districts.
>
> . . . .

> When elections held pursuant to this section coincide with other elections held by the state of Idaho or any subdivision thereof, or any municipality or school district, the board of trustees may make agreement with the body holding such election for joint boards of election and the payment of fees and expenses of such boards of election on such proportionate basis as may be agreed upon.

(Emphasis added.) Therefore, the statute distinguishes between election dates and election procedures, the former being at the discretion of the community college board and the latter in accordance with school election laws.

The 1992 legislature added a new statute, Idaho Code § 34-106, which sets uniform election dates with certain exceptions. The law is effective January 1, 1994. The statute states in pertinent part:

> On and after January 1, 1994, *notwithstanding any other provision of the law to the contrary,* there shall be no more than four (4) elections conducted in any county in any calendar year, except as provided in this section. . . .
>
> . . . .
>
> (4) The governing board of each political subdivision subject to the provisions of this section, which, prior to January 1, 1994, conducted an election for members of that governing board on a date other than a date permitted in subsection (1) of this section, shall establish as the election date for that political subdivision the date authorized in subsection (1) of this section which falls nearest the date on which elections were previously conducted, unless another date is established by law.
>
> . . . .
>
> (6) *School districts governed by title 33, Idaho Code,* and water districts governed by chapter 6, title 42, Idaho Code, *are exempt from the provisions of this section.*

(Emphasis added.) *See also,* Idaho Code § 34-1401 (contains a similar exemption from the Uniform District Election Law for school districts and water districts).

The question then becomes whether the school district exemption set forth in the Idaho Code sections cited above also applies to community college elections or whether the "notwithstanding any other provision of the law to the contrary" language precludes application of the exemption.

It appears significant that the reference in Idaho Code § 33-2106 is to "*notice* of election, the *conduct* thereof, the *qualification of electors* and the *canvass of returns* as prescribed for the election of school district trustees." (Emphasis added.) The references are to *procedural aspects* of the conduct of elections and qualifications of electors. It is in these matters that trustee elections for community college districts are to track the procedures for the election of school district trustees. *There is no mention of election dates.* Indeed, Idaho Code § 33-2106 itself does not appear to require that a community college district election be on the date prescribed for school district elections. Further, since the new statute on uniform dates contains the language "*notwithstanding any other provision of the law to the contrary*" (emphasis added), it appears that the intent of the legislature was to override the community college trustees' authority to determine an election date different from the prescribed uniform dates. Legislative minutes concerning the new statute (H.B. 743) indicate that the sponsors intended the exemptions to be viewed narrowly.

We therefore conclude that after January 1, 1994, your trustee elections should be held on the uniform date prescribed in Idaho Code § 34-106 "which falls nearest the date on which elections were previously conducted." Idaho Code § 34-106(4).

However, since the statute does not become effective until January 1, 1994, if there is some compelling reason for holding community college trustee elections on a date other than one of the prescribed uniform dates, you may wish to seek a specific exemption during the 1993 legislative session.

We have conferred with the Secretary of State's office regarding your question and have determined that there are currently no rules, regulations, or interpretations of that office which would answer your specific question. See, Idaho Code § 34-106(5).

Sincerely,

BRADLEY H. HALL
Deputy Attorney General and Chief Legal Officer

December 24, 1992

William Thompson, Jr.
Latah County Prosecutor
Latah County Courthouse
Moscow, ID 83843

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

Dear Mr. Thompson:

By the prior letter of Mr. Craig Mosman, the Latah County Prosecutor's office requested assistance from this office to investigate the allegation that Latah County Commissioner, Mark Solomon, has not resided within the commissioner district from which he is elected. Mr. Solomon was elected to represent Latah County Commissioner District No. 1 in November of 1990. The claim has been made that Mr. Solomon has not continuously resided in District No. 1 since he assumed that office in January of 1991 and has therefore "vacated" his office pursuant to Idaho Code § 59-901.

According to Idaho Code, it is the statutory duty of the county prosecutor to bring any action for usurpation of office against any county, precinct or city officer. Idaho Code § 6-601. As legal counsel to the Latah County commissioners, however, it was Mr. Mosman's belief that he had a conflict of interest that prevented him from conducting an investigation into the allegations and issuing a legal opinion concerning Mr. Solomon's residency status. For that reason, Mr. Mosman requested the attorney general to conduct an investigation and issue a legal opinion in this matter. I apologize for the lengthy delay. This opinion has involved substantially more investigation and legal research than initially anticipated.

Factual Investigation

In response to your request, Attorney General Investigator Allan Ceriale traveled to Latah County to conduct a factual investigation focused on the issue of Mr. Solomon's residence since he was elected to office in November of 1990. Investigator Ceriale interviewed various individuals, gathered relevant documents, and provided Mr. Solomon the opportunity to provide information he believed might be relevant to the investigation. Mr. Ceriale and I traveled to the Moscow Mountain property in the early summer of this year and had the opportunity to meet with Mr. Solomon and observe the improvements located on the property.

Showalter Road Property
(District No. 1 Property)

On February 22, 1990, Mr. Solomon signed his Declaration of Candidacy to run for the office of Latah County Commissioner for District No. 1. Within his Declaration of Candidacy, Mr. Solomon stated that his resident address was 2178 Showalter Road (hereinafter "Showalter Road property"). The Showalter Road property is located within Latah County Commissioner District No. 1 on Moscow Mountain, approximately 12-15 miles from the city of Moscow. Mr. Solomon purchased the Showalter property in 1978. Mr. Solomon sold the Showalter property in the early summer of 1990, prior to his election to the office of County Commissioner for District No. 1. On

January 9, 1990, Mr. Solomon was issued a driver's license from the state of Idaho and, at that time, listed the Showalter property as his residence. No change of address for the license was located in the public records, nor was there any record of issuance of a renewal license since that date.

Moscow Mountain Road Property
(District No. 1 Property)

In August of 1982, Mr. Solomon purchased additional property on Moscow Mountain at the address of 2499 Moscow Mountain Road. This property is also located within Latah County Commissioner District No. 1. There was no building or living quarters on this acreage at the time of the original purchase. Mr. Solomon applied for a building permit in 1984 in order to construct improvements on this property.

During the calendar years 1984 and 1985, Mr. Solomon had purchased a used lumber drying shed from Potlatch Corporation. Following the purchase, Mr. Solomon dismantled the shed and hauled the lumber to the Moscow Mountain property. Mr. Solomon used the lumber from the drying shed to construct a large shop and adjoining living quarters. At the time of the original construction, there was no sewer or water system on the property and no electricity.

After the initial construction, Mr. Solomon made additional improvements to the property through the installation of a water delivery system constructed of ditching and water pipe, solar panels for heat and electricity, a specified service telephone and a drain field. Mr. Solomon also furnished the living quarters with a bed, table, counters, windows and a wood stove.

On September 7, 1989, Mr. Solomon applied for an adjustment to the solid waste user fee charge by Latah County against the Moscow Mountain property. On the form, Mr. Solomon checked the box that stated as follows; "House or mobile home used as a cabin, seasonal use." Additional comments were placed on the form by Mr. Solomon as follows: "Under construction, no residence. Temporary living only." Request for seasonal status on the property was approved for the purpose of reduction of a solid waste user fee by Latah County Commissioners, and a one-year reduction was granted.

Mr. Solomon states that roads to the Moscow Mountain property are not passable by motor vehicle from October or November through April or May of each year. During the winter season, Mr. Solomon states he travels into the property by cross county skis and stays there most weekends (from Friday evening or Saturday morning to Sunday evening or Monday morning). During the summer months (May to September) Mr. Solomon states he is able to drive to the property and he stays at the property after the end of his week (from either Thursday p.m. or Friday through Sunday p.m. or Monday

a.m.). Mr. Solomon also listed the Moscow Mountain property as his address on his voter registration card which was completed and filed with the Latah County Clerk's office on the 15th day of July, 1990. (On the same form, he also listed his "mailing address" at that time as 328 No. Washington.) On December 3, 1990, Mr. Solomon applied for an owner-occupied residency exemption for the tax year 1991 pursuant to Idaho Code § 63-105DD for the Moscow Mountain Road property. On the form, Mr. Solomon stated the date he first occupied the property as "5/15/90." This application was submitted by Mr. Solomon to the Latah County Commissioners for the 1991 tax year.

North Washington Street Property
(District No. 2)

Mr. Solomon married his current wife, Nadine Solomon, on May 15, 1990. At the time of their marriage, Nadine Solomon owned a residence at 328 N. Washington in Moscow. This property is located in Latah County Commissioner District No. 2. Nadine Solomon purchased the North Washington property in 1987 and has resided at the property since the date of her purchase.

Interviews of neighbors living adjacent to the North Washington property state they have observed Mr. Solomon at the residence on a regular basis since 1988 or 1989 and have formed the opinion, based upon their observations, that Mr. Solomon has resided at the North Washington property since 1989. They observed him coming and going from that property on a regular basis, parking his vehicle there constantly and riding his bike from there to the county courthouse.

Collateral contacts establish that on July 25, 1991, Mr. Solomon applied for his registration on a 1976 Toyota pick-up and listed the North Washington Street property as his current address. Mr. Solomon did likewise on July 29, 1991, for a 1984 pick-up. Mr. Solomon's bank account at First Security Bank also lists his address as the Washington Street property, and his correspondence from the bank is mailed to that address. On June 1, 1990, Mr. Solomon instituted a change of address at the Moscow Post Office from the Showalter property to the North Washington Street property, so his mail could be delivered to the North Washington Street residence. On his W-4 tax forms for the tax years 1990-91, Mr. Solomon lists the North Washington property as his residence.

LEGAL ANALYSIS - RESIDENCY

A. Pre-Election Residency

Residency requirements for elective office in Idaho fall into two basic categories,

pre-election and post-election durational residency standards. Pre-election residency qualifications for federal, state and county elected officials are located in ch. 6, title 34, of the Idaho Code. Candidate residency qualifications for the office of county commissioner are set forth in Idaho Code § 34-617:

> (2) No person shall be elected to the board of county commissioners unless he has attained the age of twenty-one (21) years at the time of the election and is a citizen of the United States, and shall have resided in the county one year *next preceding his election* and in the district which he represents for a period of ninety (90) days *next preceding his election.*

(Emphasis added.)

The Idaho Supreme Court has stated that if a statute is not ambiguous it should be interpreted by applying the plain meaning of the language. *Sherwood v. Carter,* 119 Idaho 246, 805 P.2d 452 (1991); *George W. Watkins Family v. Messenger,* 118 Idaho 537, 797 P.2d 1385 (1990); *Burt v. City of Garden City,* 118 Idaho 427, 797 P.2d 135 (1990). Applying this principle to the phrase "next preceding his election" leads to the simple conclusion that the one-year county and ninety-day district residency qualifications in Idaho Code § 34-617 are pre-election requirements. The term "election" as used in this context has been interpreted by the Idaho Supreme Court to apply to the general and not the primary election. *Strecker v. Smith,* 66 Idaho 593, 164 P.2d 192 (1945); *Bradfield v. Avery,* 16 Idaho 769, 102 P. 687 (1909).

Candidate residency standards for the office of county commissioners are also found at Idaho Code § 31-702:

> *District from which elected.* Each member of a board of commissioners must meet the residency requirements in the county and district which he represents as set out in Section 34-617, Idaho Code.[1]

Although it is clear that Idaho Code § 34-617 imposes pre-election residency requirements, it is not easy to determine whether Idaho Code § 31-702 imposes a pre-election or post-election standard. The language, "each *member* of a board of commissioners . . . ," can be construed as applying to a person already a "member" of the board by election or appointment and therefore imposing a *post-election residency standard.* The post-election interpretation can be buttressed by the proposition that the legislature would not enact two separate statutes both addressing pre-election residency conditions for candidates for county commissioner.

However, the plain meaning of the section heading, "DISTRICT *FROM WHICH ELECTED,*" supports the conclusion that the language imposes a pre-election residency requirement. (Emphasis added.)

A statute is ambiguous if it is susceptible of two reasonable interpretations. *State v. Moore,* 111 Idaho 854 (App.), 727 P.2d. 1282 (1986). See *St. Benedict's Hospital v. County of Twin Falls,* 107 Idaho 143 (App.), 686 P.2d 88 (1984). If the statute is ambiguous, it is the responsibility of the court to seek out and give effect to the legislative intent and purpose. *Sherwood v. Carter, supra; Sweitzer v. Dean,* 118 Idaho 568, 798 P.2d 27 (1990); *State v. Paul,* 118 Idaho 717 (App.), 800 P.2d 113 (1990). Idaho Code § 31-702, is susceptible of two reasonable interpretations: that it applies to pre-election residency or to post-election residency. In trying to ascertain legislative intent, it is proper to examine the legislative history. *Mix v. Gem Investors, Inc.,* 103 Idaho 355 (App.), 647 P.2d 811 (1982); *Sunset Memorial Gardens v. Idaho State Tax Commission,* 80 Idaho 206, 327 P.2d 766 (1958); *Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983).

The most recent amendment to Idaho Code § 31-702 was in 1982:

> District from which elected. Each member of a board of commissioners must ~~be an elector of the district he represents~~ meet the residency requirements in the county and district which he represents as set out in Section 34-617, Idaho Code.

Idaho Sess. Laws, ch. 332, p. 839. The language deleted in 1982, "be an elector of the district he represents," is identical to earlier statutes that predate Idaho Code § 31-702. R.C. & C.L., § 1905: C.S. § 3403; I.C.A. § 30-602. In fact, the same language can be found in a statute first enacted by the legislature in 1887. *Revised Statutes of Idaho,* 1887, Sec. 1746. The 1982 amendment was the first time in almost 100 years that the specific language "be an elector of the district he represents" was deleted from Idaho statutory law. By contrast, Idaho Code § 34-617 (imposing pre-election residency requirements upon candidates for county commissioner) was not adopted until 1970. Initially, it imposed only a one-year *county* residency requirement upon county commission candidates. *Idaho Session Laws,* 1970, Ch. 140, § 197 p. 351. In 1982, it was amended by adding a 90-day pre-election *district* residency provision. The 1982 amendments to Idaho Code § 34-617 (adding the 90-day district requirement) and Idaho Code § 31-702 (deleting the district elector language and incorporating by reference the one-year county and 90-day district residency standards of Idaho Code § 34-617) were enacted in the same bill. *Idaho Session Laws,* 1982, Ch. 332, §§ 1 & 2, p. 839.

It is apparent that the legislature saw a direct relationship between the provisions of Idaho Code § 34-617 and Idaho Code § 31-702. Prior to 1982, Idaho Code § 34-617 required that a candidate be 21 years of age, a U.S. citizen and reside in the county for one year, but did *not* impose a district residency requirement. Once the 90-day district residency standard was added in 1982, there was no longer need for a separate statute

(Idaho Code § 31-702) to impose the less specific requirement "elector of the district." Since Idaho Code § 34-617 imposes a pre-election durational residency requirement, the legislature's decision in 1982 to incorporate Idaho Code § 34-617 by reference into Idaho Code § 31-702 reveals the intent of the legislature that the latter statute likewise apply a pre-election residency standard.

This interpretation is further supported by the fact that the term "elector," as used in the phrase "an elector of the district he represents," was a legal term of art which, as defined in art. 6, § 2, of the Idaho Constitution, had precise pre-election durational residency connotations. Prior to 1982, the relevant portion of that section stated:

> *Qualifications of electors.* — Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one (21) years old, who has actually resided in this state or territory for six (6) months and, in the county where he or she offers to vote, thirty (30) days *next preceding* the day of the election, if registered as provided by law, is a *qualified elector;* . . .

(Emphasis added.) The terms "elector" and "qualified elector" have been determined by the Idaho Supreme Court to be interchangeable and to have the same meaning. *Wilson v. Bartlett,* 7 Idaho 271, 62 P. 416 (1990).

Therefore, reading Idaho Code § 31-702 (in its pre-1982 form) in conjunction with the constitutional definition of "qualified elector" would require a candidate for county commissioner to be twenty-one (21) years of age, a citizen of the United States and a resident of the state for six (6) months, and a county resident for thirty (30) days. The only factor added by Idaho Code § 31-702 to the constitutional requirements to be a qualified elector was that a candidate would have to be registered in the district from which he or she seeks to be elected.[2]

In 1982, art. 6, § 2, of the Idaho Constitution was amended to reduce the voting age to eighteen (18), to delete the specific residency requirements and to grant the legislature the authority to define the duration of residency necessary to become a qualified elector. *Idaho Session Laws,* 1982, H.J.R. No. 14, p. 932; ratified at the general election, Nov. 2, 1982.

In 1982, the legislature also amended the statutory definition of "qualified elector" to require a thirty-day (30) residency in the county and state. As a result, if the word "elector" had not been deleted from Idaho Code § 31-702, there would have been a conflict with Idaho Code § 34-617. Prior to its amendment, Idaho Code § 31-702 required a candidate for county commissioner to be an "elector of the district" and thereby as a "qualified elector" was required to be eighteen (18) years of age and satisfy a thirty-day (30) residency in the state and county, but Idaho Code § 34-617 required a

county commissioner to be twenty-one (21) years of age and reside in the county for one (1) year.

In conclusion, it is clear that both Idaho Code § 34-617 and § 31-702 prescribe pre-election residency requirements. Based upon the 1982 statutory amendments, the two statutes now set forth a single standard. Therefore, neither of these statutes, standing alone, imposes a continuing post-election residency requirement upon a person holding the office of county commissioner.

B. Post Election Residency

Post election durational residency requirements for elected officials are imposed by Idaho Code § 59-901:

> *How vacancies occur.* — Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:
>
> . . . .
>
> 5. His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected.

Therefore, if a county commissioner ceases to be a resident of his or her commissioner district, the office of county commissioner is considered vacant. Idaho Code § 59-901; *Mechem, Public Officers,* § 438 (1890); *Throop, Public Officers,* Section 425 (1892); See *State v. McDermott,* 52 Idaho 602, 17 P.2d 343 (1932). Once the office of a county commissioner becomes vacant by change of residency, the office cannot be reoccupied by re-establishing proper residency. *Mechem, supra; Throop, supra.* See also *State v. McDermott, supra.* Once the office is vacant, it remains so until filled by a proper appointment or by a new election. Idaho Code § 59-904, et seq.

The key word in the application of Idaho Code § 59-901(5) is "resident" as stated, "ceasing to be a *resident* of the state, district or county . . . ." (Emphasis added.) The term "resident" is not defined within the statutory provisions of title 59, nor is there a single generic definition for that term in the Idaho Code. The Idaho Supreme Court and Idaho Court of Appeals have issued a number of decisions that define the term "reside," "resident" or "residency."[3] The basic conclusion reached by the courts is there is no single definition for the word "resident" but its meaning depends upon the context in the statute and its relationship to other statutes addressing the same or similar subject matter:

> Further, the words "residence" and "resident" as used in statutes do not have a uniform meaning. "They are to be construed in the light of the context, with consideration of the purpose of the statutory enactment."

Intermountain Health Care v. Board of Commissioners, 109 Idaho at 414, 707 P.2d at 1053. It is apparent, based upon the decisions of the supreme court and the court of appeals that one cannot simply turn to *WEBSTER'S* or *BLACK'S LAW DICTIONARY* to provide a single appropriate meaning to these terms.[4]

It is a rule of statutory construction that statutes that are "in pari materia" (upon the same matter or subject) should be construed together to achieve a reasonable and consistent result. *Greenwade v. Idaho State Tax Commission,* 119 Idaho 501 (app.), 808 P.2d 420 (1991); *State v. Paul, supra; George W. Watkins Family v. Messenger, supra.* The provisions of ch. 9, title 59, apply to vacancies in civil or public office. In fact, the general subject matter of title 59 ("Public Officers In General") is similar to title 34 of Idaho Code entitled "Elections." Title 34 addresses legal issues such as: When will elections be held? What procedure will be followed? Who can vote? Who can be a candidate for office?

Idaho Code, ch. 6, title 34, provides the residency requirements necessary to run for elected office. Ch. 9, title 59, incorporates the same residency standards for persons appointed to fill a vacancy in office. Idaho Code § 59-906 sets forth the specific steps to fill a vacant county office (except county commissioner) and specifically requires the appointee to have the same qualifications as the person elected to the same office:[5]

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

The word "reside" as applied to a public office is also found at Idaho Code § 59-103:

> *Residence of certain officers.* The following officers must *reside* within the county of Ada and keep their offices in Boise City:
>
> The Governor.
> The Secretary of State.
> Auditor.
> Treasurer.
> Attorney General.
> Superintendent of Public Instruction.

(Emphasis added.) Residency for public office is also indirectly addressed by Idaho Code § 59-101:

> *Qualifications in general.* Every *qualified elector* shall be eligible to hold any office of this state for which he is an elector, except as otherwise provided by the Constitution.

(Emphasis added.) Currently, the definition of that term is located at Idaho Code § 34-104:

> *"Qualified elector" defined.* "Qualified elector" means any person who is eighteen (18) years of age, is a United States citizen and who has *resided* in this state and in the county at least thirty (30) days next preceding the election at which he desires to vote, and who is registered as required by law.

(Emphasis added.)

Therefore, a substantial inter-relationship exists between chapters 1 and 9, title 59, and ch. 6, title 34, Idaho Code, concerning the subject matter of public officers. The relationship is sufficiently strong to support the conclusion that the statutes are "in pari materia" and should be construed together in a consistent and reasonable manner. Since the term "resided" as used in either Idaho Code § 59-103 or § 59-901 is not defined within title 59, (and titles 59 and 34 are "in pari materia") it is appropriate to examine title 34 for a definition of the term "resided" or "residence."

Within the statutory definitions in title 34, the term "residence" is defined at Idaho Code § 34-107:

> *"Residence" defined.* (1) "Residence," *for voting purposes* shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of absence therefrom.
>
> (2) In determining what is a principal or primary place of abode of a person, the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse and children, if any, leaseholds, situs of personal and real property, situs of residence for which the exemption in § 63-105DD, Idaho Code, is filed, and motor vehicle registration.
>
> (3) A qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.

> (4) A qualified elector shall not be considered to have gained a residence in any county or city of this state into which he comes for temporary purposes only, without the intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there.
>
> (5) If a qualified elector moves to another state, or to any of the other territories, with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.

(Emphasis added.) Definitions set forth within a specific title apply to the use of those terms within the various chapters of that title. *Cameron v. Lakeland Class A School District No. 272, etc.*, 82 Idaho 375, 353 P.2d 651 (1960); *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965). The term "resided" is used repeatedly within ch. 6, title 34, to define residency requirements for federal, state, county and city public offices. Furthermore, Idaho Code § 59-906 incorporates the provisions of ch. 6, title 34, pertaining to residency qualifications for county officers. If the definition for "residence" in Idaho Code § 34-107 applies to ch. 6, title 34, then by incorporation the same definition of "residence" in Idaho Code § 34-107 applies to Idaho Code § 59-906.

There is, however, a phrase within the definition of "residence" (Idaho Code § 34-107) that casts uncertainty on the scope of its application. The phrase "'Residence,' *for voting purposes,* . . ." raises the question whether the legislature intended to apply the definition to both voters (qualified electors) and candidates. The answer to this question requires us to examine the historical inter-relationship between qualifications (including residency) for voters and those for office holders.

As stated previously, Idaho Code § 59-101 provides that any "qualified elector" can run for public office. To be a qualified elector a person must meet certain residency standards set forth by Idaho Constitution art. 6, § 2 (pre-1982), or by Idaho Code § 34-402 (post-1982). Therefore, the legal criteria for a qualified voter (voter eligibility) and candidate eligibility have been interwoven throughout Idaho's history. Furthermore, until 1982, a candidate for county commissioner had to "be an elector of the district he represents." Idaho Code § 31-702. To be a qualified elector for his or her district actually required meeting residency standards for the state, county and district. Art. 6, § 2, Idaho Constitution (prior to the 1982 Amendment). For most of Idaho's history the qualifications to be an eligible elector and a qualified candidate have been identical. Therefore, looking at the long-standing policy of synonymous requirements for voting and office holding, we conclude that the term "resided" has the same meaning for both voters and public officers.

C. Factual/Legal Application

The definition of "residency" located at Idaho Code § 34-107(1), was amended in 1982 to include the following changes:

> "Residence" defined. (1) "Residence," for voting purposes, shall be the ~~place in which a qualified elector has fixed his habitation and to which, whenever he is absent he has the intention of returning~~ principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after departure or absence therefrom, regardless of the duration of the absence.

(Emphasis added.) Idaho Session Laws, ch. 215, p. 589. Adding the language "principal or primary home or place of abode" addresses the reality that individuals may live at more than one location. The individual may have both a summer and winter home, or some recreational property or may even be a commuter located out of state for business reasons. "Principal or primary home or place of abode" is defined to be the place of fixed habitation and, if absent, is the place to which a person has the present intention of returning. The duration of absence does not matter.

Subsection (2) of Idaho Code § 34-107 identifies a number of objective circumstances to determine a person's primary or principal place of abode:

> [B]usiness pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal or real property, situs of residence for which the exemption in section 63-105DD, Idaho Code, is filed, and motor vehicle registration.

Subsection (2) is entirely new language added in 1982. It provides a list of factors that "may be" considered in determining a person's residence. It reveals the legislature's intent that the information to be examined goes beyond the stated intent of the person in question. Statements made by a person after a controversy has arisen are subjective and can be self-serving. The language in subsection (2) signals the need to balance the personal statements of the individual at issue with objective circumstances that may also reveal a person's intent or state of mind regarding his or her principal home or place of abode.

Focusing on the issue of residency of Commissioner Solomon, it is clear from our legal analysis that he must reside not only in Latah County but also in Commissioner District No. 1.

From approximately 1978 to the summer of 1990, Commissioner Solomon owned a parcel of property (Showalter Road property) in Latah County Commissioner District

No. 1. Commissioner Solomon does not claim that he maintained a home or place of abode on the Showalter property after his election as Latah County Commissioner in November of 1990. Therefore, the Showalter property cannot be considered his legal residence in Latah County Commissioner District No. 1 during his tenure as county commissioner.

In 1982, Commissioner Solomon purchase a second parcel of property (Moscow Mountain property) in Latah County Commissioner District No. 1. Commissioner Solomon has maintained his ownership of that parcel to the present time. It is the Moscow Mountain parcel that Commissioner Solomon maintains that he has used as his principal or primary home or place of abode during his term as Latah County Commissioner from January of 1991. From 1984 to 1989, Commissioner Solomon constructed substantial improvements on the property. Based upon our investigation, it is difficult to establish when Commissioner Solomon commenced and completed the different stages of construction on the property. It was obvious, based upon a site visit in June, 1992, that the improvements were considerable and provided for very habitable accommodations. The structure and furnishings we observed were sufficient that Commissioner Solomon could, if it was his intention, establish the property as his principal or primary home or place of abode.

The actual circumstance that has given rise to the allegation that Commissioner Solomon has not continued to reside in Commissioner District No. 1 was his marriage to Nadine Solomon in May of 1990. At the time of their marriage, Nadine Solomon owned property in Commissioner District No. 2 on North Washington Street. She has continuously owned the property up to the present time. Both Nadine and Commissioner Solomon state the property is owned as her sole and separate property. This statement is confirmed by the fact that Commissioner Solomon is not listed as a co-owner in the Latah County Assessor's office.

The complaint has been made that Commissioner Solomon actually resides at the District No. 2 property on Washington Street. This is based upon the claim that Commissioner Solomon actually stays there with his wife, Nadine. If it is true that Commissioner Solomon has established *legal residency* in District No. 2, then he has vacated his public office. If the office is vacant, merely re-establishing his residency in District No. 1 would not eliminate the vacant office. Essentially, it is an all or nothing proposition. If Commissioner Solomon has continuously "resided" in District No. 1 during his term, then there is no vacancy. If at any time during his term, Commissioner Solomon has established *legal residency* in District No. 2, the office has become vacant and remains so until filled by proper appointment or election.

Commissioner Solomon maintains that his principal or primary home is on Moscow Mountain property in Commissioner District No. 1. He states that this property has

continuously been his principal or primary home during his tenure as Latah County Commissioner. If Commissioner Solomon's statement of intent were sufficient, then the issue would be resolved. This approach, however, would ignore the legislature's enactment of Idaho Code § 34-107 (definition of residency) and its list of objective factors. Many of the factors in subsection (2) are easier to apply if the issue concerns state or county residency as compared to district residency within a particular county. Factors such as "business pursuits," "employment," and "income sources" are not particularly helpful to determine *district* residency, at least in this particular situation.

Looking at the other identified factors, the results are equivocal. Commissioner Solomon has owned real property on Moscow Mountain since 1982 within Commissioner District No. 1. Very substantial improvements have been made (including the location of large amounts of personal property on the Moscow Mountain property) and Commissioner Solomon maintains these improvements existed prior to taking office in January of 1991. Commissioner Solomon did apply on December 3, 1990 (for the 1991 tax year) for a real property exemption pursuant to Idaho Code § 63-105DD for the Moscow Mountain property, but it was not approved.[6]

Contrary information arises from the fact that Commissioner Solomon applied for registration on July 25, 1991, for his 1976 Toyota pick-up and on July 29, 1991, for a 1984 pick-up and listed the North Washington Street property (District No. 2) as his current address. Nadine Solomon's residence prior to her marriage to Commissioner Solomon was clearly at the North Washington property. Since their marriage, Nadine Solomon has continued to claim a real property homeowner's tax exemption pursuant to Idaho Code § 63-105(DD) on the North Washington property. This application was made under penalty of perjury and, if that is not her legal residence, she would, at a minimum, owe Latah County back taxes with penalty and interest. Based upon our investigation, it is our conclusion that Nadine Solomon has maintained the North Washington property as her residence throughout Commissioner Solomon's tenure as County Commissioner. Accepting Commissioner Solomon's statement at face value, Commissioner Solomon and Nadine Solomon have two different legal residences. However, there is no legal requirement that a husband and wife must have the same legal residence.

We were not able to examine the issue of residence related to state and federal tax purposes because both federal and state income tax returns are confidential and Mr. Solomon and Nadine Solomon did not consent to allow us to review their returns for the years he has served as Latah County Commissioner.

Collateral information revealed that Commissioner Solomon completed a change of address at the Moscow post office on June 1, 1990, from the Showalter property to the North Washington property. Commissioner Solomon's bank account also lists his

address as the Washington Street property. Commissioner Solomon's W-4 tax forms for the tax years 1990 and 1991 list the North Washington property as his residence. Commissioner Solomon filled out and filed a voter registration card on June 25, 1990, and listed the Moscow Mountain property as his address but the North Washington property as his mailing address.

Commissioner Solomon's response to providing the North Washington property as his mailing address to the post office, bank, vehicle registration and voter registration was that it was done for convenience because it was difficult to receive mail at the Moscow Mountain property. This is not an unreasonable explanation.

Neighbors adjacent to the North Washington property state they have observed Mr. Solomon there on a regular basis and, weather permitting, Commissioner Solomon also rides his bike to the courthouse. Commissioner Solomon does not dispute this information as he admits staying in town during the commissioner's work week which is from either Monday through Thursday or Monday through Friday. The time he physically spends at Moscow Mountain is limited to a two- or three-day weekend and vacation periods. Commissioner Solomon concedes it is not possible to drive a vehicle to the Moscow Mountain property during the winter season from either October or November to April or May, depending upon the severity of the weather. However, Commissioner Solomon states he continues to stay at the Moscow Mountain property on a regular basis during the winter months and is able to gain access to the property by cross county skiing or snow shoes. Based upon the information available, we have no reason to contest Commissioner Solomon's assertion that he physically stays at the Moscow Mountain property on an average of two days per week.

Principal or primary home or place of abode, as stated earlier, requires both fixed habitation and a present intention to return if absent. Commissioner Solomon has continuously maintained throughout this controversy that his principal or primary home or place of abode is at the Moscow Mountain property. Physical presence alone is not necessary to establish a person's principal or primary home or place of abode. College students as electors are able to leave the state for nine months and attend school and still be considered Idaho residents. Military personnel may be physically stationed outside the boundaries of Idaho for years and as electors still maintain Idaho as their legal residence. Business commuters may work all week out of state, even maintaining a separate apartment or home, but as electors still claim Idaho as their legal residence.

We recognize Commissioner Solomon's statements and factual circumstances present arguments on both sides of this issue. At the heart of our analysis is the legal conclusion that the term "reside" as used to define a vacancy in office (pursuant to Idaho Code § 59-901) is equivalent to principal or primary home or place of abode and that intention, not "physical presence," remains the dominant factor for establishing legal

residence. Factual circumstances may support or contradict a person's statement of intent. In this situation the factual circumstances do both. Looking at the entire picture, however, we conclude the factual investigation does not sufficiently establish that Commissioner Solomon's legal residence, as an office holder, as the North Washington property in Commissioner District No. 2. Therefore, we cannot conclude that Commissioner Solomon has vacated the office of Utah County Commissioner for District 1 by ceasing to be a resident of that district.

If the legislature had chosen to define "reside" in the context of Idaho Code § 59-901 to focus solely or predominantly on the issue of physical presence, then we would likely reach the opposite conclusion. Such legislation would support a public policy requiring a public official to spend the majority of his or her time in the district, county or state from which he or she is elected. However, this would be a significant change from Idaho's history of applying the same definition for residency to Idaho's public office holders, public candidates and electors. This change would need to be accomplished by clear and concise language enacted after the legislature has the opportunity for public debate and consideration. Thus, until that change occurs, our conclusion is the term "resides" as applied to office holders in Idaho Code § 59-901 has the same meaning as the term "residency" found at Idaho Code § 34-107.

In order to answer this inquiry, it required a factual determination. Our conclusion is based upon the facts we gathered during the Attorney General's investigation. Our fact finding is not binding on the county commissioners nor the district court. If this issue is pursued beyond the conclusion in this opinion, the factual determination would have to be made by a court of law.

Very truly yours,

STEVE TOBIASON
Deputy Attorney General
Chief, Legislative Affairs Division

[1] County commissioners are the only elected county officials who must comply with residency requirements for both the county and a separate sub-district within the county. This arises from the fact that the commissioners are required to divide the county into three districts, equal in population, and one commissioner must reside in each district. Idaho Code § § 31-704, 34-617.

[2] When the language "an elector of the district he represents" was adopted in 1887, there were no primary elections and, therefore, registration to vote was only necessary prior to the general election. See Strecker v. Smith, supra.

[3] Criminal Law — State v. McDermott, supra; State v. Flower, 147 P. 786 (1915).

Domestic Relations — Willis v. Willis, 93 Idaho 261, 460 P.2d 396 (1969); Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949); Hawkins v. Winstead, 65 Idaho 12, 138 P.2d 972 (1943); Duryea v. Duryea, 46 Idaho 512, 269 P. 987 (1928); Ruebelman v. Ruebelman, 38 Idaho 159, 220 P. 404 (1923).

Education — Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960); Smith v. Binford, 44 Idaho 244, 256 P. 366 (1927).

Employment — Tiffany v. City of Payette, 92.3 ISCR 118 (1992).

Licensing — Hawkins v. Spaulding, 78 Idaho 533; 307 P.2d 222 (1957).

Medical Indigency — IHC Hospitals v. Board of Commissioners, 117 Idaho 207, 786 P.2d 600 (App.) 1990; Intermountain Health Care v. Board of Commissioners, 109 Idaho 412, 707 P.2d 1051 (1985); Cartwright v. Gem County, 108 Idaho 160, 697 P.2d 1174 (1985).

Insurance — Aid Insurance Co. (Mut.) v. Armstrong, 119 Idaho 897, 811 P.2d 507 (App.) 1991.

Public Elections — Strecker v. Smith, supra; Village of Ilo v. Ramey, 18 Idaho 642, 112 P. 126 (1910).

[4] For a detailed analysis of the legal meaning of the word "residence" compared to "domicile," read Vanderbilt Law Review, Vol. 6, p. 561 (1953). The authors begin the article with the statement, "Domicile has a reasonably constant meaning. Residence, on the other hand, is one of the most variable words in the legal dictionary."

[5] A county commissioner is appointed by the governor. Idaho Code § 59-906A. A county commissioner appointed by the governor must meet the same qualifications as any other appointed county official. Idaho Code §§ 59-906A, 59-908.

[6] The Latah County Assessor stated that Commissioner Solomon was told that both he and his wife could not claim Idaho Code § 63-105DD exemptions for different properties and, as a result, Commissioner Solomon did not pursue his tax exemption claim for the Moscow Mountain property.

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