

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
AND
SELECTED INFORMAL
GUIDELINES
FOR THE YEAR
1994**

Larry EchoHawk
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

This volume should be cited as:
1994 Idaho Att'y Gen. Ann. Rpt.

Thus the Official Opinion 94-1 is found at:
1994 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of January 12, 1994,
is found at:
1994 Idaho Att'y Gen. Ann. Rpt. 83

CONTENTS

Roster of Attorneys General of Idahov

Introductionvii

Roster of Staff of the Attorney General1

Organizational Chart of the Office of the Attorney General 2

Official Opinions—19945

 Topic Index to Opinions77

 Table of Statutes Cited78

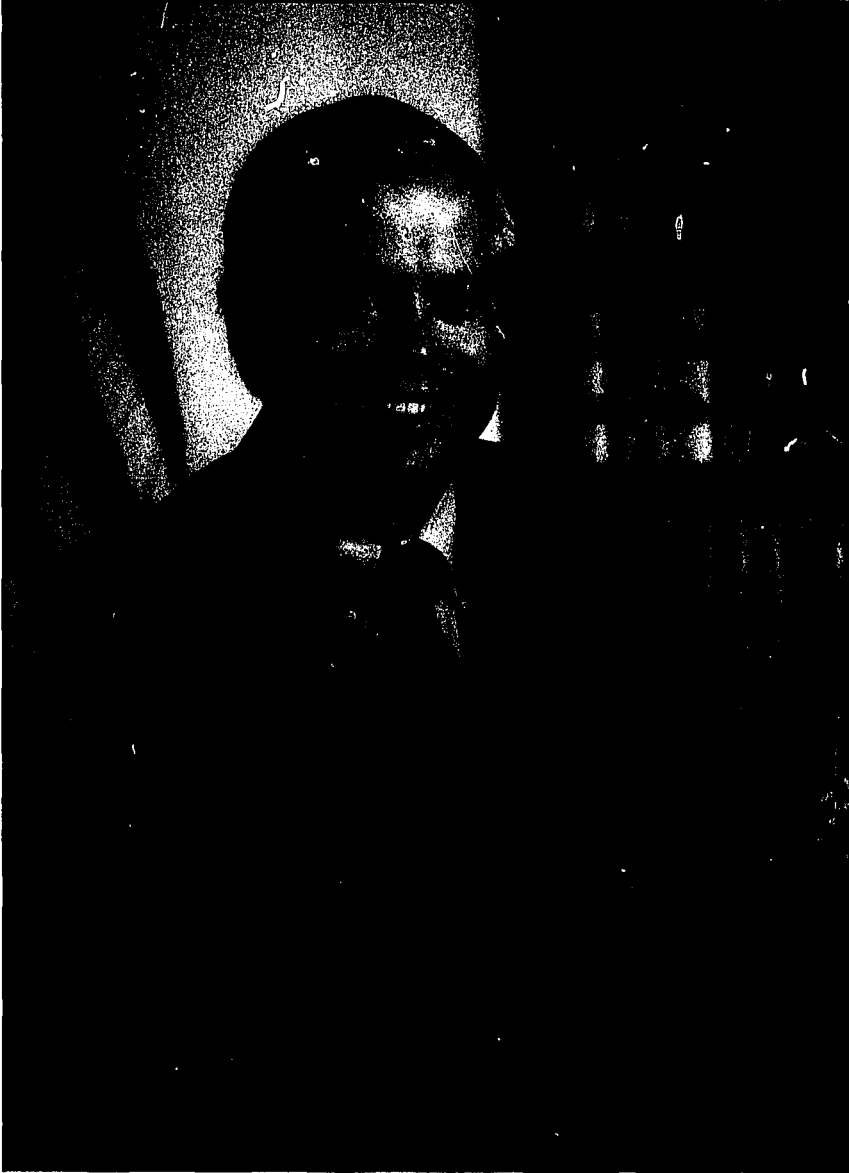
Selected Informal Guidelines—199481

 Topic Index to Selected Informal Guidelines199

 Table of Statutes Cited202

ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1904-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16).	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLEN B. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-1982
JIM JONES	1983-1990
LARRY ECHOHAWK	1991-1994



Larry EchoHawk
Attorney General

INTRODUCTION

Dear Idahoan:

As my last duty upon leaving office as Idaho's 29th Attorney General, I am pleased to present the annual compilation of the official opinions and more significant guidelines issued during calendar year 1994. This compilation would not be possible without the hard work of many dedicated public servants -- the attorneys and support staff it has been my pleasure to work with over the past four years. I dedicate this edition to them.

As I entered office, I was told by many former attorneys general that serving as a state attorney general was the most rewarding experience of their professional career. I agree wholeheartedly. During my years as Attorney General, I was privileged to meet many of the citizens of Idaho. The work of my office has been instrumental in addressing their concerns about the future of this great state. My staff and I have worked to protect state sovereignty over Idaho's water. We succeeded in overturning a federal decision regarding salmon that threatened to drain Idaho's reservoirs. We fought both the Federal Energy Regulatory Commission's efforts to erode state water rights and the federal government's excessive reserved water right claims. We succeeded in stemming the tide of nuclear waste to this state and forced compliance with Idaho's environmental laws.

My staff and I also brought a new focus to the problem of child abuse in every county in Idaho and achieved an enviable record of success in criminal appeals and prosecutions. We defended Idaho's present educational system and played a pivotal role in guaranteeing a more demanding and accountable educational system for the future.

The citizens of Idaho can rest assured that they have dedicated and competent professionals within the Attorney General's Office to address their needs. I am pleased that most of these individuals will continue to serve the incoming Attorney General. I am proud of them and the service they have provided to the people of Idaho during my tenure in office. I wish them and my successor, Alan G. Lance, all the best.

Best wishes,

LARRY ECHOHAWK
Attorney General
State of Idaho

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

1994 Staff Roster

ADMINISTRATIVE

Larry EchoHawk--Attorney General
John J. McMahon--Chief Deputy
Lois Hurless--Office Administrator
Tara Orr--Business Manager
Vivian Klein--Legislative & Public Affairs Assistant
Jake Putnam--Public Information Officer
Christine Peck--Executive Assistant
Dan Kelsay--Computer Imaging Systems Manager
Don Larson--Computer Network Coordinator
Sandra Rich--Administrative Secretary/Receptionist

DIVISION CHIEFS

Clive J. Strong--Natural Resources
David G. High--Civil Litigation
Brett DeLange--Consumer Protection
Michael Kane--Criminal
Michael DeAngelo--Health & Welfare
Steve Tobiasson--Legislative & Public Affairs
Terry Anderson--Business Regulation & Finance

DEPUTY ATTORNEYS GENERAL

Willard Abbott	Doug Conde	E. Scott Harmon	Nancy Matthews	Myrna Stahman
Peter Anderson	Ann Coslio	Michael Henderson	Stephanie Maulin	Dan Steckel
LaMont Anderson	Katherine Crawford	Thomas Holden	Nicole McKay	Michael Stoy
Brent Asay	Thomas Dominek	John Holt	Matthew McKeown	Steve Strack
James Baird	Larry Dunn	John Homan	Tim McNeese	Weldon Stutzman
Stephane Balzarini	Elaine Eberharter-Maki	Donald Howell	Jane Newby	Alyssa Swartz
David Barber	Mary Feeny	Margaret Hughes	Brian Nicholas	Evelyn Thomas
Kevin Beaton	Curt Fransen	Mary Hughes	Carl Olsson	Lynn Thomas
Mary Jo Beig	Nora Fuentes	John Hummel	Eric Pfost	Kathleen Trever
Lore Benschel	Roger Gabel	Cheri Jacobus	Shad Priest	Eric Van Orden
Richard Bergesen	Robert Gates	Michael Jones	Brad Purdy	Bill von Tagen
Craig Bledsoe	Michael Gilmore	Rinda Just	Phillip Rastier	Francis Walker
Maureen Bock-Dill	Leslie Goddard	C. Nicholas Krema	Marilyn Scanlan	Lawrence Wasden
Carol Brassey	Stephen Goddard	Lynne Krogh	Steven Scanlin	Thomas Watkins
Stevin Brooks	Fred Goodenough	Lisa Kronberg	Steve Schuster	Doug Werth
Ron Bruce	Jeanne Goodenough	Michael Larsen	Phoebe Smith	Will Whelan
Bernadette Buentgen	David Hanel	Margaret Lawless	Michael Sheeley	Lenard Wittlake
Dallas Burkhalter	Brad Hall	Chris Lockwood	Theodore Spangler	Scott Woodbury
Corey Cartwright	Susan Hamlin	Lori Mann	Nicholas Spencer	
Kevin Cassidy	Teresa Hampton	Kay Manweiler	Marcy Spilker	

PARALEGALS

Ralph Blount	Dora Morley	Jean Rosenthal	Teresa Teevan
Kathie Brack	Lynette Berggren	Paula Saul	Karen Wright

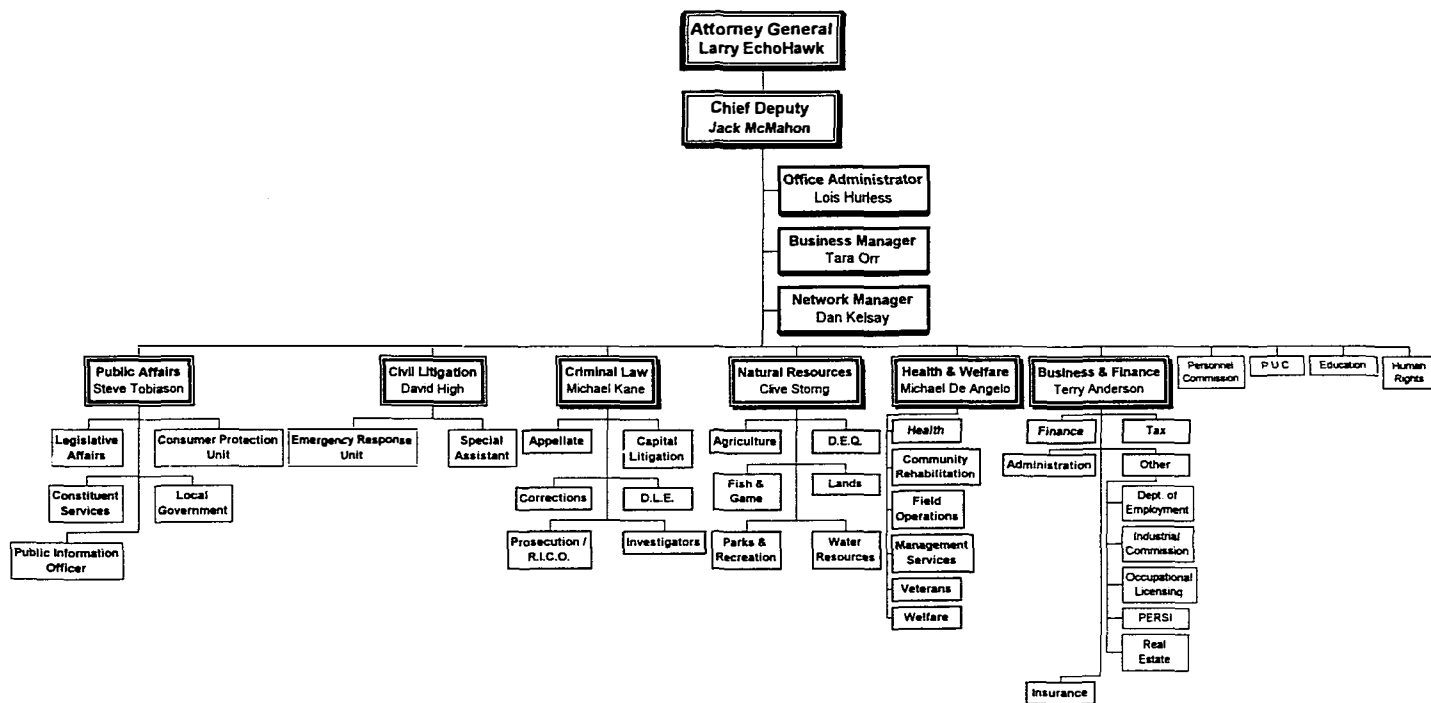
CRIMINAL INVESTIGATION

Russell Rencant--Chief Investigator
Scott Birch
Allan Ceriala
Richard LeGall
Randall Everitt
Jackie Atkins

NON-LEGAL PERSONNEL

Prudence Barnes	Carrie Clark	Marilyn Freeman	Pamela Marteness	Sharon Noice	Erica Scarrow
Janice Biggs	Jeanne Dillon	Doug Graves	Pat McCoy	Lori Peel	Sharon Schul
Kriss Bivens	Ellen Darnell	Linda Hines	Patty McNeill	Kevin Peterson	Debra Stufflebeam
Patricia Boehm	Julie Fiddy	Ann Lang	Ronda Mein	Sharon Powell	Lynae Van Horn
Karen Bolian	Laura Fanene	Jo Ann Lanham	Victoria Mundy	Elizabeth Rountree	Rebecca Williams

ORGANIZATION CHART - Office of the Attorney General



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1994**

LARRY ECHOHAWK

ATTORNEY GENERAL
STATE OF IDAHO

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

ATTORNEY GENERAL OPINION NO. 94-1

To: Honorable John Peavey
Idaho State Senate
STATEHOUSE MAIL
Boise, ID 83720

Honorable W. R. Schroeder
Ada County Assessor
650 Main Street
Boise, ID 83702

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

House Bill 389 passed by the 1993 Idaho Legislature (1993 Idaho Sess. Laws 1473) amended Idaho Code § 63-202 to require that the State Tax Commission's administrative rules relating to assessment of property for ad valorem property taxes shall comply with the following:

The rules shall provide that if property consists of six (6) or more lots within one (1) subdivision, and the lots are held under one (1) ownership and which lots are held for resale, the lots shall be valued under a method which recognizes the time period over which those lots must be sold in order to realize current market values for those lots until such time as a building permit is issued for each lot.

(Emphasis added.) The issue presented by your two requests for an Attorney General's opinion is whether this amendment to

Idaho Code § 63-202 would require the State Tax Commission to adopt rules that violate either section 2 or section 5 of article 7 of the Idaho Constitution.

CONCLUSION

If the intent of Idaho Code § 63-202, as amended by House Bill 389, is to discount assessed values for some taxpayers, but not for others, owning similar parcels, it violates the proportionality and uniformity provisions of article 7, sections 2 and 5 of the Idaho Constitution. Appraisal methods that favor persons owning multiple lots and deny equal treatment to persons owning single lots of the same type are frequently referred to as “developers’ discounts.” Such discounts are not allowed by the Idaho Constitution. Unconstitutional results must be avoided. Therefore, a reasonable alternate interpretation of H.B. 389 must be given if it is possible to construe the statute in a constitutional manner. In our opinion, H.B. 389 can be construed in a constitutional manner if construed consistent with State Tax Commission rules that already recognize the reasonable time to consummate a sale as to all taxpayers. H.B. 389 requires assessed values to reflect the reasonable time to consummate sales for persons owning six or more lots. Assuming this is not interpreted as providing a discriminatory assessment scheme and is merely recognition of the general rule which takes into account a reasonable time to consummate sales, the statute is valid. No change in State Tax Commission rules is necessary to carry out H.B. 389 in a constitutional manner.

ANALYSIS

1. Introduction

The 1993 session of the Idaho Legislature, by H.B. 389, amended Idaho Code § 63-202. 1993 Idaho Sess. Laws 1473. The question asked is whether the amendment violates either the proportionality provision of section 2 or the uniformity provision of section 5 of article 7 of the Idaho Constitution.

Section 2 of article 7 requires that property be taxed “in proportion to” its value. It provides:

Section 2. Revenue to be provided by taxation.—The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided.

Section 5 requires that property tax levies “be uniform” on all nonexempt property within the boundaries of the governmental entity levying the tax. It provides in pertinent part:

Section 5. Taxes to be uniform—Exemptions.—All taxes shall be uniform upon the class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal

The requirement that taxes be uniform applies to property taxes and is self-enacting. Orr v. State Board of Equalization, 3 Idaho 190, 28 P. 416 (1891).

The mandate of these two sections of the Idaho Constitution was concisely stated in Chastain's, Inc. v. State Tax Commission, 72 Idaho 344, 348, 241 P.2d 167, 171 (1952), when the Idaho Supreme Court stated:

The Constitution requires that for tax purposes the ad valorem tax must be uniform and on the same basis of valuation as other property in the county, and if this requirement of uniformity has not been attained and retained, then the mandate of Article VII, Sections 2 and 5 of the Constitution, has been violated. Uniformity in taxing implies equality in the burden of taxation and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of tax.

(Citations omitted.) In Merris v. Ada County, 100 Idaho 59, 63, 593 P.2d 394, 398 (1979), the court stated:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in Id. Const. Art. 7, § 5, *i.e.*, that each taxpayer's property bear the just proportion of the property tax burden.

Idaho Code § 63-202 requires the State Tax Commission to promulgate rules and distribute them to each county assessor and board of county commissioners directing the manner in

which market value for assessment purposes is to be determined for the purpose of ad valorem taxation. The State Tax Commission must require each assessor to find market value for assessment purposes of all the property within his county using recognized appraisal methods and techniques.

As required by this statute, the State Tax Commission has promulgated such rules for county authorities to follow. State Tax Commission Property Tax Rule 204.01 states:

Market value is that amount of United States dollars or equivalent for which, in all probability, a property would exchange hands between a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment.

(Emphasis added.) This conforms with the command of Idaho Code § 63-202 to use recognized appraisal methods and techniques.¹

With this introduction, it is possible to restate the question presented: May the State Tax Commission adopt rules that conform to this newly enacted statutory requirement and that do not also violate section 2 and section 5 of article 7 of the Idaho Constitution?

2. Presumption of Constitutionality

Statutes are presumed to be constitutional, and all reasonable doubts as to constitutionality must be resolved in favor of validity. Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542

(1969). Appellate courts are obligated to seek an interpretation of a statute that will uphold its constitutionality. State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985). An analysis of the constitutionality of the H.B. 389 amendment to Idaho Code § 63-202 must begin with the assumption that the amendment is constitutional. If doubts as to the amendment's constitutionality arise, an interpretation must be sought that will preserve the amendment's constitutionality. Cowles Publishing Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

At the same time, when applying legislative acts, there is a duty to ascertain and give effect to the legislative intent. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1980). Standard rules of statutory construction require giving effect to the legislature's intent and purpose, and to every word and phrase employed. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

3. Effect of House Bill 389

Sponsors of H.B. 389 expressed an intent to require the State Tax Commission to mandate by rule the use of an appraisal method commonly known as the "developers' discount."² The rationale underlying the developers' discount is that valuing each lot independently and allowing a reasonable time to consummate the sale of each single lot does not yield current market value when many lots are on the market.³ Supporters of the discount argue that a reasonable length of time necessary to sell a lot when only one lot is for sale is not the same period as a reasonable length of time necessary to sell a given lot when many lots are on the market. Mandating recognition of this difference when assessing six lots held under one ownership in a single subdivision is seen as necessary to correctly determine market values for such lots.

However, if the H.B. 389 amendment to Idaho Code § 63-202 is read to mean that the developers' discount is to be applied only to some taxpayers' properties, it creates a non-uniform mode of assessment that results in other taxpayers' properties bearing an unjust proportion of the property tax burden. This would be an unconstitutional result.

An example makes this clear. Suppose there are seven identical lots in the same subdivision for sale. Six of them are held by one owner. Another owner has only one lot. This reading of the H.B. 389 amendment to Idaho Code § 63-202 would require that each of the six lots held under one ownership be assessed in a way designed to result in each of those lots having a market value for assessment purposes less than that of the single lot held under different ownership. The sole criterion for assessing one lot higher than the other six is ownership. Given the constitutional requirements of proportionality and uniformity, it is impossible to defend applying different assessment techniques to lots based solely on ownership.

The reason this is so was well illustrated very recently by the Utah Supreme Court in Board of Equalization v. Utah Tax Commission, No. 910310, 1993 WL 479711, at *4797 (Utah Nov. 18, 1993):

Even more troublesome to us, however, is the fuzzy line of demarcation between a developer and the owner of a single lot. The premise of absorption valuation is that by listing all of his or her lots for sale, a developer gluts the market—the number of lots for sale exceeding the number of willing buyers. In this predicament, the developer is forced to sell lots over time as willing buyers

become available. This reasoning, according to the Commission, justifies a developer discount reflecting the absorption period. However, the seller of a single lot is in the same predicament. By listing his or her single lot for sale, an owner competes with all other sellers of similar lots for a sale to a limited number of willing buyers. It is possible, and in many cases probable, that the single lot will not be sold in the first tax year. The number of sales the market will bear impacts single lot owners and developers uniformly, but the Commission, by granting an absorption discount, softens the blow exclusively for the developers.

Whether a reasonable length of time necessary to sell a lot when only one lot is for sale is or is not the same period as a reasonable length of time necessary to sell a given lot when many lots are on the market is irrelevant. What is relevant is that the alleged cure for this situation provided by reading the developers' discount into the H.B. 389 amendment applies only to that select group of lot owners who own six or more lots in a single subdivision. Thus, certain lot owners are favored by the discount while other property taxpayers bear that part of the tax burden which the favored taxpayers escape. This obviously violates the policy embodied in the Idaho Constitution, as elucidated by the Idaho Supreme Court, "that each taxpayer's property bear the just proportion of the property tax burden." Merris v. Ada County, 100 Idaho at 63, 593 P.2d at 398. It violates this policy by requiring non-uniformity in the mode of assessment. This is contrary to the dictates of article 7, sections 2 and 5 of the Idaho Constitution. See Chastain's, Inc. v. State Tax Commission, 72 Idaho 344, 241 P.2d 167 (1952).

Other states with uniformity provisions in their constitutions have also found the developers' discount to be incompatible with those provisions. The Michigan Supreme Court addressed the developers' discount in Edward Rose Building Co. v. Independence Township, 462 N.W.2d 325 (Mich. 1990). A developer owned 100 developed, vacant lots in a subdivision. The developer argued that he was entitled to a discount to reflect "holding of wholesale costs for marketing, financing and risk." He maintained that the lots should be valued as a group sales transaction. The local appraiser valued the lots by comparing sales of individual lots. The court held that the developers' discount violated the state constitution's uniformity requirement. The court said:

It is well established that the concept of uniformity requires uniformity not only in the rate of taxation, but also in the mode of assessment. The "controlling principle" is one of equal treatment of similarly situated taxpayers.

462 N.W.2d at 333-34 (citations omitted).

The Oregon Supreme Court addressed the developers' discount twice. The first time the court dealt with the issue, Oregon's statutes did not provide for the discount. In First Interstate Bank v. Department of Revenue, 760 P.2d 880 (Or. 1988), the court held that the use of the developers' discount method of appraisal was inappropriate.⁴

In 1989, the Oregon Legislature enacted a developers' discount. It provided that four or more lots in a single subdivision held by a single owner were to be appraised using the developers' discount method. In Mathias v. Department of Revenue, 817 P.2d

272 (Or. 1991), the court held that the statute violated the uniformity requirements of the Oregon Constitution. Oregon's uniformity requirement provides that "all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." This language is virtually identical to that of the Idaho Constitution found in article 7, section 5.

4. Alternative Effects of House Bill 389

When the Idaho Legislature enacts a statute it should be presumed to have acted within the scope of its constitutional authority. Olson v. J.A. Freeman Co. 117 Idaho 706, 971 P.2d 1285 (1990). Thus, a statute will be construed so as to avoid conflict with the constitution. AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986). In Union Pac. R.R. Co. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946), the Idaho Supreme Court construed a statute relating to refunds of fuels taxes to avoid attributing an unconstitutional intention to the legislature. The court said:

Furthermore, a denial of refunds to all non-highway users would necessarily include appellant and other companies operating railroads in interstate commerce. We cannot attribute to the legislature an intent to deny refunds of the one cent per gallon additional tax to *all* non-highway users, because that would amount to holding the legislature designedly and willfully intended to violate the commerce clause of the Federal Constitution . . . by placing a direct burden on interstate commerce which, of course, it could not do.

66 Idaho at 688, 166 P.2d at 930 (citations omitted).

A statutory provision will not be deprived of its potency if a reasonable alternative construction is possible. State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972). In this instance, a reasonable alternative construction is possible. Rather than find the legislature acted beyond its constitutional authority when it amended Idaho Code § 63-202 by H.B. 389, it is better to conclude that, as amended, that code section incorporates the principle that a proper determination of market value requires recognition of the time required to make a sale of property at a price that reflects its market value. See footnote 1 of this opinion. H.B. 389 directs the State Tax Commission to provide rules which recognize the time period over which lots must be sold. As previously discussed, the State Tax Commission's Property Tax Rule 204.01 already embodies appraisal practices that recognize a reasonable time in which to consummate a sale. Therefore, current rules already comply with the direction of H.B. 389. Further refinement of the State Tax Commission's rules and practice is unnecessary.

5. Implications for Taxing Districts

This construction avoids another practical difficulty for counties and taxing districts that rely on property tax revenues. There exists the possibility that taxing district finances may be adversely affected if the State Tax Commission's rules required and county assessors applied the developers' discounts. Should a group of lot owners who do not qualify for the developers' discount dispute their assessed valuations, the court may well hold that the appropriate remedy is to lower the valuations of the protesting lot owners to be in accord with the lots that do qualify for the discount. In In re Farmer's Appeal, 80 Idaho 72, 325 P.2d 278 (1958), the Idaho Supreme Court held this was the appropriate remedy for a property owner who rightfully complained that the methods used to assess his property resulted in an assessed

valuation that was too high when compared with other similar property. The court said:

Where certain property is assessed at a higher value than all other property and a standard in determining the value for assessment purposes is used, which does not conform to the standard generally used, the taxpayer is entitled to a reduction in conformance to the standard used in assessing other property.

80 Idaho at 79, 325 P.2d at 285. The result would be loss of revenues and inequitable tax consequences to those who don't complain about the assessment methods.

CONCLUSION

The amendment to Idaho Code § 63-202 cannot be interpreted to create what is commonly referred to as the developers' discount. If it did, it would violate article 7, sections 2 and 5 of the Idaho Constitution. Such a reading might also force other taxpayers to challenge their assessed valuations on the grounds that developers are systematically assessed at lower rates. The remedy might well be to lower the assessed values of the complaining taxpayers. A better interpretation is that the present State Tax Commission rules are in full compliance with the mandate of Idaho Code § 63-202 both before and after the 1993 amendment because those rules already require assessors to take into account a reasonable time allowed to consummate the sale of the property being assessed.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article 7, section 2.

Article 7, section 5.

2. Idaho Statutes:

Idaho Code § 63-202.

3. Idaho Cases:

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

Chastain's Inc. v. State Tax Commission, 72 Idaho 344, 241 P.2d 167 (1952).

Cowles Publishing Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1980).

In re Farmer's Appeal, 80 Idaho 72, 325 P.2d 278 (1958).

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

Merris v. Ada County, 100 Idaho 59, 593 P.2d 394 (1979).

Olson v. J.A. Freeman Co., 117 Idaho 706, 971 P.2d 1285 (1990).

Orr v. State Board of Equalization, 3 Idaho 190, 28 P. 416 (1891).

Sprenger Grubb & Associates v. Idaho Board of Tax Appeals. et al., Fifth Judicial District Case No. 17059.

State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972).

State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985).

Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

The Hosac Company, Inc., et al. v. Ada County Board of Equalization, Fourth Judicial District Case No. 96002.

Union Pac. R.R. Co. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946).

4. Other Cases:

Board of Equalization v. Utah Tax Commission, No. 910310, 1993 WL 479711, at *4797 (Utah Nov. 18, 1993).

Edward Rose Building Company v. Independence Township, 462 N.W.2d 325 (Mich. 1990).

First Interstate Bank v. Department of Revenue, 760 P.2d 880 (Or. 1988).

Mathias v. Department of Revenue, 817 P.2d 272 (Or1991).

DATED this 25th day of January, 1994.

LARRY ECHOHAWK
Attorney General

Analysis by:

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

¹ J. Eckert, Ph.D., Property Appraisal and Assessment 53 (International Association of Assessing Officers, 1990):

Market price approximates market value and value in exchange under the following assumptions:

1. No coercion or undue influence over the buyer or seller in an attempt to force the purchase or sale.
2. Well-informed buyers and sellers acting in their own best interests.
3. A reasonable time for the transaction to take place.
4. Payment in cash or its equivalent.

(Emphasis added.)

² If this is the intent, the “developers’ discount” is by no means limited to developers. Under the statutory language added by H.B. 389, some developers may not qualify for the discount; some property owners who are not developers may qualify for it.

³ There is another argument sometimes presented to justify the developers’ discount. This argument is that developers often make multi-lot sales. Supporters of the discount maintain that it is inappropriate to value multi-lot sales using the single lot market. This position has flaws which need not concern us here since the multi-lot market argument does not support the developers’ discount as embodied in the H.B. 389 amendment. Idaho Code § 63-202, as amended by H.B. 389, does not give the developers’ discount to all lots held for multi-lot sale; nor does it deny the discount to lots that are not held for multi-lot sales. For example, six lots held by one owner, but located in different subdivisions, do not qualify for the developers’ discount even if they are held for sale as a package. On the other hand, six lots held

by one owner located in one subdivision do qualify for the discount even if they are on the market for single lot sales. The H.B. 389 amendment does not address the “different market” argument.

⁴ Similarly, two Idaho district courts have recently refused to apply the developers’ discount in cases for years prior to the effective date of the H.B. 389 amendment to Idaho Code § 63-202. The cases are The Hosac Company, Inc., et al. v. Ada County Board of Equalization, Fourth Judicial District Case No. 96002, and Sprenger Grubb & Associates v. Idaho Board of Tax Appeals et al., Fifth Judicial District Case No. 17059.

ATTORNEY GENERAL OPINION NO. 94-2

To: The Honorable Bruce Newcomb
The Honorable Celia Gould
Idaho State Representatives
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED

Must a nutrient management plan developed by the Idaho Department of Health and Welfare pursuant to Idaho Code § 39-105(3)(o) be reviewed by the Board of Health and Welfare and the legislature prior to adoption and implementation?

CONCLUSION

Idaho Code § 39-105(3)(o) is ambiguous on whether the board and the legislature must review the plan prior to its adoption. Rules of statutory construction, however, suggest that the department is required to engage in formal rulemaking to adopt and implement the plan, pursuant to the Idaho Administrative Procedure Act (APA), Idaho Code §§ 67-5201 *et seq.* Therefore, the rule is subject to legislative review pursuant to Idaho Code § 67-5223 and Idaho Code § 67-5291. Further, the limitation on authority granted to the department and the broad authority granted the board supports the conclusion that the plan is subject to review by the board.

BACKGROUND

In 1989, the Idaho Legislature amended the Environmental Protection and Health Act to include the Nutrient Management

Act at Idaho Code § 39-105(3)(o) as a result of legislative concerns about the impact of nutrients on water quality and to ensure state-wide consistency in developing the plan. 1989 Idaho Sess. Laws 762. The act requires the department to formulate and adopt a “comprehensive state nutrient management plan for the surface waters of the state of Idaho in consultation with . . . federal agencies, local units of government, and with public involvement.” *See* Idaho Code § 39-105(3)(o). The act requires that the plan “shall be developed on a hydrologic basin unit basis” throughout the state “with a lake system emphasis.” *Id.* Each component of the plan must “identify nutrient sources [to state waters]; the dynamics of nutrient removal, use and dispersal; and preventative or remedial actions where feasible and necessary to protect the surface waters of the state.” *Id.* Once adopted, “[t]he plan shall be used by the department and other appropriate agencies . . . in developing programs for nutrient management.” *Id.* The act also requires that “[s]tate and local units of government shall exercise their police powers in compliance with the . . . plan.” *Id.*

The act requires the department to recommend rules for adoption by the board which set forth “procedures for development of the plan, including mechanisms to keep the public informed and encourage public participation in plan development.” The act also requires the department to recommend to the board rules establishing procedures to determine consistency of local nutrient management programs adopted by any local unit of government. *Id.* Finally, the act requires the department to “formulate and recommend to the board for adoption rules and regulations as necessary to implement the plan.” *Id.*

In 1990, the department recommended and the board approved Rules and Regulations for Nutrient Management,

IDAPA 16.01.16000 through -.16999. The rules establish procedures for development of the plan, including mechanisms to consult with and inform governmental agencies, affected industries and the public through a “technical advisory committee” and a “public advisory committee.” *See* IDAPA 16.01.16100.02. The rules provide that each component of the plan “shall become effective on the date of its adoption by the department” and that the plan will be considered a component of the state water quality management plan.¹ *See* IDAPA 6.01.16100.08. The rules also set forth procedures to determine consistency of local nutrient management programs with the comprehensive state nutrient management plan. The department has not formulated or recommended to the board, at this time, a comprehensive nutrient management plan or any rules to implement the plan. The department is involved, however, with development of a component of the plan for the middle Snake River.

ANALYSIS

1. The Plan Must Be Adopted Pursuant to the APA and Is Subject to Legislative Review

Idaho Code § 39-105(3)(o) specifically grants authority to the department to promulgate and implement a comprehensive nutrient management plan. Idaho Code § 39-105(3)(o) is ambiguous, however, on whether the board and/or the legislature must review and approve the nutrient management plan formulated by the department. This ambiguity exists because of the statute’s lack of clarity regarding whether the plan must be adopted pursuant to the APA. If the APA applies, then legislative review is permitted pursuant to Idaho Code § 67-5223 prior to the adoption and implementation of the proposed rule. Further, the rule would be subject to legislative review pursuant to Idaho Code

§ 67-5291 after implementation, to ascertain whether the rule comports with the legislative intent of the statute under which the rule was adopted.

Idaho Code § 39-105(3)(o) mandates that the department shall consult with appropriate state and federal agencies, with local governmental units and invite public comment consistent with the APA in the formulation of the plan. This provision suggests the plan must be adopted pursuant to the APA. This conclusion is buttressed by the provision that “[s]tate and local units of government shall exercise their police powers in compliance with the comprehensive state nutrient management plan” *Id.* This language requires that upon adoption the plan will have the force and effect of law since state and local governments “shall” comply with the plan. *Id.* In order for the plan to have the force and effect of law, as it applies to the state and local government police powers, the department must adopt the plan as a formal rule under the APA. This requirement is explained in the comments to Idaho Code § 67-5201(16), the Administrative Procedure Act’s definition of a rule:

[A]n agency may promulgate a rule only by complying with the procedure set out in the Administrative Procedure Act. If the agency has not complied with these requirements, it has not promulgated a “rule” and the statement lacks the force and effect of law. If an agency wishes to impose legal obligations on a class of persons, it must promulgate a rule.

Where ambiguity exists in a statute it is appropriate to engage in statutory construction in order to ascertain and give effect to the legislature’s intent. Easley v. Lees, 111 Idaho 115,

721 P.2d 215 (1986). One method of discerning legislative intent is to examine the purpose of the statute and its structure as a whole. Lelifeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983); *appeal after remand*, 111 Idaho 897, 728 P.2d 1306 (1986). Further, in construing a statute, it is necessary to give effect to every word, clause and sentence of the statute adopting the construction that does not deprive any provision of the statute of its meaning. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). Finally, in the face of statutory ambiguity, statutory interpretation may be accomplished by reference to other statutory provisions in the same title or chapter reading the related statutory provisions *in pari materia* in order to determine the legislative intent. Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991 (1991).

Reading Idaho Code § 39-105(3)(o) as a whole, it is apparent that the legislature intended that the plan would be adopted pursuant to the APA. First, it is necessary to give effect to the statutory language that requires the department to promulgate a comprehensive state nutritional management plan in consultation with appropriate governmental entities and with public involvement consistent with the APA. Second, Idaho Code § 39-105 requires that the plan shall have the force and effect of law in order for governmental entities to exercise their police power to require compliance—only a rule has the force and effect of law. An interpretation of Idaho Code § 39-105(3)(o) allowing the department to promulgate the plan without review as provided in the APA would render each of the afore-referenced provisions of the statute meaningless. Therefore, in order to give effect to Idaho Code § 39-105(3)(o) as a whole, the plan must be adopted pursuant to the APA. Consequently, the plan is subject to legislative review prior to its adoption pursuant to Idaho Code § 67-5223 and after its adoption pursuant to Idaho Code § 67-5291.

2. The Plan Is Subject to Review by the Board

The conclusion that the plan must be adopted pursuant to the APA does not resolve the question of whether the board must review the plan. The answer to this question turns on who the legislature intended would have the duty to promulgate the rules. Idaho Code § 39-105(3)(o) provides that the board shall promulgate the rules to implement the plan. This suggests the plan must be submitted to the board. Other statutory provisions within title 39 (Health and Safety), chapter 1 (department of Health and Welfare), support this interpretation. Idaho Code § 39-105(2) grants the department the authority to regulate subject to review by the board. Idaho Code § 39-105(2) provides that:

The director shall, pursuant and subject to the provisions of the Idaho Code, and the provisions of this act, formulate and recommend to the board, rules, regulations, codes and standards as may be necessary to deal with problems relating to personal health, water pollution, air pollution, visual pollution, noise abatement, solid waste disposal, and licensure and certification requirements pertinent thereto, which shall, upon adoption by the board, have the force of law relating to any purpose which may be necessary and feasible for enforcing the provisions of this act, including, but not limited to the prevention, control or abatement of environmental pollution or degradation and the maintenance and protection of personal health.

In addition, Idaho Code § 39-105(3) qualifies the powers and the duties of the department to be subject to “the rules, regulations, codes or standards adopted by the board”

Further, Idaho Code § 39-107(8) broadly defines the powers of the board as the entity that adopts, amends or repeals all rules, codes and standards of the department dealing with matters necessary for protecting the environment or health of the state. An interpretation of Idaho Code § 39-105(3)(o) allowing the department to formulate and implement the plan without review by the board would contradict the limitation on the department's authority provided in Idaho Code § 39-105(2), (3) and the board's grant of authority provided for in Idaho Code § 39-107(8).

Therefore, the department is required to engage in formal rulemaking to adopt and implement the plan. Formal rulemaking necessitates approval by the legislature. Further, review by the board is required by reason of the limitation on the department's authority and the broad grant of the board's authority.

AUTHORITIES CONSIDERED

1. Federal Statutes and Regulations:

33 U.S.C. §§ 1251 *et seq.*, Federal Water Pollution Control Act of 1972.
40 C.F.R. part 130.

2. Idaho Code:

§ 39-105.
§ 39-105(2).
§ 39-105(3).
§ 39-105(3)(o), Nutrient Management Act.
§ 39-107(8).
§§ 67-5201 *et seq.*

§ 67-5201(16), Administrative Procedure Act.

§ 67-5223.

§ 67-5291.

3. Idaho Cases:

Easley v. Lees, 111 Idaho 115, 721 P.2d 215 (1986).

George W. Watkins Family v. Messenger, 112 Idaho 537, 797 P.2d 1395 (1990).

Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991 (1991).

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

4. Other Authorities:

1989 Idaho Sess. Laws 762.

IDAPA 16.01.16000 *et seq.*

IDAPA 16.01.16100.02.

IDAPA 16.01.16100.08.

DATED this 16th day of February, 1994.

LARRY ECHOHAWK
Attorney General

Analysis by:

C. NICHOLAS KREMA
Deputy Attorney General
Natural Resources Division

¹ Development of a state water quality management plan is required by the United States Environmental Protection Agency to fulfill minimum requirements of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251 *et seq.* See 40 C.F.R. pt. 130.

ATTORNEY GENERAL OPINION NO. 94-3

To: Olivia Craven, Executive Director
Commission for Pardons and Parole
280 N. 8th Street, Suite 140
STATEHOUSE MAIL
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Idaho Commission for Pardons and Parole commute a sentence during a fixed term under the Unified Sentencing Act?

CONCLUSION

The commission does have the power to commute a sentence during a fixed term.

ANALYSIS

In 1984, the attorney general issued an opinion stating that the Idaho Commission for Pardons and Parole had the power to commute fixed sentences under then existing law. 1984 Idaho Att'y Gen. Ann. Rpt. 75. The opinion was based in part on State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979), which held that then existing Idaho Code § 19-2513A (creating a fixed sentence structure) was intended solely to limit the commission's power of parole and did not restrict either the power of pardon or of commutation. This was so because the parole power is a creature of statute, whereas the power to pardon or commute was found in the Idaho Constitution as it then existed:

[The commission], or a majority thereof, shall have power to grant commutations and pardons after conviction of a judgment, either absolutely or upon such conditions as they may impose in all cases against the state except treason or conviction on impeachment.

Art. 4, § 7 (1947). The statutory implementation of this section was Idaho Code § 20-213, which set up procedures for notification if applications for commutation were scheduled to be heard by the board.

In 1986, the legislature passed the Unified Sentencing Act. Idaho Code § 19-2513. In so doing, the legislature created a sentencing system whereby each convicted felon would be sentenced to a fixed term to be followed by an optional indeterminate term. This system was created in large part because of the legislature's sense that there was little certainty in Idaho's sentencing and release process:

There are two major policy justifications for this proposal. First, by making the minimum period fixed and not subject to reduction, greater truth in sentencing is achieved. At the time of sentencing everyone knows the minimum period which must be served. Second, greater sentencing flexibility is achieved. . . . The court can impart the specific amount of punishment it feels to be just and still impose an indeterminate period to be used by the Commission for Pardons and Parole for rehabilitation and parole purposes.

Statement of Purpose, H.B. 524 (1986).

Consonant with this intent, the legislature appears to have attempted to affect not only parole during the fixed term, but other methods whereby a felon could have his or her incarceration time reduced. Idaho Code § 19-2513 states in pertinent part:

During a minimum term of confinement, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service.

The 1986 legislature also passed Senate Joint Resolution No. 107. That Resolution proposed a constitutional amendment to art. 4, § 7. The resolution provided in pertinent part that the board's power to pardon and commute would only be "as provided by statute." The Statement of Purpose to the resolution stated in its entirety:

This legislation proposed [*sic*] to amend the Constitution of the State of Idaho by removing outdated language and provides that the power of the Board of Pardons to grant commutations and pardons after conviction and judgment shall be only as provided by statute.

The people of the state ratified the amendment in the election of November 1986. The Statement of Meaning and Purpose on the ballot forms from that election gives significant guidance as to the intent of the amendment:

Meaning and Purpose. The purpose of this proposed amendment . . . is to remove from consti-

tutional status the powers of commutation and pardon, which are held by the Board of Pardons, and to make the powers of commutation and pardon subject to amendment by statute by the Legislature.

Effect of Adoption. Presently, the Board of Pardons has the constitutional powers of commutation and pardon. Because these powers are constitutional, they cannot be amended or changed by statutory enactment and are not subject to review. If SJR 107 is adopted, the commutation and pardon power will no longer have a constitutional status; they will be subject to amendment by statutory enactment. The Legislature would have the authority to set policies and procedures for commutations and pardons and could also review Board commutation and pardon decisions.

Assuming that the amendment transmuted the commission's power to commute from constitutional to statutory power, two questions remain: (1) Has the legislature passed any statute designed to regulate the previously unlimited power of the commission to commute any and all sentences? (2) Can the Unified Sentencing Act be interpreted to mean that the power to commute only exists for indeterminate sentences?

Idaho Code § 20-213, which merely sets up time and notification procedures for the commission regarding pardon or commutation proceedings, has remained unchanged. In 1988, the legislature passed a significant amendment to Idaho Code § 20-240. This section had previously dealt with respites, reprieves and pardons by the governor. The legislature added a section to the statute dealing with commutation:

The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons and commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor. No commutation or pardon for such named offenses shall be effective until presented to and approved by the governor. Any commutation or pardon recommendation not so approved within thirty (30) days of the commission's recommendation shall be deemed denied.

Plainly, the commission's power to commute is left unfettered in all except six classes of cases. Even as to those types of cases, no attempt has been made to limit the commission's discretion beyond the requirement for gubernatorial approval.

Can Idaho Code § 19-2513's prohibition against credit, discharge or reduction for good conduct be interpreted as such a limitation? Applying general rules of statutory construction, there are several reasons why this question must be answered in the negative. First, the statute doesn't mention commutation or pardon. Nor was commutation or pardon addressed in the act's statement of purpose. Generally, where a statute specifies certain

things, the designation of such things excludes all others. Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

In addition, when the legislature first passed Idaho Code § 19-2513, it had no power to affect commutations. That power would not come until the ratification of the amendment to art. 4, § 7. The legislature is presumed to have full knowledge of existing law when it enacts or amends a statute. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Finally, the legislature gave full discretion over commutations to the commission two years after the passage of the Unified Sentencing Act. To the extent that the Sentencing Act can be argued to conflict with the unlimited power of the commission found in Idaho Code § 20-240, the later expression of legislative intent will control over the earlier. Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Given all the above, the informal letter sent to the commission in 1992, which was based solely on an interpretation of the Unified Sentencing Act without regard to other statutory provisions, must be retracted. Because there are no legislative enactments that limit the power to commute, the commission may commute fixed term sentences in its discretion.

It has been suggested that an opinion regarding the power to commute as being unaffected by the Unified Sentencing Act would “open the floodgates” to scores of applications from prisoners serving fixed terms who would seek commutations as a substitute for parole hearings. In order to address this concern, it is necessary to begin with an understanding of the commutation power itself and compare it to the power to parole:

est through “substantive limitations on official discretion.” Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747, 75 L. Ed. 2d 813 (1983). “The search is for *relevant* mandatory language that expressly requires the decision-maker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question.” Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 464, n.4, 109 S. Ct. 1904, 1910, n.4, 104 L. Ed. 2d 506 (1989).

Reviewing the Idaho Constitution and Idaho Code § 20-213, as well as section 50.08 of the Policy and Procedures of the Idaho Commission for Pardons and Parole, one finds nothing that “expressly” requires anything of the commission that could be considered a limitation on its discretion. Indeed, no limitations are even implied. In truth, Idaho law only creates a “unilateral hope,” which affords no due process protection. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S. Ct. 2460, 2465, 69 L. Ed. 2d 158 (1981) (the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or entitlement).

Hence, the commission need not fear that it would be hamstrung by commutation applications. The commission has the ability to be selective about which applications it hears and, indeed, may summarily refuse to hear applications that, in its discretion, are determined to be unworthy of review.

AUTHORITIES CONSIDERED

1. Constitutions:

Idaho Constitution, art. 4, § 7 (1947).

Parole and commutation are mutually exclusive powers.

The Constitution speaks only of commutations or pardons. These differ from paroles. A pardon does away with both the punishment and the effects of a finding of guilt. A commutation diminishes the severity of a sentence, e.g. shortens the term of punishment. A parole does neither of these things. A parole merely allows a convicted party to serve part of his sentence under conditions other than those of the penitentiary. The party is not “pardoned” of his guilt, nor is a portion of his sentence “commuted.”

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975). The Idaho statute on parole makes it explicit that parole shall not be granted “as a reward of clemency and it shall not be considered to be a reduction of sentence or pardon.” Idaho Code § 20-223(c).

Parole in Idaho has been described as a “mere possibility” which is not protected by due process rights. Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988). This is so because no substantive limitations are placed upon the commission’s decision-making regarding parole by either the constitution or by statute. Similarly, the same description must apply to commutations.

There is no explicit right to or liberty interest in clemency created either by art. 4, § 7, or Idaho Code §§ 20-213 or 20-233.

This being so, the next step is to look to the implementing legislation to see if the state has somehow created a liberty inter-

2. Idaho Code:

§ 19-2513.

§ 20-213.

§ 20-223.

§ 20-240.

3. Idaho Cases:

Peck v. State, 63 Idaho 375, 120 P.2d 820 (1942).

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

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

Union Pacific R. Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982).

Vittone v. State, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

4. Other Cases:

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

5. Other Authorities:

1984 Idaho Att'y Gen. Ann. Rpt. 75.

Idaho Commission for Pardons and Parole Policy and Procedures § 50.08.

Senate Joint Resolution No. 107.

Statement of Purpose, H.B. 524 (1986).

DATED this 6th day of July, 1994.

LARRY ECHOHAWK
Attorney General

Analysis by:

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

ATTORNEY GENERAL OPINION NO. 94-4

TO: Honorable Jerry L. Evans
State Superintendent of Public Instruction
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Do fees charged to students attending public schools fall within the meaning of "fees" set forth in Senate Bill No. 1490?
2. If so, how must a school district comply with the advertising requirement set forth in Idaho Code § 63-2225, since such fees are not assessed against property?

CONCLUSION

1. Yes. All fees charged by school districts fall within the definition of "fees" set forth in Senate Bill (S.B.) No. 1490.
2. While it may not be possible to follow exactly the form of advertising set forth in Idaho Code § 63-2225, each school district must give public notice and hold a public hearing for any fee increase that exceeds 105%.

ANALYSIS

1. **School District Fees Fall Within the Mandate of S.B. No. 1490 and Must be Advertised**

S.B. No. 1490, codified as Idaho Code § 63-2224A, provides:

No taxing district may request a fee increase that exceeds one hundred five percent (105%) of the amount of the fee collected in the previous year, unless it advertises its intent to do so in a similar manner to that contained in section 63-2225, Idaho Code. Any taxing district that is required to advertise as provided in this section and which fails to do so shall have the validity of all or a portion of the fees it collects be voidable. A taxing district shall at a minimum, in the advertisement, list the amount of the fees to be collected, the source of the fees, the percentage increase, any exemptions to the fees, an average cost of the fees per person, and any appeal procedures available to the imposition of the fees.

Your letter recognized that the Idaho Constitution prohibits school districts from charging fees or costs for courses in which credit is given. Paulson v. Minidoka Cnty. Sch. Dist. No. 331, 93 Idaho 469, 463 P.2d 935 (1970). However, school districts may charge fees for voluntary activities and extra costs such as extracurricular activities, driver's education, towel or locker use, adult education courses, breakfasts and lunches, parking and similar services or activities.

The Idaho Legislature did not define "fee" in S.B. No. 1490. Thus, we must look for guidance to relevant definitions of "fee" and the rules of statutory construction to see how those definitions might be applied in this instance.

Black's Law Dictionary (5th ed. 1979) provides the following definition of a fee:

A charge fixed by law for services of public officers or for use of a privilege under control of government. A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.

(Citation omitted.)

In Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988), the Idaho Supreme Court distinguished between a “fee” and a “tax” by stating “a fee is a charge for a direct public service rendered to the particular consumer while a tax is a forced contribution by the public at large to meet public needs.” *Id.* at 505, 768 P.2d at 768.

The rules of statutory construction must also be applied. In Sherwood v. Carter, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991), the Idaho Supreme Court stated:

It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. Statutes must be interpreted to mean what the legislature intended for the statute to mean, and the statute must be construed as a whole. The clearly expressed intent of our legislature must

be given effect and there is no occasion for construction where language of the statute is unambiguous. In construing a statute, the words of the statute must be given their plain, usual and ordinary meaning.

(Citations omitted.)

In this instance, what is “clearly stated” is that a fee increase of more than 105% of the previous year’s fee amount cannot be imposed by a taxing district unless it advertises its intent to do so. If we apply the “plain, usual and ordinary meaning” to the words here, a “fee” is a charge for a particular act or service (Black’s 1979) “or a charge for a direct public service rendered to the particular consumer” (Brewster, 115 Idaho at 502, 768 P.2d at 765). Thus, it is apparent that a “fee” charged by a school district for voluntary or extracurricular activities or services falls within the legal definition of “fee” set forth in S.B. No. 1490 and that any increase over the fees of the previous year of 5% or more must be advertised.

2. A School District Must Give Notice and Hold a Public Hearing for a Fee Increase in Excess of Five Percent

Idaho Code § 63-2225 sets forth the form and content of notice of a proposed increase in taxes. The notice must include an estimated schedule of increase for a typical home of \$50,000, a typical farm of \$100,000, and a typical business of \$200,000 taxable value. The purpose of the notice is to inform taxpayers of the proposed increase by the taxing district and to put the proposal into some kind of financial perspective by allowing taxpayers to see what the tax effect might be on certain types of property.

A published notice of proposed fee increases should have the same effect—namely, to notify the readers of the proposed fee increase and of the ramifications of the fee increase. S.B. No. 1490 requires that the advertisement be in a “similar manner to that contained in § 63-2225, Idaho code.” Thus, the public notice must include the “amount of the fees to be collected, the source of the fees, the percentage increase, any exemptions to the fees, an average cost of the fees per person, and any appeal procedures available to the imposition of the fees.”

For property taxpayers, the notice required by Idaho Code § 63-2225 is primarily informational. The taxpayer does not have a choice to pay or not to pay. Applied to school district fee structures, however, the notice requirement gives the prospective payer—the student—a chance to decide whether he or she wishes to pay for the service or activity. Since Paulson prohibits school districts from charging students for courses in which credit is given, the “fee” notice will apply to areas over which the student has some discretion. And, should the student wish to argue that the proposed fee increase does, in fact, apply to an area covered by Paulson, the notice will also include information about how that student might appeal. Such an appeal would be to an Idaho district court.

While S.B. No. 1490 does not address the issue of a public hearing, it does provide that the notice requirement must be handled in a “similar manner” as the notice requirement of Idaho Code § 63-2225. That notice must invite citizens to a public hearing on the matter. Thus, it can only be concluded that the legislature intended for a public hearing to be held on the issue of fee increases. School districts can hold such public hearings at regular or special school board meetings, thus eliminating the need for special meetings solely for the purpose of reviewing the proposed fee increases.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 63-2224A.

§ 63-2225.

2. Idaho Cases:

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

Paulson v. Minidoka Cnty. Sch. Dist. No. 331, 93 Idaho 469, 463 P.2d 935 (1970).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

3. Other Authorities:

Black's Law Dictionary (5th ed. 1979).

DATED this 19th day of July, 1994.

LARRY ECHOHAWK
Attorney General

Analysis by:

ELAINE EBERHARTER-MAKI
Deputy Attorney General
State Department of Education

ATTORNEY GENERAL OPINION NO. 94-5

TO: Mr. Scott B. McDonald, Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

Per Request for Attorney General's Opinion

Dear Mr. McDonald:

QUESTIONS PRESENTED

1. Without further enabling legislation, do cities and counties have authority under Idaho and federal law to regulate the basic cable television service rate for cable television franchisees?
2. Without further enabling legislation, do cities and counties in Idaho have a right to charge a franchise fee to cable television operators?

CONCLUSION

1. Cities in Idaho almost certainly have authority under current state law to franchise cable television companies. With general franchising authority under state law, federal law allows cities to regulate the basic cable television service rate and charge a franchise fee, both subject to the conditions of federal law.
2. Counties in Idaho probably have authority under current state law to franchise cable television companies. With general franchising authority under state law, federal law

allows counties to regulate the basic cable television service rate and charge a franchise fee, both subject to the conditions of federal law.

ANALYSIS

I.

AUTHORITY OF CITIES UNDER STATE LAW

The first step in determining a city's authority under state law is to examine the statutes addressing the power and authority of cities. No statute of the State of Idaho or reported appellate decision specifically addresses whether cities have authority to regulate cable television service rates or to charge a franchise fee to cable television operators. Accordingly, the analysis must fall back upon the general statutes addressing the powers and duties of cities. This analysis must be made against the backdrop of art. 12, sec. 2 of the Idaho Constitution, which provides:

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

A. General Municipal Franchising Authority

Title 50 of the Idaho Code is entitled "Municipal Corporations." Chapter 3 of title 50 is entitled "Powers." The initial two sections of that chapter and title provide cities with the following general authority:

50-301. Corporate and local self-government powers.—Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; . . . and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

50-302. Promotion of general welfare—Prescribing penalties.—(1) Cities shall make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry . . .

Idaho Code §§ 50-328 through 50-330, three other sections in the same chapter, address municipal franchising and rates of municipal franchisees with more particularity:

50-328. Utility transmission systems—Regulations.—All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits.

50-329. Franchise ordinances—Regulations.— . . . No franchise shall be created or granted by the city council otherwise than by ordinance

50-330. Rates of franchise holders—Regulations.—Cities shall have power to regulate the fares, rates, rentals or charges made for the service rendered under any franchise granted in such city, except such as are subject to regulation by the public utilities commission.

Title 50 of the Idaho Code does not define “utility” or list what businesses (be they utilities or other businesses like common carriers) may be franchised under these sections. The term “public utility” as defined in Idaho Code § 61-129, one of the sections defining the jurisdiction and authority of the Idaho Public Utilities Commission (PUC), does not include cable television within its definition of public utilities subject to state regulation by the PUC. The question becomes whether cities may franchise utilities or other businesses under the sections quoted if those businesses are not public utilities subject to the jurisdiction of the PUC. The answer is yes.

Taxis, buses, garbage collection and cable television are among the services historically franchised by cities even though none of these businesses are subject to regulation by the PUC. *E.g.*, Yellow Cab Taxi Service v. City of Twin Falls, 68 Idaho 145, 190 P.2d 681 (1948) (City of Twin Falls franchised taxi service); Tarr v. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1055, 73 Idaho 223, 250 P.2d 904 (1952) (City of Pocatello franchised bus service); Coeur d’Alene Garbage Service v. City of Coeur d’Alene, 114 Idaho 588, 759 P.2d 879 (1988) (City of Coeur

d'Alene franchised garbage collection service); Bush v. Upper Valley Telecable Company, 96 Idaho 83, 524 P.2d 1055 (1974) (City of Idaho Falls franchised cable television and regulated its rates). *See also* Idaho Code § 61-801(k)(2), which exempts from PUC regulation under the Motor Carrier Act “taxicabs . . . performing a licensed or franchised taxicab service.”

The appellate courts of Idaho have never specifically addressed whether cities have authority to franchise cable television. In KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971), the losing applicants in the award of a franchise for cable television services within the City of Boise challenged the city council decision awarding the franchise to other persons. One of their challenges, which the Idaho Supreme Court did not reach, contended that the Boise City Council had not properly followed the procedures of Idaho Code § 50-329 regarding the award of franchises. 94 Idaho at 280-81, n.1, 486 P.2d at 992-94, n.1. But neither Bush nor KTVB reached the issue of city authority to franchise cable television.

Justice Holmes once wisely observed: “[A] page of history is worth a volume of logic.” New York Trust Company v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963, 983 (1921). History and current practice suggest that cable television franchising is within the general authority of municipalities in Idaho and other states:

In connection with the law relating to franchises, the term “public utilities” is often used. One of the distinguishing characteristics of a public utility is the devotion of private property by the owner to a service that is useful to the public, and that the public has a right to have rendered with reasonable efficiency and at proper charges, so long as it is

continued. The term implies public use and the duty to serve the public without discrimination, as distinguished from private service

Specifically, the term “public utility” is understood to refer to such things as steam and street railways, telegraphs and telephones, waterworks, gasworks, electric light plants, public utility wharves, cable television systems,¹¹ and other public conveniences and activities of the city.

¹¹ **Michigan** *Charter Tp. of Meridian v. Roberts*, 114 Mich. App. 803, 319 NW2d 678 [1982].

¹² McQuillan Mun. Corp., Franchises § 34.08 (3d ed. 1986), pp. 29-31 (footnotes unrelated to cable television omitted).

This franchising authority does not depend upon whether cable television is considered a “public utility” for purposes of state utility commission regulatory authority. Roberts, which was cited in McQuillan, held that cable television was not a “utility” within the definition of a provision of the Michigan Constitution addressing specific kinds of utilities (light, heat and power), but was nevertheless a utility within the meaning of a different section of the Michigan Constitution generally defining local franchising authority. 319 N.W.2d at 680-82. It was the latter, more general definition that determined what businesses were subject to municipal franchising; cable television fell under this broad category of services subject to municipal control under general franchising provisions of the state constitution. Accord: Sacramento Orange County Cable Communications Company v. City of San Clemente, 59 Cal. App. 3d 165, 170-72, 130 Cal. Rptr. 429, 432-

34 (1976) (although cable television is not a public utility subject to regulation by California Public Utilities Commission, it is subject to general municipal franchising statute and rate regulation); Community Tele-Communications, Inc. v. the Heather Corporation, 677 P.2d 330, 338-39 (Colo. 1986) (cable television is a proper subject for city franchising under generally worded constitutional provision); City of Owensboro v. Top Vision Cable Company of Kentucky, 487 S.W.2d 283, 287 (Ky. 1972) (under generally worded constitutional provision city may franchise kinds of businesses in addition to utility services specifically listed in the constitution, *e.g.*, garbage collection, taxis, buses, and cable television); Shaw v. City of Asheville, 152 S.E.2d 139, 145-46 (N.C. 1967) (municipal franchising authority under generally worded statute is not limited to public utilities regulated by North Carolina Utilities Commission, but includes cable television); Board of Supervisors of New Britain Township, 492 A.2d 461, 463-64 (Pa. Commw. 1985) (borough's right to regulate cable television implied from its general powers to make ordinances "expedient or necessary for the proper management, care and control of the borough . . . and the maintenance of peace, good government, safety and welfare of the borough and its trade, commerce and manufactures"); Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738, 740-42 (S.D. 1970) (cable television is a public utility within the meaning of generally worded municipal franchising statutes); City of Issaquah v. Teleprompter Corporation, 611 P.2d 741, 745-47 (Wash. 1980) (although cable television is not a public utility under specific code provisions addressing municipal ownership of public utilities, it was properly subject to terms of more general municipal franchising ordinance). *But see* Devon-Aire Villas Homeowners Association No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60 (Fla. App. 1985).

After applying the constitutional rule of art. 12, sec. 2, that cities may enact local regulations not in conflict with general laws, examining Idaho's general laws, and reviewing these cases, I conclude that cities in Idaho almost certainly have authority under state law to franchise cable television service within their city limits. From this, the next questions are: Under state law, does the right to franchise include a right to set rates? Under state law, does the right to franchise include a right to collect a franchise fee?

B. Rate Regulation Under Franchising Authority

Idaho Code § 50-330 specifically provides that "cities shall have the right to regulate the fares, rates, rentals or charges made for the service rendered under any franchise granted in such city, except such as are subject to regulation by the public utilities commission." Thus, there is no question under state law that cities have the right to regulate the rates of franchisees. *See, e.g., City of Pocatello v. Murray*, 21 Idaho 180, 120 P. 812 (1912) (before passage of Public Utilities Commission Act in 1913 preempted city regulation of water franchisee's rates, city had authority to regulate rates of water franchisee, although it had not properly exercised that authority). Moreover, the authorities cited previously strongly suggest that, even without explicit rate authority in the franchising statutes, rate authority is an incident of the franchising authority itself. As another commentator says:

In granting franchises, local governments can ordinarily condition the grant as the governing body deems proper. . . .

. . . .

Local governments have been able to include conditions in franchises, which:

(a) set rates, fares, and charges to be levied by the party accepting the franchise;⁴

⁴ *Struble v. Nelson*, 217 Minn. 610, 15 N.W.2d 101 (1944); *City of Allegheny v. Millvale, E. & S. St. Ry. Co.*, 159 Pa. 411, 28 A. 202 (1893); *Helicon Corp. v. Borough of Brownsville*, 68 Pa. Commw. 375, 449 A.2d 118 (1982).

3 Antien Municipal Corporation Law, Franchises: Public Utility Regulation § 29.03, pp. 29-14 and 29-15 (1993) (footnotes unrelated to rate regulation omitted).

C. Franchise Fees

The Idaho case law is clear that once the authority to franchise a business is established under state law, prescription of reasonable franchise fees is a necessary incident of that authority (unless franchise fees have been preempted by state law). In Alpert v. Boise Water Corporation, 118 Idaho 136, 795 P.2d 298 (1990), the court addressed the legality of cities charging franchise fees to its franchisees (both gas and water companies):

The practice of charging franchise fees as consideration for the granting of a franchise was first noted in *Boise City v. Idaho Power Co.*, 37 Idaho 798, 220 P. 483 (1923), which involved the issue of cancellation of a franchise contract where Idaho Power had purchased two competing power plants and sought to consolidate the franchises. As consideration for the granting of the franchise,

Boise City had charged a percentage of the utility's gross revenue collected from its Boise patrons. The court held that the commission had no authority to invalidate the franchise cancellation agreement entered into between Boise City and Idaho Power, and further held that the payments from the utility to the city constituted valid consideration for a valuable property right which the city surrendered.

It is well established that Idaho cities have the right to own and operate utilities and provide these services to their residents. The cities contend that their surrender of this right is valid consideration for the franchise fee charged to the utilities. We agree. The franchise agreements in the present case are contracts and the franchise fees are simply payments for consideration for the rights granted by the cities to the utilities. Idaho Const. art. 15, § 2; I.C. § 40-2308.

118 Idaho at 144, 795 P.2d at 306. The final sentence quoted above cited art. 15, sec. 2, and Idaho Code § 40-2308, which are constitutional and statutory provisions dealing exclusively with water. But, the case of Boise City v. Idaho Power Company cited and relied upon dealt with an electric utility and did not depend upon the specific constitutional or statutory provisions for water. Further, Alpert's holding also applied to the gas utilities that were party to that case. Therefore, Alpert's rule concerning the right to require municipal franchise fees applies generally to all franchisees, not just to water utilities.

Given the long history of municipal franchising, rate regulation and collection of franchise fees of cable television in Idaho, and the general approval by the appellate courts of other states of

municipal franchising of cable television under general statutes not specifically addressing cable television, I conclude that cities in Idaho almost certainly have authority under Idaho law to franchise cable television, to regulate cable television service rates, and to charge a franchise fee to cable television operators.

II.

AUTHORITY OF COUNTIES UNDER STATE LAW

As with the cities, the first step in determining a county's authority under state law is to examine the statutes addressing the power and authority of counties. No statute of the State of Idaho or reported appellate decision specifically addresses whether counties have authority to regulate the basic cable television service rates or to charge a franchise fee to cable television operators. Accordingly, the analysis must fall back upon the general statutes addressing the powers and duties of counties. As was the case with the cities, this analysis must be made against the backdrop of art. 12, sec. 2.

Title 31 of the Idaho Code is entitled "Counties and County Law." Chapter 6 of title 31 is entitled "Counties as Bodies Corporate." Its initial section provides:

31-601. Every county a body corporate.—

Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

A number of statutes address county authority in a manner pertinent to the exercise of franchising authority:

31-805. Supervision of roads, bridges and ferries.—To lay out, maintain, control and manage public roads, turnpikes, ferries and bridges within the county, and levy such tax therefor as authorized by law.

31-815. Licensing of toll roads, bridges and ferries.—To grant licenses and franchises, as provided by law, for construction of, keeping and taking tolls on roads, bridges and ferries, and fix the tolls and licenses.

31-828. General and incidental powers and duties.—To do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.

An examination of these statutes in isolation could lead one to conclude the county franchising authority is restricted to the franchising of toll roads, bridges and ferries. However, the matter is not so simple.

Other statutes contemplate more extensive county franchising. For example, two sections in the Public Utilities Law, chapters 1 through 7 of title 61 of the Idaho Code, which were passed in 1913, were written against a backdrop of more extensive county franchising:

61-510. Railroad service—Physical connections.—Whenever the commission . . . shall find that the public convenience and necessity would be subserved by having connections made

between the tracks of any two (2) or more railroad or street railroad corporations . . . , the commission may order any two (2) or more such corporations . . . to make physical connections After the necessary franchise or permit has been secured from the city and county, or city or town, the commission may likewise order such physical connection, within such city and county, or city and town, between two (2) or more railroads which enter the limits of the same. . . .

61-527. Certificate of convenience and necessity—Exercise of right or franchise.—No public utility of a class specified in the foregoing section [street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation] shall henceforth exercise any right or privilege, or obtain a franchise, or a permit, to exercise such right or privilege, from a municipality or county, without having first obtained from the commission a certificate that the public convenience and necessity require the exercise of such right and privilege:

The public utility statutes indicate that, at least as long ago as their 1913 enactments, counties had been franchising utilities other than toll roads, bridges and ferries. Indeed, given the counties' explicit statutory authority over roadways under Idaho Code § 31-805 and their authority under the "general and incidental powers" language of Idaho Code § 31-828, it would appear that the franchising authority must extend beyond toll roads, bridges and ferries because almost all utilities (and most common carriers) must use county roads or rights of way and obtain the coun-

ty's permission to do so. History and established practice also support this view.

While there are a number of reported opinions from other states analyzing the question of city authority to grant franchises to cable television systems under generally worded statutes, we have not found any addressing the question of county authority to grant franchises to cable television systems under generally worded statutes. Nevertheless, there are numerous reported cases in which counties have franchised cable television systems, although the basis for the franchising authority is not discussed. *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F. Supp. 871, 872 (N.D. Ga. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 121 (7th Cir. 1982); *Town and Country Management Corp. v. Comcast Cablevision of Maryland*, 520 A.2d 1129, 1129 (Md. Ct. Spec. App. 1987); *Southwestern Bell Telephone Co. v. United Video Cablevision of St. Louis, Inc.*, 737 S.W.2d 474, 475 (Mo. App. 1987); *Bylund v. Dept. of Revenue*, 9 Or. Tax 76 (1981); *Media General Cable of Fairfax [Va.], Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1170 (4th Cir. 1993).

Applying the constitutional rule of art. 12, sec. 2, that counties may enact local regulations not in conflict with the general laws, examining Idaho's general laws, and acknowledging the general acceptance of county franchising of cable television, I conclude that counties in Idaho probably have authority under state law to franchise cable television service within their county limits. From this, the next questions are: Under state law, does the right to franchise include a right to set rates? Under state law, does the right to franchise include a right to collect a franchise fee?

Based upon the analysis earlier done with regard to the municipal franchising authority, I conclude that counties in Idaho have authority under Idaho law to regulate the cable television service rates and to charge a franchise fee for cable television operators if they have authority to franchise cable television.

III.

FEDERAL PREEMPTION OF CITY AND COUNTY AUTHORITY UNDER STATE LAW

Art. I, § 8, cl. 3 of the United States Constitution (the Commerce Clause) provides that Congress has power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In the past ten years, Congress has twice exercised its authority to regulate interstate commerce with regard to cable television, first in the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779, and then more recently in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, 1477.¹

Section 2 of the 1992 act, which was not codified in the United States Code, contained a number of congressional findings:

- Rates for cable television services have been deregulated in approximately 87% of all franchises since the passage of the 1984 act. Since this rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40% or more for 20% of cable television subscribers and the average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation. Section 2(a)(1).

- Most cable television subscribers have no opportunity to select between competing cable systems. When the cable system faces no local competition, the result is undue market power for the cable operator compared to consumers and video programmers. Section 2(a)(2).
- The 1984 act limited the regulatory authority of state or local franchising authorities over cable operators. Franchising authorities are finding it difficult under the 1984 act to deny renewals to cable systems that are not adequately serving cable subscribers. Section 2(a)(20).
- It is the policy of Congress in the 1992 act where cable television systems are not subject to effective competition to ensure that consumers' interests are protected in receipt of cable service. Section 2(b)(4).

This congressional statement of purpose and concern about consumer interests is the backdrop against which the 1992 amendments should be analyzed.

With these statements of purpose in mind, one next turns to the definitions of terms found in section 602 of the Communications Act of 1934, 47 U.S.C. § 522, to understand the statutory provisions in the remaining sections. The relevant definitions are:

- (3) The term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

. . . .

(5) The term “cable operator” means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system;

. . . .

(7) The term “cable system” means a facility . . . designed to provide cable service

. . . .

(9) The term “franchise” means an initial authorization, or renewal thereof . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system;

(10) The term “franchising authority” means any governmental entity empowered by Federal, State or Local law to grant a franchise;

Under these definitions, when a city or county has authority under state or local law to franchise a cable television system, it meets the definition of a “franchising authority” under federal law. Nevertheless, federal law does constrain the exercise of that franchising authority. The heart of the statutory provisions prescribing how local units of government may exercise their franchising authority is found at sections 621 *et seq.* of the Communications Act of 1934, 47 U.S.C. §§ 541 *et seq.*

A. Federal Law Preserves Local Franchising Authority

Section 621 of the Communications Act of 1934, 47 U.S.C. § 541, addresses the local franchising authority. It provides:

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; . . .

(1) A franchising authority may award . . . one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise

. . . .

(b) No cable service without a franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

Under this section, when cities and counties have authority under state law to award franchises for cable television, they continue to have that authority under state law, although the exercise of their franchising authority is constrained by federal law.

B. Federal Law Authorizes and Caps Franchise Fees

Section 622 of the Communications Act of 1934, 47 U.S.C. § 542, addresses franchise fees that the local franchising authorities may assess. It provides:

§ 542. Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's revenues derived in such period from the operation of a cable system. For purposes of this section, the twelve-month period shall be the twelve-month period applicable under the franchise for accounting purposes.

Under sections 622(a) and (b) of the Communications Act of 1934, 47 U.S.C. §§ 542(a) and (b), when cities and counties have authority under state law to franchise cable television systems,

they are not federally preempted from charging franchise fees, but they are federally preempted from charging franchise fees exceeding five percent of the cable television system's gross revenues. (The remaining subsections of this section flesh out the standards for franchise fees in considerable detail.)

C. Federal Law Authorizes Rate Regulation of Basic Cable Television Services

Section 623 of the Communications Act of 1934, 47 U.S.C. § 543, addresses the local franchising authorities' rate regulation. It provides:

§ 543. Regulation of rates

(a) Competition preference; local and federal regulation

(1) In general

. . . Any franchising authority may regulate the rates for the provision of cable service, or any other communication service provided over a cable system to cable subscribers, but only to the extent provided under this section. . . .

(2) Preference for competition

If the [Federal Communications] Commission finds that a cable system is subject to effec-

tive competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition—

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph

(2)(A) shall file with the Commission a written certification that—

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

**(4) Approval by
Commission**

A certification filed by a franchising authority under paragraph (3) should be effective 30 days after the

date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that—

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

(4) If the Commission disapproves the franchising authority's certification, the Commission

shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

. . . .

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulation shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

. . . .

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic

area in which cable service is provided over its cable system.

Under section 623 of the Communications Act of 1934, 47 U.S.C. § 543, when cities and counties have authority under state law to regulate franchisees' rates upon approval by the Federal Communications Commission, they continue to have authority under federal law to regulate rates for basic cable service, but they are federally preempted from regulating rates for basic cable service in a manner inconsistent with regulations promulgated by the Federal Communications Commission. *See* remaining subsections of section 623, 47 U.S.C. § 543; 47 C.F.R. part 76—*Cable Television Service*; in particular, subpart N—*Cable Rate Regulations*, 47 C.F.R. §§76.900 *et seq.*²

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 8, cl. 3.

2. Idaho Constitution:

Art. 12, sec. 2.

3. United States Code:

47 U.S.C. §§ 521 *et seq.*

47 U.S.C. § 522.

47 U.S.C. §§ 541 *et seq.*

47 U.S.C. § 542.

47 U.S.C. § 543.

4. Idaho Code:

§ 31-805.
§ 31-828.
§ 40-2308.
§ 50-328.
§ 50-329.
§ 50-330.
§ 61-129.
§ 61-801(k)(2).

5. Idaho Cases:

Alpert v. Boise Water Corporation, 118 Idaho 136, 795 P.2d 298 (1990).

Boise City v. Idaho Power Co., 37 Idaho 798, 220 P. 483 (1923).

Bush v. Upper Valley Telecable Company, 96 Idaho 83, 524 P.2d 1055 (1974).

City of Pocatello v. Murray, 21 Idaho 180, 120 P. 812 (1912).

Coeur d'Alene Garbage Service v. City of Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988).

KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971).

Tarr v. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1055, 73 Idaho 223, 250 P.2d 904 (1952).

Yellow Cab Taxi Service v. City of Twin Falls, 68 Idaho 145, 190 P.2d 681 (1948).

6. Other Cases:

Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738 (S.D. 1970).

Board of Supervisors of New Britain Township, 492 A.2d 461 (Pa. Commw. 1985).

Bylund v. Dept. of Revenue, 9 Or. Tax 76 (1981).

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871 (N.D. Ga. 1986).

City of Issaquah v. Teleprompter Corporation, 611 P.2d 741 (Wash. 1980).

City of Owensboro v. Top Vision Cable Company of Kentucky, 487 S.W.2d 283 (Ky. 1972).

Community Tele-Communications, Inc. v. the Heather Corporation, 677 P.2d 330 (Colo. 1986).

Devon-Aire Villas Homeowners Association No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60 (Fla. App. 1985).

Las Cruces TV Cable v. New Mexico State Corporation Commission, 707 P.2d 1155 (N. Mex. 1985).

Media General Cable of Fairfax [Va.], Inc. v. Sequoyah

Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993).

New York Trust Company v. Eisner, 256 U.S. 345, 41 S. Ct. 506, 65 L. Ed. 963 (1921).

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).

Sacramento Orange County Cable Communications Company v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976).

Shaw v. City of Asheville, 152 S.E.2d 139 (N.C. 1967).

Southwestern Bell Telephone Co. v. United Video Cablevision of St. Louis, Inc., 737 S.W.2d 474 (Mo. App. 1987).

Town and Country Management Corp. v. Comcast Cablevision of Maryland, 520 A.2d 1129 (Md. Ct. Spec. App. 1987).

7. Other Authorities:

3 Antien Municipal Corporation Law, Franchises: Public Utility Regulation § 29.03 (1993).

12 McQuillan Mun. Corp., Franchises § 34.08 (3d ed. 1986).

47 C.F.R. §§76.900 *et seq.*

58 Fed. Reg. 63091-92 (No. 228, November 30, 1993).

59 Fed. Reg. 6903 (No. 30, February 14, 1994).

59 Fed. Reg. 17957-61, 17972-75, and 17989-92 (No. 73, April 15, 1994).

DATED this 10th day of November, 1994.

LARRY ECHOHAWK
Attorney General

Analysis by:

MICHAEL S. GILMORE
Deputy Attorney General

¹ These acts added or amended Title VI—Cable Communications, §§ 601 *et seq.*, to the Communications Act of 1934. They are codified at 47 U.S.C. §§ 521 *et seq.* This opinion gives parallel references to the sections of the Communications Act of 1934 and to the United States Code in discussing these acts because both are often used in the literature. Further, this opinion assumes that the cable television systems subject to local franchising are engaged in interstate commerce subject to regulation under those acts, *i.e.*, it does not address the unusual situation of a purely intrastate operation of transmission of a signal without any interstate origin. *Cf. Las Cruces TV Cable v. New Mexico State Corporation Commission*, 707 P.2d 1155 (N. Mex. 1985), suggesting there may not be federal preemption in such circumstances.

² Note the extensive revisions to these regulations in the last year: The rate regulations contained in the published codification of 47 C.F.R. parts 70 to 79, revised as of October 1, 1993, have been amended at 59 Fed. Reg. 17957-61, 17972-75, and 17989-92 (No. 73, April 15, 1994). *See also* 58 Fed. Reg. 63091-92 (No. 228, November 30, 1993), and 59 Fed. Reg. 6903 (No. 30, February 14, 1994).

Topic Index
and
Tables of Citations
OFFICIAL OPINIONS
1994

1994 OFFICIAL OPINIONS INDEX

1994 OFFICIAL OPINIONS INDEX

TOPIC	OPINION	PAGE
CITIES		
Cities almost certainly have authority under state law to franchise cable television companies	94-05	46
COUNTIES		
Counties probably have authority under state law to franchise cable television companies	94-05	46
EDUCATION		
Fees charged to students for extracurricular activities or services fall within statutory definition of “fee” and any increase exceeding 105% must be advertised	94-04	40
HEALTH AND WELFARE		
Department of Health and Welfare must engage in formal rulemaking to implement nutrient management plan, and plan is subject to review by Idaho Legislature and Board of Health and Welfare	94-02	21
PARDONS AND PAROLE		
Commission for Pardons and Parole has power to commute a sentence during a fixed term	94-03	30
TAX COMMISSION		
A property tax “developers’ discount” on lots held for resale would violate the uniform taxation provisions of the Idaho Constitution	94-01	5

UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	OPINION	PAGE
Art. I, § 8, cl. 3	94-05	46

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	OPINION	PAGE
ARTICLE 4		
§ 7	94-03	30
ARTICLE 7		
§ 2	94-01	5
§ 5	94-01	5
ARTICLE 12		
§ 2	94-05	46

UNITED STATES CODE CITATIONS

SECTION	OPINION	PAGE
33 U.S.C. §§ 1251 <i>et seq.</i>	94-02	21
47 U.S.C. §§ 521 <i>et seq.</i>	94-05	46
47 U.S.C. § 522	94-05	46
47 U.S.C. §§ 541 <i>et seq.</i>	94-05	46
47 U.S.C. § 542	94-05	46
47 U.S.C. § 543	94-05	46

IDAHO CODE CITATIONS

SECTION	OPINION	PAGE
19-2513	94-03	30
20-213	94-03	30
20-223	94-05	46
20-240	94-05	46
31-805	94-02	21
31-828	94-02	21
Title 39, chapter 1	94-02	21
39-105	94-02	21
39-105(2)	94-02	21

1994 OFFICIAL OPINIONS INDEX

SECTION	OPINION	PAGE
39-105(3)	94-05	46
39-105(3)(o)	94-02	21
39-107(8)	94-02	21
40-2308	94-05	46
50-328	94-05	46
50-329	94-05	46
50-330	94-05	46
61-129	94-05	46
61-801(k)(2)	94-05	46
63-202	94-01	5
63-2224A	94-04	40
63-2225	94-04	40
67-5201 <i>et seq.</i>	94-02	21
67-5223	94-02	21
67-5291	94-02	21

**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 1994**

LARRY ECHOHAWK

ATTORNEY GENERAL
STATE OF IDAHO

January 12, 1994

Honorable Pete T. Cenarrusa
Secretary of State
STATEHOUSE MAIL
Boise, ID 83720

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

Re: Notaries Public

Dear Mr. Cenarrusa:

Question Presented

Does a non-resident employee working for the Bonneville Power Administration (BPA) in Portland, Oregon, and making frequent business trips to Idaho qualify to be commissioned as a notary public?

Conclusion

BPA employees living in Portland and doing business in Idaho comply with the requirements of Idaho Code § 51-104(2) and may qualify to be notaries public provided that the other qualifications in Idaho Code § 51-104 are met.

Analysis

The BPA's Oregon employees frequently visit Idaho on

business trips. In conducting the BPA's business, the employees often travel to remote Idaho locations in order to obtain necessary documents. Many of these documents need to be notarized. The question is whether these non-resident employees qualify to be notaries public under Idaho law.

Idaho Code § 51-104(2) states that non-residents may qualify to be commissioned as notaries public if they are "employed in or doing business in the state of Idaho." (Emphasis added.) The Oregon employees are not employed in the State of Idaho and, thus, do not qualify under that provision. To qualify to be notaries public under Idaho law, the BPA's Oregon employees must meet the statutory requirement of "doing business in the state of Idaho."

Idaho Code § 51-102 provides definitions for title 51; however, it does not define "doing business." Moreover, the Idaho Legislature has not provided a general definition of "doing business" in the statutes. The available legislative history taken at the time of the adoption of § 51-104(2) provides no additional guidance as to the definition of "doing business." Guidance, therefore, must be obtained from case law.

Courts have frequently held that it is difficult to precisely define the term "doing business." In State Highway and Public Works Commission v. Diamond S. S. Transp. Corp., 34 S.E.2d 78, 80 (N.C. 1945), the North Carolina Supreme Court, in discussing the phrase "doing business" held:

It has been frequently pointed out that no satisfactory general definition can be made of the phrase "doing business" as found in our statutes, and that, generally speaking, each case must be

determined on its own facts. “No all embracing rule as to what is doing business” has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by application of fixed definite rules.

(Citations omitted.) The Idaho Supreme Court echoed the holdings of the North Carolina court in Adjustment Bureau of the Portland Assoc. of Credit Men v. Conley, 44 Idaho 148, 152 (1927), stating that:

The question of when a foreign corporation is doing business within a state . . . must be decided upon the particular facts and circumstances entering into the transaction.

(Citation omitted.) However, the Oregon Supreme Court, in Haas v. Ellis, 361 P.2d 820, 826 (Oreg. 1961), held the term “doing business” generally means “engaging in activities in the pursuit of gain.” The general definition adopted by the Oregon court appears to be a safe rule of thumb to use when reviewing the facts of each out-of-state applicant on a case-by-case basis.

In the present case, it appears that the BPA employees are requesting to be commissioned as notaries public for the purposes of carrying out job-related duties when on business trips in Idaho. As such, it would appear that the BPA employees meet the “doing business” requirement contained in Idaho Code § 51-104(2). If the employees meet the other qualifications contained in Idaho Code § 51-104, their request to be commissioned as notaries public should be granted.

I hope this adequately addresses your question. If you have any additional questions with reference to this or any other matter, please contact me.

Very truly yours,

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

January 12, 1994

Mr. Fritz A. Wonderlich
BENOIT, ALEXANDER, SINCLAIR, DOERR,
HARWOOD & HIGH
126 Second Avenue North
P.O. Box 366
Twin Falls, ID 83303-0366

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

Re: 1992 House Bill No. 754

Dear Mr. Wonderlich:

This letter is in response to your inquiry concerning 1992 House Bill No. 754. House Bill No. 754 was approved by the 1992 legislature. The bill amended the Idaho Building Code Advisory Act, Idaho Code § 39-4101, *et seq.* Your specific inquiry is whether the amendments to the act require the City of Twin Falls to adopt and enforce the Americans with Disabilities Act Part III (appendix A to Part 36—Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities and subsequent editions, and the Americans with Disabilities Act Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities (the “ADA”). I will address your inquiry and also discuss the possible sanctions that may be imposed against the City of Twin Falls if it fails to adopt and enforce the ADA.

House Bill 754 amended, inter alia, sections 39-4109(3) and (8) of the act by deleting the 1961 ANSI accessibility standards and adding (substituting) the ADA's standards. Idaho Code §§ 39-4116(3) and (8) now read as follows:

The following codes are hereby adopted for the state of Idaho:

(3) Americans with Disabilities Act (ADA) Part III, (Appendix A to Part 36-Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities as published in the Federal Register Volume 56 No. 144, Friday, July 26, 1991, and subsequent editions and this shall also be known as UBC Standard 31-1;

(8) Americans with Disabilities Act (ADA) Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities as published in the Federal Register Volume 56 No. 173, Friday, September 6, 1991.

House Bill 754 amended section 39-4116(2) of the act to require local governments to adopt the ADA even if they choose not to comply with the remaining provisions of the act. Section 39-4116(2) now reads as follows:

(2) Regardless of whether or not a local government opts to comply with the other sections of this act, they shall adopt the Americans with Disabilities Act (ADA) Part III, (Appendix A to Part 36-Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities as published

in the Federal Register Volume 56 No. 144 Friday, July 26, 1991 and subsequent editions and this shall also be known as UBC Standard 31-1 and the Americans with Disabilities Act (ADA) Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities as published in the Federal Register Volume 56 No. 173, Friday, September 6, 1991.

(Emphasis added.)

House Bill 754 was introduced in order to replace chapter 31-1 of the Uniform Building Code (UBC) with the ADA's new accessibility guidelines and to require local governments to adopt those guidelines in order to ensure statewide construction uniformity and ADA compliance. House Bill 754's statement of purpose reads as follows:

1. Section 39-4109 is amended to adopt the latest addition *[sic]* of the Uniform Building Code, as adopted by the Idaho Building Code Advisory Board for the State of Idaho.

2. To replace Chapter 31-1 of the UBC with the Americans with Disabilities Act Part III Standards and subsequent revisions which is the Federal Accessibility Law as the reference standard regarding new and existing buildings.

3. Add the Americans with Disabilities Act, Part II Standards as the accessibility guidelines for transportation facilities.

4. Section 39-4116 sub-section II is added to mandate for local governments Americans with Disabilities Act Accessibility Guidelines Part III (replaces Chapter 31-1 of UBC) and Americans with Disabilities Act Part II as the accessibility guidelines for transportation facilities.

In summary, this legislation will serve to provide improved uniformity for compliance with the Federal Accessibility Laws and bring them into the Uniform Building Code for the State of Idaho.

(Emphasis added.) Second Regular Session of the 51st Idaho Legislature of 1992, House Bill No. 754, Statement of Purpose/Fiscal Impact.

The fact that House Bill 754 was intended to ensure statewide compliance with the ADA is illustrated by the testimony of Representative Ruby Stone before the Senate Local Government and Taxation Committee:

Representative Ruby Stone simply went through the changes in House Bill 754. The changes deal primarily with revisions to the Idaho Building Code Advisory Act (Title 39, Chapter 41). The changes bring the Idaho laws into compliance with the Americans with Disabilities Act Part III (Standards) This is a very comprehensive and complex law. We need to use the same standards throughout the state for accessibility for the disabled.

(Emphasis added.) Idaho Senate Local Government and Taxation Committee Minutes, March 11, 1992, at p. 2.

The testimony of Dave Hand before the same committee further demonstrates that House Bill 754 was intended to require (Idaho) state and local governments to adopt the ADA's accessibility standards for purposes of construction uniformity:

Dave Hand, Innkeeper's Association, spoke in support of House Bill 754. Right now there are seven hotels that are under construction or in the planning stages. Previous to this time, the hotels have been in compliance with the ANSI standards, the ADA standards are more stringent than the ANSI standards. The planners have been confused with the differences in the two standards. This bill will help to clarify the requirements that they should go by in the construction, as well as the inspectors and all others that are involved. He reiterated that the changes to be made must be readily achievable and without undue hardship.

(Emphasis added.) *Id.* at p. 3.

Title II of the Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability in "all services, programs, and activities of public entities." 42 U.S.C. §§ 12131 through 12134. Title II regulations describe the scope of Title II as including "all services, programs, and activities provided or made available by state and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance." 28 C.F.R. part 35, appendix A (Section-by-Section Analysis). Title II "applies to anything a public entity does." *Id.* All governmental activities of public entities are covered "even if they are carried out by contractors." *Id.*

The City of Twin Falls would violate Title II if its building department approved for construction a building designed in violation of the ADA. 28 C.F.R. § 35.130. Section 35.130 provides, *inter alia*, as follows:

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

. . . (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit or service to beneficiaries of the public entity's program; . . .

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; . . . (or)

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability . . . (or)

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

The City of Twin Falls may not, without violating Section 35.130, aid, benefit, or assist through the administration or carrying out of its programs, services, or activities any person or entity that discriminates on the basis of disability. Accordingly, the city would violate Section 35.130 if it licensed or certified a building for construction that was designed or constructed in violation of the ADA.¹ *Id.* Since the city may not approve for construction a building designed in violation of the ADA, it must, in essence, enforce compliance with the ADA through its building program.²

In summary, Title II of the ADA and Idaho Code § 39-4116(2) require the City of Twin Falls to adopt and enforce the ADA.

There are many potential federal, state and private sanctions for violations of the ADA. Section 203 of the ADA provides that the remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, for enforcement of Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap, shall be the remedies, procedures and rights for enforcement of Title II. 28 C.F.R. part 35, Appendix A; 42 U.S.C. § 12133; and 28 C.F.R. part 35, subpart F (Compliance Procedures). Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d.) 28 C.F.R. part 35, Appendix A.

28 C.F.R. § 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. Complaints may be filed with a federal agency with jurisdiction or the United States Department of Justice. *Id.* The complaint is processed by the designated federal agency. 28 C.F.R. § 35.172. If the complaint is not resolved by the agency, it is referred to the Department of Justice for administrative resolution or a lawsuit. 28 C.F.R. § 35.173. Title II regulations do not require complainants to exhaust administrative remedies before filing a private lawsuit. 28 C.F.R. part 35, Appendix A (Analysis of Section 35.172).

As previously stated, the remedies available under the Rehabilitation Act of 1973 are also available to Title II litigants. Depending upon the case, declaratory, injunctive, and/or monetary relief may be available. See, *e.g.*, Smith v. Barton, 914 F.2d 1330 (9th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2825, 115 L. Ed. 2d 995 (1991). Finally, attorneys' fees and costs may be awarded to the prevailing party, unless the United States is the prevailing party. 28 C.F.R. § 35.175.

In addition to federal and private actions, the Idaho Department of Labor and Industrial Services has the authority to bring ADA enforcement actions. Idaho Code § 39-4104. The department may seek an injunction to prevent the construction of a building that does not conform to the requirements of the Idaho Building Code Advisory Act. Idaho Code § 39-4125. Also, any person who willfully violates any provision of the Act or the rules promulgated pursuant thereto may be "guilty of a misdemeanor, and upon conviction, shall be fined not more than three hundred dollars (\$300), or imprisoned for not more than ninety (90) days or by both fine and imprisonment." Idaho Code § 39-4126.

In conclusion, failure to adopt and enforce the ADA as required by Idaho Code § 39-4116(2) and Title II of the ADA may subject Twin Falls to federal, state, and private compliance actions.

Very truly yours,

THOMAS B. DOMINICK
Deputy Attorney
General Department of
Labor and Industrial
Services

¹ Title II also incorporates those provisions of Titles I (discrimination in employment) and III (public accommodations) of the ADA that are not inconsistent with the regulations implementing Title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 790-94). 28 C.F.R. part 35, Appendix A (Analysis of Section 35.103).

² Title II does not preempt Idaho Code § 39-4116(2). Section 39-4116(2) requires adoption of the ADA and does not conflict with it. Congress never intended the ADA to displace noncontradictory federal or state laws. 28 C.F.R. part 35, Appendix A (Analysis of Section 35.103).

January 14, 1994

Representative Michael K. Simpson
Speaker of the House
STATEHOUSE MAIL
Boise, Idaho 83720

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

Re: Duration of Judgment Lien for Child Support

Dear Mr. Speaker:

The following is in response to your request for legal guidance relating to the enforcement of judgment liens against real property arising from spousal maintenance and child support judgments.

The issue is the duration of a lien based on a judgment for child support. It is the conclusion of this office that, pursuant to Idaho Code § 10-1110, a judgment for child support continues as a lien for five years from the date of judgment.

Idaho Code § 10-1110 sets forth the procedures for obtaining a lien against real property. That section provides in part:

A transcript or abstract of any judgment or decree of any court of this state or any court of the United States the enforcement of which has not been stayed as provided by law, if rendered within this

state, certified by the clerk having custody thereof, may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and from the time of such recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien; provided that where a transcript or abstract is recorded of any judgment or decree of divorce or separate maintenance making provision for installment or periodic payment of sums for maintenance of children or alimony or allowance for wife's support, such judgment or decree shall be a lien only in an amount for payments so provided, delinquent or not made when due.

It is clear from the language of the statute itself that the legislature intended this statute to apply to judgments for child support. Next, the statute provides:

The lien continues five (5) years from the date of the judgment, unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed upon an appeal as provided by law.

It is equally clear from this provision that all liens, including those resulting from the recording of a judgment for child support, expire five years from the date of the judgment, unless the judgment is renewed pursuant to Idaho Code § 10-1111. That section states:

10-1111. Renewal of judgment—Lien.—

Unless the judgment has been satisfied, at any time prior to the expiration of the lien created by section 10-1110, Idaho Code, or any renewal thereof, the court which entered the judgment may, upon motion, renew such judgment. The renewed judgment may be recorded in the same manner as the original judgment, and the lien established thereby shall continue for five (5) years from the date of judgment.

This section contemplates a two-step process in order to renew a lien. First, the judgment creditor must motion the court which entered the judgment to renew the judgment. Second, the judgment creditor must record the renewed judgment in the county where the real property is located. The judgment must be renewed within five (5) years of the judgment. The lien established as a result of this process continues for five (5) years from the date of the renewed judgment.

Please feel free to contact me if you wish further guidance on this issue.

Sincerely,

MARGARET C. LAWLESS
Deputy Attorney
General

January 19, 1994

The Honorable Dean L. Cameron
Idaho State Senate
STATEHOUSE MAIL
Boise, ID 83720

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

Re: Small Employer Health Insurance Availability Act

Dear Senator Cameron:

The Attorney General has asked me to respond to your letter of November 23, 1993. Your letter presents two questions for review.

First, does the Small Employer Health Insurance Availability Act, chapter 47, title 41, Idaho Code, require the implementation of rules?

Second, do the basic and standard health insurance plans developed by the Health Benefit Plan Committee and approved by the Director of Insurance pursuant to Idaho Code § 41-4712 meet the definition of a rule as provided in the Administrative Procedure Act?

In addressing your questions, it is helpful to first look briefly at the history and intent of chapter 47, title 41, entitled "Small Employer Health Insurance Availability Act."

1. History

The Small Employer Health Insurance Availability Act (the Act), chapter 47, title 41, was passed by the Idaho Legislature in the 1993 legislative session. Its purpose is to “promote the availability of health insurance coverage to small employers regardless of their health status or claims experience . . .” Idaho Code § 41-4702. The Act attempts to accomplish its stated purpose in the following manner.

The Act requires, as a condition of transacting business in the state, that all small employer insurance carriers (“carriers”) offer to small employers at least two types of health benefit plans; a basic health benefit plan and a standard health benefit plan. Idaho Code § 41-4708.

Idaho Code § 41-4712 requires the Director of the Department of Insurance to appoint a health benefit plan committee and then provide two types of procedures for approval of basic and standard health benefit plans. Under the first procedure, the health benefit plan committee designs a basic health benefit plan and a standard health benefit plan and submits them to the director for approval. Under the second procedure, the committee reviews alternative basic and standard health benefit plans submitted by the carriers themselves and makes recommendations to the Director of the Department of Insurance for approval or rejection of these individual plans. Once plans submitted by carriers are approved, those plans can be used rather than the plans designed by the committee.

The Act also establishes a small employer carrier reinsurance program which is to be supervised by an eight-member board appointed by the Director of the Department of Insurance. Idaho Code § 41-4711. The Act further requires the Department

of Insurance to regulate the establishment of classes of business and premium rates by carriers. Idaho Code §§ 41-4705, 41-4706. In addition, the Act mandates renewability of small employer health insurance benefits unless the insurer meets one or more of the statutorily delineated exceptions for renewal. Idaho Code § 41-4707.

In sum, the Act provides a statutory framework for increasing the availability of small employer insurance coverage in the state. Your first question, in essence, asks whether the Act is self-enacting or whether rulemaking is required to carry out the intent of the legislature.

2. Necessity of Rulemaking

The Administrative Procedure Act (APA) defines “rule” as follows:

[T]he whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:

- (a) law or policy, or
- (b) the procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
 - (i) statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or

- (ii) declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
- (iii) intra-agency memoranda; or
- (iv) any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

(Idaho Code § 67-5201.) In the comments following Idaho Code § 67-5201 which refer to the definition of a “rule,” it is noted that an agency may “promulgate a rule only by complying with the procedure set out in the Administrative Procedure Act.” It is further noted that the imposition by an agency of legal obligations on a class of persons is a rule and, to impose such legal obligations, an agency must promulgate rules pursuant to the APA.

Idaho Code § 41-4715 requires the Director of the Department of Insurance to promulgate rules in accord with the APA, chapter 52, title 67, Idaho Code, for the implementation and administration of the small employer health coverage reform act. Thus, it is clear the legislature intended that the director promulgate regulations and a review of the Act provides a number of areas where rulemaking would be appropriate.

Idaho Code § 41-4705 allows a carrier to establish separate classes of businesses in certain limited situations. The Director of the Department of Insurance may wish to establish procedures for bringing small employer carriers into compliance with the requirements of Idaho Code § 41-4705 and further may wish to establish procedures approving classes of businesses. Establishment by an agency of procedure or practice requirements generally applicable to small employer carriers meets the

definition of a rule and would also require rulemaking. Idaho Code § 67-5201(16)(b).

Idaho Code § 41-4706 provides restrictions and maximum levels of increase for premium rates on health benefit plans. The Director of the Department of Insurance may wish to establish procedures for small employers to demonstrate compliance with the provisions of this section. Establishing procedures for compliance by carriers meets the definition of a rule as provided in Idaho Code § 67-5201(16) and it was clearly contemplated by the legislature that regulations would be promulgated in this area. *See* Idaho Code § 41-4706(k).

Idaho Code § 41-4710 allows a carrier to apply with the Director of the Department of Insurance to become a risk-assuming carrier. The director may contemplate establishing procedures for the application and review by the department of the risk-assuming carrier applicants. Such procedures would also qualify as rules.

Idaho Code § 41-4711 requires that the small employer carrier reinsurance program board establish a plan of operation which includes, among other things, procedures for selecting an administering carrier, procedures for reinsuring risks in accord with the Act and procedures for collecting assessments from reinsuring carriers to fund claims. Idaho Code § 47-4711(7). The plan is to be submitted by the board and approved by the director. However, since the plan imposes legal obligations on a class of people, it meets the definition of a rule and should be promulgated through the APA rulemaking process.

In conclusion, it is clear that there are numerous areas appropriate for rulemaking under the Small Employer Health Insurance Availability Act. However, the question remains as to

whether the basic health benefit plan and the standard health benefit plan designed by the health benefit plan committee pursuant to § 41-4712 and approved by the Director of the Department of Insurance must go through a rulemaking process.

3. Health Benefit Plans as Rules

As previously stated, Idaho Code § 41-4712 requires appointment of a health benefit plan committee charged with the responsibility of, among other things, designing two health care plans: a basic health benefit plan and a standard health benefit plan. The plans are to be consistent with benefit plans of health maintenance organizations and the statute recommends some cost containment features that the committee may include in the plans.

The committee is required within 180 days after its appointment to submit the plans to the director for approval. Currently, the committee has been appointed by the director, plans have been prepared and submitted, and the director has approved the plans. The plans are available for use by carriers unless the carriers prepare their own plans and submit them for approval to the Department of Insurance.

At issue is whether the two plans originally prepared and submitted by the committee to the Director of the Department of Insurance and ultimately approved by him must now go through rulemaking. To be a “rule” under the APA, the plans must meet the following criteria:

1. Be an agency statement of general applicability; *i.e.*, impose legal obligations on a class of people;
2. Implement, interpret, or prescribe law or policy or the procedures or practice requirements of the (agency); and

3. Be promulgated in compliance with the provisions of the APA.

For the reasons delineated below, the plans designed by the committee and approved by the director do not meet this definition.

First, Idaho Code § 41-4712 does not require that the plans drafted by the committee and approved by the director be the only plans available for use by small employer carriers. Rather, the statute provides that carriers may use alternative plans that are submitted and approved by the director after review by the committee. Idaho Code § 41-4712(3)(b). Thus, the plans are not agency statements of general applicability imposing a legal obligation on a class of persons. The plans are merely available for use by any carrier if that carrier chooses.

The plans also do not implement, interpret, or prescribe law or policy or the procedure or practice requirements of the agency. Rather, the plans are the products of the committee's fulfillment of its statutory responsibility to create contracts of insurance available for use by small employer carriers. If § 41-4712 provided a limited procedural framework for the appointment of a committee and the development of the plans, it may be appropriate for the Department of Insurance to promulgate rules to interpret or prescribe a procedure for the committee. However, unlike other areas of the Small Employer Health Insurance Availability Act previously referenced, § 41-4712 provides a clear procedural process for the design and approval of the health benefit plans. As such, it does not appear necessary for the department to further interpret the law or develop procedures through promulgation of rules and to do so may be redundant.

Conclusion

The Small Employer Health Insurance Availability Act requires the Department of Insurance to enact rules for the implementation and administration of the Act. There are areas within the Act where rulemaking would be appropriate in implementing the intent of the legislature and carrying out the administration of the Act. A number of those areas have been referred to in the analysis. Whenever the Department of Insurance wishes to impose legal obligations on a class of people in an effort to establish procedures or interpret the statutory provisions provided under the Act, the department must promulgate rules pursuant to the provisions of the Administrative Procedure Act.

However, with reference to the plans of insurance developed by the health benefit plan committee and approved by the Director of the Department of Insurance, it appears that a sufficient statutory procedure has been established by the legislature for the design and approval of the plans. Further, it appears that the plans developed by the committee and approved by the director do not meet the definition of a rule since the plans do not impose legal obligations on a class of people. As such, it would be unnecessary for the Department of Insurance to promulgate the plans in the form of a rule.

Very truly yours,

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

February 9, 1994

Mr. A. Dean Tranmer
Pocatello City Attorney
P.O. Box 4169
Pocatello, ID 83205

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

Re: Bannock Regional Medical Center

Dear Mr. Tranmer:

You requested an opinion from this office regarding the denial of a conditional use permit by the Pocatello City Council and whether certain members of the city council had conflicting interests in the matter. According to your letter, the Bannock Regional Medical Center applied to the City of Pocatello for a conditional use permit in order to expand its facility. After a public hearing, the city's community development commission recommended that the conditional use permit be granted. Upon review, the city council voted to reject the community development commission's recommendation and denied the Bannock Regional Medical Center's request for a conditional use permit.

The Bannock Regional Medical Center has raised the issue whether a member of the city council had a conflict of interest when considering the conditional use permit application. This councilmember, Ed Brown, sits on the Board of Directors for the Pocatello Regional Medical Center which you state is a "competitor" of Bannock Regional Medical Center. Mr. Brown receives no

compensation for his role as a director and has no pecuniary interest in the Pocatello Regional Medical Center. (A former councilmember, Earl Pond, was a member of the Pocatello Regional Medical Center's foundation, a fundraising entity for the medical center when this matter came before the council. Councilman Pond has since left the city council and would not participate in any council reconsideration of the conditional use permit.)

Councilman Brown has no direct interest or association with Bannock Regional Medical Center. Nevertheless, Bannock Regional Medical Center contends that Councilman Brown's association with Bannock Regional Medical Center's main competitor creates a conflict of interest within the framework of Idaho Code § 67-6506 as well as the Ethics in Government Act of 1990, chapter 7, title 59, Idaho Code. Our analysis will focus upon Idaho Code § 67-6506 since it deals specifically with zoning proceedings and is prohibitory in nature. Our conclusions would be no different if Idaho Code § 59-701, *et al.* were discussed.¹

IDAHO CODE § 67-6506

Idaho Code § 67-6506 is set forth in the Local Planning Act of 1975, chapter 65, title 67, Idaho Code. This statute prohibits public officers from participating in planning or zoning proceedings in which they have an economic interest:

A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business

partner, business(,) associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. A knowing violation of this section shall be a misdemeanor.

(Emphasis added.) This provision is specific in that the conflict must be economic in nature. Unlike many other states' zoning laws, personal bias alone is not an enumerated factor in determining conflicting interest. *See* Conn. Gen. Stat. Ann. § 8-11; N.J. Stat. Ann. § 40:55-1.4.

The Idaho Supreme Court construed Idaho Code § 67-6506 in Manookian v. Blaine County, 112 Idaho 697, 735 P.2d 1008 (1987). In that case, Idaho Power applied for a conditional use permit to build a power transmission line through Blaine County. The proposed route for the power line crossed property owned by a county planning and zoning commissioner and a county commissioner. The conditional use permit over that route was denied and an alternate route was approved by the county. Both the planning and zoning commissioners and the county commissioner participated in the proceedings advocating their positions.

The landowners impacted by the alternate route challenged the conditional use permit, charging that the proceedings were invalid due to the conflicts of the county commissioner and the planning and zoning commissioner. The district court agreed and voided the conditional use permit due to the participation of the two interested public officials.

Upon review, the Idaho Supreme Court affirmed, stating:

Appellants argue that the construction of a high voltage public utility transmission line across a person's property does not have the type of economic effect contemplated by 67-6506 on that property. We disagree. First, construction of such a development requires not only zoning approval but also the purchasing of easements from the affected property owners. In this case, Purdy had already sold Idaho Power an easement creating a measurable economic impact on his property. Second, by their very nature, utility transmission lines impact the land they occupy both visually and physically. Depending on the present and future use of the property, there are innumerable ways the effects could be encountered. For example, the location of transmission lines may render property unsuitable for residential use and thereby foreclose that possibility of future development to the landowner. Suffice it to say that the location of such lines could adversely affect the property, and this adverse effect can be quantified in economic terms.

112 Idaho at 701, 735 P.2d 1012 (emphasis added).

Justice Shepard dissented, arguing that any impact upon the commissioners' property could not be established from an economic standpoint. Therefore, he argued, the interest was not prohibited by Idaho Code § 67-6506 and the officials' participation was not illegal. It is clear from Idaho Code § 67-6506 and Manookian that the prohibited interest must be "a measurable economic interest" or the adverse effect must be such that it "can be quantified in economic terms."

In reaching its conclusion, the court noted the strong public policies established by the legislature in prohibiting interested parties from participating in zoning proceedings:

In adopting 67-6506, the legislature acted to assure that, consistent with our democratic principles, only impartial and objective persons make decisions affecting other persons' liberty and property.

Further, the court stated the importance of this public policy in relation to the remedies available to the public through the courts:

The policy behind the statute is essential because, under the Idaho Administrative Procedure Act, I.C. §§ 67-5201 *et seq.*, the findings of fact of an administrative agency are subject to review only under the "substantial evidence test" on appeal to a district court. I.C. § 67-5215(f), (g)(5); *Van Orlen v. State Dept. of Health & Welfare*, 102 Idaho 663, 637 P.2d 1159 (1981). In Idaho a district court may reverse a zoning decision only if one of the grounds set forth in subsection (g) of this section is found to exist. *Love v. Board of County Comm'rs*, 108 Idaho 728, 701 P.2d 1293 (1985). With appellate review so limited, it is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure.

112 Idaho at 701, 735 P.2d at 1012 (emphasis added). The statute is aimed at barring participation by those who may be biased or potentially biased by virtue of some measurable economic interest impacted by their decision.

COUNCILMAN BROWN

Councilman Brown, as a board member of the Pocatello Regional Medical Center, is, at a minimum, a “business associate” of the medical center, which brings his relationship within the scope of Idaho Code § 67-6506. Although Councilman Brown may have no personal pecuniary interest in the medical center, when acting as a member of the board, the board exercises all corporate powers, directly or by delegation, over the business affairs of Pocatello Regional Medical Center. Further, Councilman Brown has a statutory duty to “serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation.” Idaho Code § 30-1-35. His statutory responsibilities as a director essentially create a unity of interest between Pocatello Regional Medical Center and Councilman Brown. Consequently, pursuant to Idaho Code § 67-6506, Councilman Brown should not participate in the proceeding if Pocatello Regional Medical Center has a quantifiable economic interest in the proposed conditional use permit of Bannock Regional Medical Center.

The determination whether a quantifiable economic interest exists is factual and one of degree. For example, a quantifiable economic impact to a business such as a service station could be determined if another service station were to be built directly across the street. On the other hand, it is doubtful that a quantifiable economic impact could be identified if another station were built five miles away which was one of dozens in the area. Consequently, a public official facing the former situation should not participate if he is economically interested in the existing service station. The latter situation probably would not pose a prohibited conflict of interest. As the above examples reflect, whether a quantifiable economic impact exists will depend on the specific facts of each case.

Whether to refrain from participation is frequently a difficult decision. For example, there is no doubt that remote, nebulous and speculative interests could handicap local governments to the point of inaction if every possible potential interest disqualified officials from acting. Justice Holmes noted in Graham v. United States 231 U.S. 474, 480 (1913), that, “Universal distrust creates universal incompetency.” If every remote interest were sufficient to disqualify public officials from doing their duty, capable men and women would be discouraged from serving the public and local governments could not competently provide the services expected of them.

On the other hand, it is well established that a public official owes an undivided loyalty to the public served, and a public officer cannot serve two masters at the same time. The public’s interest in an unbiased process and impartial decisions must come before expediency. See 63A Am. Jur. 2d *Public Officers and Employees* § 322-324. Anderson v. Zoning Commission of City of Norwalk, 253 A.2d 16 (Conn. 1968).

Given our limited information on the competitiveness of the medical centers in the Pocatello region, this office cannot definitively determine whether Councilman Brown was prohibited from participating in the conditional use permit matter. Nevertheless, given the competitiveness of the medical services market in general, and our own point of reference in Boise where two medical centers dominate the market, it seems very likely that a major expansion of Bannock Regional Medical Center would have a quantifiable economic impact upon Pocatello Regional Medical Center. In all likelihood, Pocatello Regional Medical Center does have an interest in the conditional use permit proceedings and Councilman Brown should not participate when the conditional use permit is reconsidered by the city council.

In summary, while we recognize that we are not in a position to definitively determine whether Pocatello Regional Medical Center has a quantifiable economic interest in the outcome of the proceeding, based upon what we do know it appears likely that Pocatello Regional Medical Center does have such an economic interest. Unless the facts are very different than we have been told, i.e., this is a major expansion that is critical to Bannock Regional Medical Center's continued competitiveness in the market, our advice is that Councilman Brown should not participate in the reconsideration proceeding. We also recommend that public officials refrain from participation in close cases. In close cases, the public's trust in having an unbiased decision and proceeding is at stake. Consequently, we recommend erring on the side of caution.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney
General

February 25, 1994

Mr. Charles M. Dodson
DODSON & RAEON
P. O. Box 1237
Coeur d'Alene, ID 83814

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

Dear Mr. Dodson:

I am responding to your request for an Attorney General's Opinion regarding the use and rental of school district facilities by sectarian groups. You have raised several questions concerning how such use relates to art. 9, § 5 of the Idaho Constitution as well as to federal and state case law on separation of church and state. Before answering the questions set forth in your letter, a brief overview of art. 9, § 5 of the Idaho Constitution and the relevant sections of the United States Constitution may be helpful.

1. Background—Constitutional Provisions

There are a number of state and federal constitutional provisions which are critical to the questions you have raised. It may be useful to review some of these provisions before beginning a legal analysis.

First, art. 9, § 5 of the Idaho Constitution prohibits public aid to religious organizations. It states in pertinent part:

Neither the legislature nor any . . . school district . .

. 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

Under this Idaho provision, the state may not provide “aid” to religious societies from any public funds or monies.

The United States Constitution also addresses government involvement with religion. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech

Under this federal constitutional provision, the state cannot establish a religion. Importantly, it also cannot prohibit the free exercise of religion or burden a religious group’s right to free speech.

Finally, the Supremacy Clause of the United States Constitution states:

This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the

Constitution or laws of any state to the contrary notwithstanding.

The Supremacy Clause makes clear that, if a state constitutional provision or state statute is in direct conflict with the United States Constitution or a federal statute, the federal law is supreme and the state cannot use its own state constitution or statutes to circumvent the federal law. *See, e.g., Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160 (D. Idaho 1991). A state constitution may be “more protective of a right than an analogous provision of the federal Constitution—provided that protection of the state constitutional right does not infringe a competing federal guarantee.” *Id.* at 1163 (emphasis added). In short, state law cannot be used to thwart federal requirements or federal protections.

With these principles as background, I will address your questions.

2. May Public School Property Be Rented/Leased to a Sectarian Organization for Sectarian Purposes, Considering Article 9, § 5 of the Idaho Constitution and Idaho Code § 33-601?

Turning first to Idaho Code § 33-601, it merely authorizes school boards:

1. To rent to or from others, school buildings and other property used, or to be used, for school purposes [and]

. . . .

7. To authorize the use of any school building of the district as a community center, or for

any public purpose, and to establish a policy of charges, if any, to be made for such use.

This state statute provides little more than authority to rent or “authorize the use of” school facilities to non-school groups. It does not specifically address or limit such use if religious organizations are involved. Hence, there is no reason to conclude that it would bar such rentals from occurring.

As to art. 9, § 5 of the Idaho Constitution, as noted, it does prohibit “aid” to religious groups. Here again, however, there is no reason to construe art. 9, § 5’s language as an absolute prohibition of a rental arrangement, assuming the arrangement included a fee commensurate with the actual cost of using the facility. Rather, art. 9, § 5 simply bars usage without commensurate compensation. (*See* discussion below at pp. 6-7.) In short, neither Idaho Code § 33-601 nor art. 9, § 5 of the Idaho Constitution specifically addresses, let alone prohibits, rental agreements with religious groups.

3. When Does the Federal Constitution Require that Public School Property Be Rented or Leased to Sectarian Organizations?

State law does not prohibit school districts from renting public school facilities to religious organizations. Nor does it require them to do so. Idaho Code § 33-601(1) and (7) simply authorizes rental or use of the facilities, and art. 9, § 5 of the Idaho Constitution requires a fee be charged once such usage has been made available. (*See* below at pp. 6-7 for a more complete discussion of this issue.) Importantly, however, there are instances when the United States Constitution does require that religious organizations be allowed to use public school facilities. Although, under state law, a school district is not required to open

its facilities to the public, according to the United States Supreme Court, once it has chosen to do so, the United States Constitution forbids it from barring religious groups from using those facilities.

The most recent United States Supreme Court opinion on this issue is Lamb's Chapel v. Center Moriches Union Free Sch. Dist., ___ U.S. ___, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). There, the U.S. Supreme Court reviewed a complete prohibition against after-hours use of public schools by religious groups in a context where school districts had already allowed after-hours use of their school property by a number of other secular organizations. Pursuant to a New York statute, the Center Moriches School District had adopted a rule allowing use of school property for social, civic and recreational purposes. However, the school district refused to allow a Christian film series about family issues and child-rearing to be shown in a public school, reasoning this would violate both the state and federal establishment clauses.

Their policy was challenged and, on appeal, the Supreme Court held that the Free Speech Clause of the First Amendment prohibits discrimination against religious perspectives in public school buildings when those buildings are generally open to the public and are not being used for school purposes. The Court further held that the claimed defense—that such use by a religious group would violate the Establishment Clause requirements of separation of church and state—was unfounded. The showing of the film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. Noting that the district property had repeatedly been used by a wide variety of private organizations, the Court held that “under these circumstances . . . there would have been no realistic danger that the community would

think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.” 113 S. Ct. at 2148. The U.S. Supreme Court did recognize that there might be instances when the need to ensure separation of church and state under the Establishment Clause by public schools could outweigh the free speech rights of religious groups. “[T]he interest of the State in avoiding an Establishment Clause violation ‘may be a compelling’ one justifying an abridgment of free speech otherwise protected by the First Amendment” 113 S. Ct. at 2148. Nevertheless, in the case before it, the Court applied the three-part Lemon test established in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and found that the usage of the school facility after school hours for a Christian film series did not violate the Establishment Clause.

Based on the language set forth in the Lamb’s Chapel case, it is the opinion of this office that, once a school district chooses to allow use of its facilities as to the community in general or for other public purposes pursuant to Idaho Code § 33-601(1) and (7), the school district has created at least a limited open forum, and it cannot deny access to this forum to a religious group solely because the content of its speech is of a religious nature. To do so would be to unconstitutionally discriminate against the religious group and violate its members’ First Amendment rights. Of course, a school district is not required to open its facilities for non-school usage at all. But, once it has chosen to do so, those facilities must be made available in a non-discriminatory manner.

4. If Public School Property is Rented/Leased to a Sectarian Organization, What Guidelines Should Be Imposed Regarding Terms of Rental, Frequency of Use and Factors for Calculating Rental Fees?

The Supreme Court has held that if a school district allows non-school organizations to use its facilities during non-school hours, it cannot deny access to those facilities by religious groups solely because of the religious nature of their speech. The next question, then, is what terms the school districts should impose in any rental agreement with religious organizations.

a. Length and Frequency of Use and the Establishment Clause

In considering terms of a rental agreement, one factor which must be weighed is the length and frequency of use. Prolonged use by a religious organization can raise problems under the Establishment Clause.

In 1959, for example, the Florida Supreme Court held that “prolonged” use of school facilities by a congregation “without evidence of immediate intention to construct its own building” would be impermissible. Southside Estates Bapt. Church v. Bd. of Trustees, Sch. Dist. No. I, 115 So. 2d 697, 700 (Fla. 1959) (emphasis added). Almost two decades later, the New Jersey Supreme Court, in Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944 (N.J. 1978), held that temporary use of a public school facility by a religious group for worship services was neither excessive entanglement nor a violation of the Establishment Clause. Importantly, however, in its decision, the Court also stated:

Our only real concern under the entanglement test is with the lengthy use of these school premises by some of the religious groups. At some point, such continuous use will surely implicate the Board in the promotion of religion.

Id. at 958. Worth noting again here is the language in Lamb's Chapel that, while the use of school facilities after school hours for a Christian film series did not violate the Establishment Clause, there might be other instances where a different conclusion would be reached.

These opinions, taken together, suggest that not only must school districts be aware of free speech concerns when renting space to church facilities, they must also be concerned with the Establishment Clause and its requirement that the state maintain a separation of church and state. These cases indicate that, at some point, prolonged and continuous use of a school facility by a religious group, as opposed to temporary or occasional use, may create an Establishment Clause concern.

In short, districts should be aware that, when they approve a request from a religious group for use of their facilities on an ongoing basis, at some point, prolonged use by the religious group may violate the Establishment Clause. Whether or not there is, in fact, a violation is a fact-based question. School districts would be prudent to consult with their legal counsel to ensure that no such violations occur. Cases that should be taken into account by their legal counsel include Wallace v. Washoe Cnty. Sch. Dist., 818 F. Supp. 1346 (D. Nev. 1991) (school district had a limited open forum, and a non-permanent use of school facilities did not run afoul of the Establishment Clause); Pratt v. Ariz. Bd. of Regents, 520 P.2d 514 (Ariz. 1974) (court upheld the lease of a university stadium to the Reverend Graham for a seven-day period); Southside Estates Bapt. Church v. Bd. of Trustees, Sch. Dist. No. I, 115 So. 2d 697 (Fla. 1959) (court upheld the "temporary" use of school buildings for Sunday worship); Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944 (N.J. 1978) (court upheld temporary use of school facility, but suggested prolonged use by a religious group with no intent to

procure its own building could violate the Establishment Clause). Of relevance also is a guidance memorandum from Washington State (which has a constitutional provision very similar to Idaho's) in which advice on what constitutes "occasional use" is offered. *See* Appendix B.

b. Rental Fees

A second issue relating to terms of a rental agreement is whether the districts must charge religious organizations fees for using their buildings.

Idaho Code § 33-601(7) permits a school board to establish a policy for charges. It does not require that charges be made. However, as noted above, art. 9, § 5 of the Idaho Constitution prohibits the state from providing public aid to religious organizations. This raises two questions. The first is whether allowing religious organizations free access to school facilities constitutes "aid" for purposes of art. 9, § 5. The next question is, assuming that free access is prohibited "aid," how can districts charge religious organizations for use of their schools' facilities without thereby violating the U.S. Constitution's prohibition against discriminatorily burdening religious speech?

Turning to the first question, allowing religious groups free use of school facilities without charging them at least the actual cost of such use probably constitutes "aid" under art. 9, § 5 of the Idaho Constitution. The most recent Idaho Supreme Court opinion addressing public aid to a religious group is Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971). There, the court found that furnishing free transportation to parochial school students violated art. 9, § 5:

While the legislative goal to aid all students in

obtaining an education is commendable, nonetheless, the constitution of this state in explicit terms has declared that public aid of churches and church schools is prohibited.

94 Idaho at 398, 488 P.2d at 868. In a similar determination, the Idaho Attorney General concluded that state funds set aside for the Idaho College Workstudy Program for post-secondary students could not be given to students attending post-secondary institutions controlled by a church, sectarian or religious denomination without violating art. 9, § 5 of the Idaho Constitution. 1989 Idaho Att’y Gen. Ann. Rpt. 42. While neither the Idaho Supreme Court ruling nor the Idaho Attorney General’s decision directly addressed the free use of public school facilities by religious organizations, each underscores that the Idaho Constitution is very restrictive when it comes to public aid for religious groups.

Although the case law from other jurisdictions is sparse, a few courts have directly reviewed the question of whether the use of public school facilities by religious groups constitutes “aid” to religion. In Pratt v. Arizona Bd. of Regents, 520 P.2d 514 (Ariz. 1974), the Arizona Supreme Court considered whether leasing a state university football stadium for a series of religious services violated its state prohibition against using public funds to aid a church. The court concluded that the “aid” prohibition had not been violated in that instance because the stadium was leased and not donated to the religious group. Significantly, the court emphasized that, absent the fair rental arrangement, there would have been a constitutional problem. This opinion is especially significant for Idaho because Arizona’s constitutional prohibition against aid to religious organizations is similar to our own.

In Resnick, 389 A.2d at 951, the New Jersey Supreme Court considered whether use of public school facilities by reli-

gious groups violated their state constitutional provision guaranteeing that no person would be obliged to pay “taxes” for “building . . . any church or . . . for the maintenance of any . . . ministry.” The court concluded that, so long as churches that used public school facilities were charged the “out-of-pocket expenses of the board directly attributable to the use by the religious body,” the state constitutional requirements were met. *Id.* Free usage would have violated the New Jersey Constitution.

Given these cases, school districts should assume that free usage of their facilities by religious organizations does constitute “aid” for the purposes of art. 9, § 5. Consequently, to carefully avoid the Idaho Constitution’s prohibition against using public funds “in aid of any church or sectarian or religious society,” a school district that allows religious organizations to use its facilities should charge or assess at least the marginal cost (that is, out-of-pocket expenses) of that use.¹

Given that districts must charge religious organizations at least the marginal cost of using school facilities, the next question is how this can be accomplished without violating the United States Constitution. As noted, the First Amendment prohibits the state from discriminating against religious groups based on the content of their speech. Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., ___ U.S. ___, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). Moreover, this prohibited discrimination does not only take the form of absolutely barring religious groups from open forums to which other groups have access. Charging religious groups more than non-religious groups for the same use of those forums is also a form of prohibited discrimination.

In Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 811 F. Supp. 1137 (E.D. Va. 1993), for example, a church challenged a school board policy of charging the church more than other

community groups to use school facilities. The board's policy provided that during the first five years of use religious organizations were to be charged at the same rate as other non-profit organizations. However, the policy further stated that during the sixth year, religious groups were to pay double the rental rate; during the seventh year, triple the rate; and during the eighth year, four times the non-profit rate. No other group was subject to this escalating fee. The reviewing court held that "[b]y charging religious groups alone the escalating rental fee scale and having no compelling interest . . . to rationalize the higher rate, the School Board violate[d] a fundamental premise of the Free Speech clause." 811 F. Supp. at 1140 (emphasis added). The court concluded the policy was unconstitutional.²

Clearly, it is important that school districts that allow outside groups use of their facilities have a policy in place that sets forth the different categories of organizations who may use the facilities and the charges that will be assessed. In order to comply with art. 9, § 5 of the Idaho Constitution, that fee schedule, at a minimum, should charge religious groups at least the marginal cost of usage. However, because of the U.S. Constitution, the fee schedule must not discriminate against religious groups by charging other comparable groups less solely because their speech is nonreligious in nature. Any fee schedule established must be content-neutral in terms of its classifications for fees and comparable groups must be charged at the same rate.

This is not to say that some content-neutral categories cannot be established. A district could, for example, distinguish between usage of its facilities by school-affiliated versus non-school-affiliated organizations and exempt school-affiliated organizations from charges. Likewise, the district could exempt government organizations from paying fees or partially subsidize

them by reduced fees as this is, again, a content-neutral distinction based instead upon one government entity assisting another.

However, we reiterate that, in complying with art. 9, § 5, and charging religious groups a use fee, it is important that districts not violate the United States Constitution by charging other comparable groups, such as political organizations or other private nonschool-affiliated groups, a lower fee or no fee at all. While charging religious groups for actual costs may be necessary under art. 9, § 5, this charge must be levied in a nondiscriminatory manner against all comparable groups to avoid free speech concerns.

CONCLUSION

In summary, court rulings have held that if a school district allows its facilities to be used by outside organizations, the district must also allow religious groups to have the same access to those facilities. However, long-term or permanent use of school facilities by a religious group may violate the Establishment Clause of the U.S. Constitution. A district policy should address this issue of long-term use. Moreover, the clear prohibition against use of public funds to support religious or sectarian activities found in art. 9, § 5 of the Idaho Constitution suggests that when a religious group uses a public school facility, a charge for the use that at least equals the marginal cost of using the facility for the specified period of time should be assessed. However, because the U.S. Constitution prohibits discriminating against religious groups, other comparable organizations must also be charged this fee at the same rate.

As a practical matter, at least one publication offers suggestions to school districts. In Discrimination Against Religious Viewpoints Prohibited in Public Schools: An Analysis

of the Lamb's Chapel Decision, 85 Ed. Law Rep. 387 (commentary by David Schimmel, J.D.), the author sets forth several guidelines regarding the use of school buildings by religious groups. These may be helpful to you and I have enclosed them as Appendix A. As noted above, I have also enclosed as Appendix B a 1978 excerpt from a memorandum by the Washington State School Superintendent. Because Washington has a constitutional provision similar to art 9, § 5 of the Idaho Constitution, excerpts from this Washington memorandum may provide guidance on Idaho constitutional concerns.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office. I hope the information provided is helpful in advising school districts. I realize this is not an easy issue and the case law is not always clear. If you have any questions, please do not hesitate to call.

Sincerely yours,

ELAINE EBERHARTER-
MAKI Deputy Attorney
General
State Department of
Education

APPENDIX A

1. The First Amendment does not generally require public schools to allow outside groups to use their facilities.

2. If public schools allow some community groups to use their facilities after school hours to present films, speakers, or forums on one or more subjects, they cannot prohibit religious groups from presenting their views on the same subjects. Such viewpoint discrimination against a religious perspective (or any other legitimate perspective) is a violation of the Free Speech Clause of the First Amendment.

3. Nevertheless, public schools may restrict or prohibit religious speech or religious activities on their property, if necessary, to avoid violating the Establishment Clause.

4. There is no unanimity among the justices concerning what test should be applied to determine what activities violate the Establishment Clause. However, the Court's use of the *Lemon* and "endorsement" tests in *Lamb's Chapel* suggests that educators should use *Lemon* or both of these tests to determine when use of school facilities by religious groups or for religious purposes may be prohibited.

Discrimination Against Religious Viewpoints Prohibited in Public Schools: An Analysis of the *Lamb's Chapel* Decision, 85 Ed. Law

Rep. 387, 395-96 (commentary by David Schimmel, J.D.).

APPENDIX B

What constitutes an “occasional” use is not readily computable pursuant to any magic formula. Common sense would, however, appear to dictate that a particular school building or complex of buildings be used in whole or part only on an infrequent ad hoc basis for the conduct of religious activities. Regular use of a particular building or complex for normal religious activities, e.g., each Sunday for religious services, is obviously more apparent to the public and fraught with the danger that the public will view the religious group(s) as having established a degree of permanency at the location, thus, lending the prestige of the government to the particular religious group(s).

. . . .

[T]he principal and specific violations of the federal and state constitutions to be guarded against are: 1) an express or recognizable purpose or intent on the part of the school district of aiding or supporting religion; 2) support of religion in terms of preference for a particular religion to the exclusion of others; 3) support of religion in terms of the placement of the authority and/or prestige of the school district behind a particular religion or religion generally; 4) excessive administrative relationships with religious groups as a consequence of their use of school buildings; 5) excessive political divisiveness in the community as a consequence or

likely consequence of the use of school buildings for religious purposes; and 6) direct and indirect financial support of religion.

Excerpts from Memorandum dated February 27, 1978, to Austin from Patterson (Washington State Superintendent of Public Instruction).

March 3, 1994

The Honorable Robert C. Geddes
Idaho House of Representatives
HAND DELIVERED

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

Re: Publication

Dear Representative Geddes:

QUESTIONS PRESENTED

1. What is meant by the term “newspaper of general circulation in the county” as used in Idaho Code § 14-518 relating to notice and publication of lists of abandoned property?
2. Under Idaho Code § 14-518, must a newspaper of general circulation be published or printed in the county where notice is required?

CONCLUSIONS

1. For a newspaper to be a “newspaper of general circulation in the county” so as to qualify to publish notice pursuant to Idaho Code § 14-518, the newspaper must have a content appealing to the public generally, it must contain news of general interest to the community and to the average read-

er in the county, it must have more than a de minimis number of actual paid subscribers in the county, it must be geographically diverse in that its distribution must not be entirely limited to one community or section of the county and it must be available to anyone in the county who wishes to subscribe.

2. A newspaper which is not printed or published in the county in which it is distributed and does not maintain an office in the county in which it is distributed may nonetheless be a newspaper of general circulation in that county if it meets the above criteria.

ANALYSIS

A. Newspaper of General Circulation

Idaho Code § 14-518 provides in relevant part:

Notice and publication of lists of abandoned property. —(1) The administrator shall cause a notice to be published annually each year, at least once a week for two (2) consecutive weeks in newspapers of general circulation, or in a published notice distributed, one (1) time only, concurrently with a newspaper of general circulation in the county of this state in which is located the last known address of any person to be named in the notice.

The only requirement of newspapers carrying lists of unclaimed property is that they be “a newspaper of general circulation in the county.” When compared to statutory requirements for other types of published notice in Idaho as well as in other states, the

requirements contained in Idaho Code § 14-518 are minimal. Often, statutory requirements mandate that the newspaper be printed or published in the jurisdiction where notice is required to be given, that it have a certain number of paid subscribers or that it have been published for a certain number of consecutive weeks or months in order to qualify as a paper in which legal notice can be given.

The primary purpose of notice by publication requirements, such as the one contained in Idaho Code § 14-518, is to ensure that the printing of legal notice will receive the widest distribution and publicity practicable. Consequently, statutes of the same type as Idaho Code § 14-518 often set forth a number of requirements which must be met by newspapers carrying the notice.

The requirement of a paper of general circulation was discussed by the Idaho Supreme Court in the case of Robinson v. Latah County, 56 Idaho 759, 59 P.2d 19 (1936). While the Robinson case discusses a different statutory publication requirement and does not define the term “general circulation,” it does give some guidance as to what is meant by the term.

It seems clear that the legislature intended . . . that commissioners’ proceedings be published in the [newspaper] “most likely to give notice thereof.” And it is evident that the legislature made *effective notice* the controlling consideration.

Id. at 767. Courts of other jurisdiction have defined what is meant by a newspaper of general circulation. For instance, Great Southern Media, Inc. v. McDowell County, 284 S.E.2d 457 (N.C. 1981);

[F]or a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, it must meet this four pronged test. First it must have a content that appeals to the public generally. Second, it must have more than a de minimis number of actual paid subscribers in the taxing unit. Third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit. Fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it.

284 S.E.2d at 467.

The Alaska Supreme Court in Moore v. State of Alaska, 553 P.2d 8 (Alaska 1976), held that a newspaper which carried news on a variety of subjects of general interest to the average reader and which had a circulation of approximately 5% of the total population was a newspaper of general circulation for the purpose of an Alaska statute requiring notice of the sale of state lands. The Alaska court went on to hold that a newspaper which contains news of general interest to the community and reaches a diverse readership is a “newspaper of general circulation” for purposes of Alaska’s notification requirement for the sale of state lands.

The case law from Alaska and North Carolina is in accord with the general rule:

It is accepted generally that for a publication to be considered in law a newspaper of general circulation it must contain items of general interest to the public, such as news of political, religious,

commercial or social affairs. And in the absence of a statutory definition, a newspaper may ordinarily be said to be one of general circulation even though the paper is devoted to the interests of a particular class of persons and specializes in news and intelligence primarily of interest to that class, if, in addition to such special news, the paper also publishes news of a general character and of a general interest, and to some extent circulates among the general public.

58 Am. Jur. 2d *Newspapers* § 42.

Whether a newspaper is of general circulation involves consideration of a number of elements other than just the number of readers or subscribers. The heterogeneity of subscribers and the extent of circulation are two primary factors looked to by the courts. N.H. Ranch Co. v. Gann, 82 P.2d 632 (N. Mex. 1938). Whether a newspaper is one of general circulation is more a question of substance rather than the size of the newspaper or the number of subscribers. The size of the paper's readership or the number of subscribers is only one factor to be considered. 58 Am. Jur. 2d *Newspapers* § 43. The Idaho Supreme Court in Robinson discussed some of the factors to be considered in determining whether a newspaper is one of general circulation:

While, as just stated, the actual circulation of a newspaper is an important element of "notice," it is not decisive. There are other elements which may be taken into consideration. For example: Suppose that one paper, "A", has an actual circulation of 2,000 copies generally distributed throughout the various precincts of the county, and that its

competitor, “B”, has an actual circulation of 2,500 copies confined largely to a single town; or that “B” is a sectarian paper—its subscribers for the most part being members of a particular sect, residing in a single locality; or that most of “B’s” subscribers belong to a particular nationality. Under these circumstances, a board may, in the exercise of sound discretion, vested in it by statute, award county printing to “A”, even though its circulation, numerically, is not as large as “B’s.” Otherwise, the very purpose of this statute might be defeated. However, where there is a controversy between two newspapers as to which one would most likely give effective notice, the circulation of the particular newspaper to which the board makes its award, or with which it contracts, and the circulation of the newspaper contesting the award, are the only circulations which can be considered.

56 Idaho at 768, 59 P.2d at 23.

The presence or absence of advertising of interest to the general public is also a factor to be considered in determining whether a newspaper is of general circulation. 58 Am. Jur. 2d *Newspapers* § 46. In other words, advertisement which would only be of interest to a particular sect, profession or nationality would be an indication that the newspaper is not of general circulation. However, it is clear that the primary consideration does not concern advertising but rather the variance of circulation and the type of news and whether that news is of interest to the general public. A publication which is devoted chiefly to a particular class, profession or religion will not disqualify a paper from being one of general circulation if the paper also devotes columns to

dissemination of news of importance and interest to the public generally and if, in fact, the paper is circulated amongst the general public. McDonald v. Shreveport Mutual Building Association, 152 So. 318 (La. 1934).

Some states impose by statute a requirement that circulation be determined by looking at a list of paid subscribers. *See, e.g., In re Carson Bulletin*, 85 Cal. App. 3d 785 (1978). In the absence of an express statutory requirement, however, it appears that newsstand sales should be included. The Kentucky Court of Appeals ruled:

Even though only six percent of the estimated 5,700 households in Mason County had paid subscriptions to *The Post* in March 1987, *The Post* is also available at newsstands and at convenience stores. Moreover, we do not think that the number of subscriptions is the controlling factor in determining whether a newspaper has a general circulation. Indeed, by relying on a “numbers game” to decide if a newspaper has “general circulation” in a particular area, the clear purpose of the act could be frustrated.

E.W. Scripps Co. v. City of Maysville, 790 S.W.2d 450, 452 (Ky. Ct. App. 1990).

Idaho Code § 14-518 has no requirement relating to paid subscription and, therefore, newsstand sales should be included. However, in resort areas an Idaho court might be expected to scrutinize newsstand sales if it appears that they are generated by out-of-town residents and that, in fact, the out of town or out-of-county newspaper is not being purchased by locals. Certainly, an

Idaho court might be expected to require at least some paid subscribers.

B. Place of Publication

It is not a requirement that a newspaper be published or printed in a particular county in order to be considered a newspaper of general circulation for that county. In E.W. Scripps v. City of Maysville, the Kentucky Court of Appeals held:

We hold that to be entitled to notice of special meetings, a newspaper must show that it serves a limited geographical area and that its coverage of news in a particular city or county as regular and intensive.

Clearly, *The Post* is a newspaper because it is distributed within a limited twelve county region which includes Maysville and Mason County. Secondly, *The Post* has a general circulation because it provides more than random coverage of news of Maysville and Mason County. Indeed, *The Post* demonstrated that it gathers and reports economic, educational, sports, human interest, government and court news at the local level.

790 S.W.2d at 452.

The Idaho Supreme Court, in a 1988 decision, distinguished circulation from publication and in so doing appears to have held that circulation in a particular locale does not require that the paper be printed or published there. In Express Publishing, Inc. v. City of Ketchum, 114 Idaho 114, 753 P.2d 1260 (1988), the court ruled:

Based on the above facts, and its view of the strictures of I.C. § 50-213, the trial court correctly concluded that the only question presented to him on summary judgment was whether *Idaho Mountain Express* was the *only* newspaper “published” within the city limits of Ketchum. As above noted, the district court concluded that the *Express* was the *only* newspaper “published” within the city limits of Ketchum.

The *Woodriver Journal* asserts that the word “published” as contained in Idaho Code § 50-213 must be given a meaning “to disseminate” or “to circulate.” The District Court concluded otherwise and stated “the language of Idaho Code § 50-213 manifests a legislative intent to distinguish a newspaper’s place of publication from its place of circulation. We agree.

114 Idaho at 116, 753 P.2d at 1262.

In order to be a “newspaper of general circulation in the county,” it is not necessary that the newspaper be actually published or printed in the particular county. It is sufficient if the newspaper is circulated to a wide cross-section of the county’s residents and that the newspaper be of the type which carries information which will be of interest to the public at large and of interest to the citizens of that county. In determining whether publication in a particular newspaper satisfies the requirement of Idaho Code § 14-518 or of a similar statute, the primary purpose for publication should be kept in mind. If more than one paper qualifies as a “newspaper of general circulation,” the agency administrator is given discretion to choose the paper which will publish the notice.

Very truly yours,

WILLIAM A. VON TAGEN
Deputy Attorney
General

March 8, 1994

Mr. Bob Peyron, Chairman
Permanent Building Fund Advisory Council
Department of Administration
STATEHOUSE MAIL
Boise, ID 83720

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

Re: Governor's Residence

Dear Mr. Peyron:

By your letter of March 2, 1994, you asked four questions concerning the creation and appropriations to the Governor's Residence Account by legislative acts in 1977, 1989, 1990 and 1993. Your inquiry is focused on whether these legislative acts are sufficient to allow the Permanent Building Fund Advisory Council to commence construction of a governor's residence without further legislation. In particular, you are concerned as to whether the provision of art. 7, § 13 of the Idaho Constitution has been met. You also inquire as to whether the requirements for unity of subject and title found in art. 3, § 16 of the Idaho Constitution have been satisfied. You ask whether there has been compliance with the governor's constitutional right of line item veto on appropriation bills. Finally, you question whether and on what basis the Permanent Building Fund Advisory Council is authorized to commence construction of the governor's residence.

Prior to addressing these issues, it would be helpful to

review the pertinent portions of the legislative acts which created the Governor's Residence Account and provides for the perpetual appropriation of funds in that account.

I.

HISTORICAL OVERVIEW

In 1977, the legislature enacted House Bill 275 which, among other things, provided for the creation of a dedicated fund to be called the Governor's Residence Account which was to consist of:

[M]oneys received from any and all gifts, grants or endowments from any and all persons, firms, organizations, corporations, and otherwise, for the purpose of decorating, equipping, completing and/or furnishing the governor's residence and/or landscaping the grounds surrounding such residence.

1977 Idaho Sess. Laws 903. The legislature allowed all monies deposited to the account to be:

[P]erpetually appropriated and set apart for the purposes for which the moneys are received, the same to be available for such purposes immediately upon their being credited to the said account, upon authorization for expenditure being given by the Permanent Building Fund Advisory Council, and the Division of Public Works.

Id. at 903-04 (emphasis added).

In 1989, the legislature again addressed the issue of the Governor's Residence Account in Senate Bill 1148. It authorized and directed the State Land Board of Commissioners to act as custodian for the governor's mansion then on North 21st Street in Boise, Idaho. The Department of Lands was provided authorization to dispose of the property by sale. Any monies realized from the sale of the governor's residence were to be deposited to the Governor's Residence Account.

The bill created an agency asset fund in the state treasury designated as the Governor's Residence Account. The stated purpose for the account was broadened from the 1977 act to include site acquisition, planning and construction of a governor's residence. As in the 1977 act, monies were perpetually appropriated for the purposes stated in the act. Since the 1977 and 1989 acts essentially address the same issues, for purposes of this analysis it is necessary to focus only on the 1989 act.

In 1990, the Idaho Legislature adopted Senate Bill 1647 which was enacted into law as chapter 337 of the 1990 Session Laws. Section 4 of this act provided an appropriation of \$778,800 from the permanent building fund account to the Governor's Residence Account.

In 1993, the Idaho Legislature adopted House Bill 442 which was enacted into law as chapter 382 of the 1993 Sessions Laws. Section 8 of this act appropriated \$150,000 from the Governor's Residence Account for the purpose of "planning and designing an Executive Residence."

II.

ANALYSIS

A. Art. 7, § 13 of the Idaho Constitution.

The first issue raised by your letter is a question of whether the above-delineated acts comply with art. 7, § 13 of the Idaho Constitution. Art. 7, § 13 provides:

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

The term “appropriation” as used in art. 7, § 13, has been defined by the court to mean (1) authority from the legislature, (2) expressly given, (3) in a legal form, (4) to proper officers, (5) to pay from public monies, (6) a specified sum, and no more, (7) for a specified purpose and no other. *See Leonardson v. Moon*, 92 Idaho 796, 804, 451 P.2d 542 (1969). *See also State ex rel. Williams v. Adams*, 90 Idaho 195, 409 P.2d 415 (1965); *McConnell v. Gallet*, 51 Idaho 386, 6 P.2d 143 (1931).

The first five of these requirements are obviously met in the 1989 act. As to the requirement of a specified sum, and no more, the court in *McConnell v. Gallet* held:

However, from an examination of the authorities it appears that [the] element of specificness is necessary only when the appropriation is made payable from the general fund and is required solely as a protection against unlimited withdrawals from such fund under authority of a general appropriation. When, as here, the appropriation is made payable from a special fund, it is not necessary to

appropriate a specific sum. The act is clearly an attempt to make a continuing appropriation of all money that at any time may be in the Adjutant General's Contingent Fund; and the authorities are unanimous that, in the absence of a constitutional inhibition against continuing appropriations, they are valid.

51 Idaho at 390, 6 P.2d at 144 (emphasis added; citations omitted). Thus, the sixth requirement has been met by the continuing appropriation contained in the 1977 and 1989 acts.

The seventh and last requirement to meet the definition of "legal appropriation" is that monies be appropriated for a specific purpose and no other. The money contained within the Governor's Residence Account is for the specific purpose of "site acquisition, planning, construction of, decorating, equipping, completing and furnishing the governor's residence and/or landscaping the grounds" The language contained in the 1989 act states with specificity the purpose for which the account is to be used, meeting the seventh and last requirement.

You have also inquired as to whether these acts comply with the provisions of art. 3, § 16 of the Idaho Constitution, requiring unity of title and subject within an act.

B. Art. 3, § 16 of the Idaho Constitution.

Art. 3, § 16 of the Idaho Constitution states:

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in

the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

As stated by the Idaho Supreme Court, the purpose of this provision:

[I]s to prevent fraud and deception in the enactment of laws, and to provide reasonable notice to the legislators and the public of the general intent and subject matter of the act.

Kerner v. Johnson, 99 Idaho 433, 452, 583 P.2d 360, 379 (1978). With reference to art. 3, § 16, in Federal Reserve Bank v. Citizens Bank and Trust Company, the Idaho Supreme Court stated “[t]he title should not be as to such a character as to mislead or deceive either the lawmaking body or the public as to the legislative intent.” 53 Idaho 316, 324-25, 23 P.2d 735, (1933). *See also* State v. O’Bryan, 96 Idaho 548, 555, 531 P.2d 1193, 1200 (1975).

The court has also held that the title of an act need not be an exhaustive compilation of the provisions contained therein. In State v. O’Bryan, the court stated that the “title of the legislative act must set forth the general subject, but need not serve as a catalog or index to the subject matter.” 96 Idaho at 555, 531 P.2d at 1200. To invalidate a statute because its subject or object is not properly expressed in its title, the violation must not only be substantial, but must be plain, clear, manifest and unmistakable. *See* Golconda Lead Mines v. Neill, 82 Idaho 96, 103, 360 P.2d 221, 228 (1960).

Applying these standards to the 1989 act, it is clear that the title of Senate Bill 1148 delineates the substance of the legislation:

Relating to a governor's residence; authorizing and directing the State Board of Land Commissioners to act as custodian of certain surplus properties; authorizing the disposal of property as it becomes surplus and directing moneys realized from the sale to be credited to the governor's residence account; creating the governor's residence account in the agency asset fund and appropriating the moneys for the purposes specified, authorizing the division of public works to accept, store and use gifts and donations, and providing for investment of idle moneys in the account; reappropriating certain unexpended and unencumbered balances; and declaring an emergency.

Thus, the requirements of art. 3, § 16, are satisfied.

A question remains as to whether the appropriation made in 1990 complies with this provision. Senate Bill 1647 notes in the title of the act that there is an appropriation of monies from the "Permanent Building Fund Account to the Governor's Residence Account." Section 4 of the act provides an appropriation of \$778,800 to the Governor's Residence Account. This appears to comport with the provisions of art. 3, § 16. The \$150,000 appropriation from the Governor's Residence Account provided in the 1993 act also complies with the provisions of art. 3, § 16, however, because of the perpetual appropriation, this appropriation was probably not necessary.

The next question raised by your correspondence is whether the provisions of the legislative acts comply with art. 4, § 11, which allows for gubernatorial line item veto of the appropriation bills.

C. Art. 4, § 11 of the Idaho Constitution.

Art. 4, § 11 of the Idaho Constitution reads in pertinent part as follows:

The governor shall have power to disapprove of any item or items of any bill making appropriations of moneys embracing distinct items, and the part or parts approved shall become a law and the item or items disapproved shall be void, unless enacted in the manner following

The appropriation of \$778,800 contained in Senate Bill 647 appears clear in its intent and could have been vetoed by the governor pursuant to art. 4, § 11. However, it was not. Further, although the appropriation of \$150,000 from the Governor's Residence Account was probably unnecessary due to the perpetual appropriation, this appropriation could have been vetoed by the governor pursuant to art. 4, § 11 of the Idaho Constitution. Again, it was not.

Although there was no appropriation provided in the 1977 and 1989 acts creating the Governor's Residence Account and providing for its functions, both acts could have been vetoed by the governor pursuant to the veto power provided in art. 4, § 10 of the Idaho Constitution. If any of the acts appeared to be structured to deceive or hide the actual intent of the act from the governor, there may have arguably been violations of art. 4, §§ 10 and 11. This, however, is not the case and there is no apparent violation of these provisions.

The final question addressed in your correspondence asked on what basis the Permanent Building Fund Advisory Council would be required to act.

D. Authority of the Permanent Building Fund Advisory Council.

Although there is no requirement in the Idaho Code for the Permanent Building Fund Advisory Council to prioritize state building projects, it is clear that Idaho Code § 67-5710 requires approval by the Permanent Building Fund Advisory Council as a “condition precedent to the undertaking of planning or construction” of any project. In addition, the 1989 legislation provides for a perpetual appropriation authorizing expenditures for the purposes stated only when authorization by the Permanent Building Fund Advisory Council and the Division of Public Works has been provided. Thus, it appears that there is no mandate that the council act. And, without the consent of the Permanent Building Fund Advisory Council and the Division of Public Works, planning or construction on a governor’s residence cannot begin.

III.

CONCLUSION

In conclusion, art. 7, § 13, requiring an appropriation of a specified amount is met by the language in the 1977 and the 1989 acts which provides for a perpetual appropriation. The legislation meets the requirements of unity of title and subject within the act as required by art. 3, § 16 of the Idaho Constitution. The gubernatorial veto provisions provided in art. 4, §§ 10 and 11 of the Idaho Constitution were not violated by the acts creating the Governor’s Residence Account and appropriating money to that account. Finally, Idaho Code § 67-5710 and the language of the 1989 act require the consent of the Permanent Building Fund Advisory Council and the Division of Public Works prior to undertaking planning or construction of a governor’s residence.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

I hope this adequately addresses the issues raised by your correspondence. If I can be of further assistance, please let me know.

Very truly yours,

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

March 14, 1994

Honorable Jim Hansen
Idaho House of Representatives
HAND DELIVERED

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

Re: Constitutionality of Statutory Limitation on
Qualifications to be
Candidate for and Serve as State Superintendent of
Public Instruction

Dear Representative Hansen:

Your letter of March 8, 1994, poses the following question:

During our deliberations on legislative changes to Idaho Code §§ 34-613 and 67-1501 on the qualifications to be a candidate for and serve as the State Superintendent of Public Instruction, it has come to my attention that the Idaho Constitution does not speak to the qualifications for this constitutional office.

Please, will you research this to determine if, in fact, Idaho Code §§ 34-613 and 67-1501 unconstitutionally limit the ability of Idaho citizens to be a candidate for and serve as the State Superintendent of Public Instruction.

It is my opinion that statutory qualifications to be a candidate for and serve as State Superintendent of Public Instruction are constitutional so long as they are rationally related to service in the office. I reach this conclusion for the following reasons.

As originally adopted, art. 4, § 3 of the Idaho Constitution addressed the qualifications of the office of Superintendent of Public Instruction by including the office in the list of offices whose officeholders must be 25 years old, a citizen of the United States, and a resident of Idaho for two years. 1947 Senate Joint Resolution No. 6, however, proposed a constitutional amendment to remove the State Superintendent of Public Instruction from the section dealing with qualifications of executive officers. *See* 1947 Idaho Sess. Laws 908-09. The proposed amendment was ratified by the voters in 1948. The title to the joint resolution proposing the amendment stated the following:

A joint resolution proposing amendment of the constitution of the state of Idaho, by amending section 3 of article IV of the constitution of the state of Idaho relating to the qualification of officers of the executive department to eliminate the superintendent of public instruction as an officer whose qualifications are prescribed by the constitution of the state of Idaho, and submitting to the electors of the state of Idaho for their approval or rejection the question whether said section of article IV of the constitution of the state of Idaho shall be so amended as to eliminate the superintendent of public instruction as an officer whose qualifications are prescribed by the constitution of the state of Idaho, and directing the secretary of state to give legal notice of this proposed constitutional amendment.

The logical import of the title and text of this joint resolution removing references to the Superintendent of Public Instruction from art. 4, § 3, is to allow the legislature to prescribe qualifications for office.

There is, however, a strong line of case law in Idaho's sister western states to the effect that a legislature cannot add to a constitutional prescription of qualifications for office. *See, e.g., State ex rel. Sawyer v. LaSoto*, 580 P.2d 714, 717 (Ariz. 1978) (qualifications for office fixed in the constitution are exclusive and legislature may not add new or different ones); *State ex rel. Powers v. Welch*, 259 P.2d 112, 115 (Ore. 1953) (constitutional right given to voters to elect whomever they please that meets the constitutional age and residency requirements cannot be abridged by legislature); *In re Bartz*, 287 P.2d 119, 121 (Wash. 1955) (state constitutions that prescribe qualifications for officeholders generally and specific qualifications for certain officers have been construed to prohibit legislative imposition of any additional qualifications). *But see Rittenband v. Cory*, 205 Cal. Rptr. 576, 579 (Cal. App. 1984) (upholding mandatory retirement of district judges at age 70). Strictly speaking, this line of authority would not apply to the State Superintendent of Public Instruction because the reference to the superintendent has been removed from art. 4, § 3 of the Idaho Constitution, and therefore there are no constitutionally prescribed qualifications for office for the State Superintendent of Public Instruction.

Even if there were constitutionally prescribed qualifications for the office, the Idaho Supreme Court has construed statutes that restrict the eligibility of persons to become district judges as not being in conflict with art. 5, § 23 of the Idaho Constitution providing the qualifications of district judges. Art. 5, § 23 provides:

Qualifications of District Judges.—No person shall be eligible to the office of district judge unless he be learned in the law, thirty (30) years of age, and a citizen of the United States, and shall have resided in the state or territory at least two (2) years next preceding his election, or unless he shall have been at the time of his election, an elector in the judicial district for which he is elected.

In Boughton v. Price, 70 Idaho 243, 215 P.2d 286 (1950), the Idaho Supreme Court considered the constitutionality of a statute providing that no person shall be eligible for election or appointment to the office of district judge after having attained the age of 70 years. The court upheld the constitutionality of this statute with the following analysis:

Section 1-2007, I.C., prescribing that no person shall be eligible for election or appointment to the office of district judge after having attained the age of 70 years, is part of the plan and purpose of the Judges Retirement Act. This act provides for the resignation and retirement of judges upon retirement pay, and was enacted for the purpose of betterment of our judicial system. The fixing of the maximum age limit at 70 years does not appear to be unreasonable and is in harmony with the other provisions of the retirement act.

We conclude that section 1-2007, I.C., is not in conflict with article V, section 23, of the constitution and was within the power of the legislature to enact.

70 Idaho at 251, 215 P.2d at 295.

Art. 4, § 3 of the Idaho Constitution does not prescribe qualifications to the office of State Superintendent of Public Instruction. The constitutional amendment removing that office from that section stated that it was intended to repeal constitutional qualifications from the office. Moreover, the Idaho Supreme Court has held in Boughton v. Price that the legislature may supplement the constitutional qualifications to be a district judge with reasonable statutory qualifications. (As noted earlier, the latter holding is at odds with that of many of Idaho's sister western states, but not all of them.) Accordingly, it would appear that it is constitutional for the legislature to enact statutes prescribing qualifications for the office of State Superintendent of Public Instruction that are reasonably related to the office itself.

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

Sincerely yours,

MICHAEL S. GILMORE
Deputy Attorney
General

May 23, 1994

Mr. Mike Wetherell
HYDE, WETHERELL, BRAY, HAFF & FRENCH
Owyhee Plaza, Suite 500
1109 Main Street
Boise, ID 83702

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

Dear Mr. Wetherell:

By letter dated April 14, 1994, you take exception to a comment this office made to the *Idaho Statesman*. We stated that “serial meetings” held by public officers to form a consensus on a matter pending before a public agency could violate the spirit of the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347.¹

You raise three objections to our interpretation of the Open Meeting Law. First, you contend that your actions taken in private to discuss public business are protected by the First Amendment to the United States Constitution. You contend that Idaho’s Open Meeting Law would be unconstitutional if it interferes with your “freedom of speech and freedom of communication and association” Second, you contend that even if serial meetings are not protected by the Constitution, it is poor public policy and “contributes to bad, not good government” to read the Open Meeting Law so as to prohibit such meetings. Third, you argue that serial meetings with city council members cannot violate the Open Meeting Law because these meetings are not

officially “convened.” Finally, you demand that the Attorney General charge you with violations of the Open Meeting Law if it is the opinion of this office that serial meetings do, in fact, violate the law.

I.

PRELIMINARY OBSERVATIONS

At the outset, we decline to address your contention that a ban on serial meetings is poor public policy. If you are convinced that such is the case, your argument should be addressed to the Idaho Legislature, not to this office.

We likewise decline to bring charges against you for any confessed violations of the law. We have not investigated your conduct and do not intend to do so. The 1992 amendment to the Open Meeting Law makes it clear that this office enforces the law against state agencies, not local governmental entities:

The attorney general shall have the duty to enforce this act in relation to public agencies of the state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies with their respective jurisdictions.

Idaho Code § 67-2347(3).

II.

THE CONCEPT OF SERIAL MEETINGS

In order to respond to your questions, we must first define “serial meetings.” The term does not appear in the Idaho Open

Meeting Law. We therefore derive our definition of the term from the pattern of conduct presented in your letter. You describe your practice as that of contacting colleagues on the city council “on a one-on-one basis, and indeed even in a serial manner” in an “attempt to build a consensus for a position or a policy” which you “wish to advance or have already advanced.” In another paragraph, you describe these serial meetings as part of your “effort to form policy, build consensus, and pass ordinances to govern the City of Boise.”

For purposes of this opinion, therefore, we define the term “serial meeting” to mean the contacting of members of a public agency one-on-one or in groups less than a quorum, outside of official public meetings, in a deliberate attempt to build a majority for or against a public policy or proposed ordinance.²

III.

SERIAL MEETINGS MAY VIOLATE THE IDAHO OPEN MEETING LAW EVEN THOUGH THEY ARE NOT FORMALLY CONVENED

The question whether a serial meeting violates the Open Meeting Law boils down to two issues. First, must the meeting be formally “convened”? Second, can a meeting take place without a quorum in attendance at one time? We address each of these two issues in order.

A. The Notion of “Convening”

The fundamental requirement of open meetings is found in Idaho Code § 67-2342(1):

Except as provided below, all meetings of a governing body of a public agency shall be open to

the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

The pivotal word is “meeting.” The Open Meeting Law is not triggered unless there is first a meeting. The term “meeting,” according to the law, means “the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.” Idaho Code § 67-2341(6). Thus, there are two components of the word “meeting”: A procedural element that identifies the group and the context of its gathering (“the convening of a governing body of a public agency”) and a substantive element that identifies the purpose of the gathering (“to make a decision or to deliberate toward a decision on any matter”).

Turning first to the procedural component, we note that there is no question that the Boise City Council is “the governing body of a public agency.” The Open Meeting Law defines “governing body” as “the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.” Idaho Code § 67-2341(5). A “public agency” is defined, in pertinent part, as “any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho.” Idaho Code § 67-2341(4)(c).

The procedural hurdle identified in your letter is the question whether a serial meeting is the “convening” of the governing body of the public agency. You deny that such is the case:

Have we completely forgotten that this is an open “meeting” law and that meeting is specifically

defined in the act as the convening of a governing body of a public agency to make a decision or deliberate toward a decision? When I lobby my colleagues (as I point out again I do all the time, and will continue to do unless you or the courts restrain me from this clandestine practice), I do not convene them—I corner them; I call them; I accost them; I probably bore and annoy them, but I most assuredly do not convene them.

You bolster this argument by pointing to the fact that you personally cannot call into session a formal meeting of the Boise City Council:

Indeed, I have no independent legal power to convene the Boise City Council. I would have to call the other members one at a time to build a consensus to do so other than on a regular meeting night. Let's eliminate this ridiculous (in my opinion) interpretation of the law.

The term “convene” is not defined in the Open Meeting Law. It is reasonable to assume that the legislature meant it to be used in its plain, dictionary meaning. Taken intransitively, the term “convene” follows its own literal derivation, “to meet together; assemble, esp. for a common purpose.” Webster's New World Dictionary, 1988. In the active sense of actively convening, the term's primary meaning is “to cause to assemble, or meet together.” *Id.*

In either sense (and the statutory context is not clear), the definition of “convening” seems broad enough to cover formal as well as informal gatherings of the members of the city council. They are “convened” when they meet together or when someone causes them to meet together.

This reading is supported by the fact that the legislature found it necessary to clarify that certain kinds of “informal and impromptu discussions” are exempt from the law; namely, those discussions “of a general nature which do not specifically relate to a matter than pending before the public agency for decision.” Idaho Code § 67-2341(2). If the Open Meeting Law applied only to formal meetings, there would have been no need to single out a specific category of informal meetings that is exempt from the law.

Any other reading would eviscerate the law. It makes no sense to say that the Open Meeting Law applies only when the governing body of a public agency has been “convened,” *i.e.*, formally called to order by a body’s presiding officer. Such a reading would provide a blueprint for circumventing the law: Just don’t ever formally convene and you cannot violate the Open Meeting Law.

It is the opinion of this office that the Idaho Legislature could not have intended such a result. The problem sought to be remedied by the Open Meeting Law is the practice of a governing body first convening informally to discuss and decide how public business is to be conducted, and then formally convening to rubber-stamp the secret decisions already reached in private. To repeat, it is the opinion of this office that an Idaho court would find that both formal and informal gatherings are “meetings” and that both must comply with Idaho’s Open Meeting Law.

B. The Requirement of a Quorum

As noted earlier, a “meeting” occurs when the governing body of a public agency gathers together “to make a decision or to deliberate toward a decision on any matter.” The question with regard to serial meetings is whether the law applies to gatherings of less than a quorum of the governing body of the public agency.

The terms “decision” and “deliberation” are defined in the Open Meeting Law. The term “decision” is defined, in pertinent part, as:

[A]ny determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present

Idaho Code § 67-2341(1). The term “deliberation” means “the receipt or exchange of information or opinion relating to a decision” Idaho Code § 67-2341(2). As noted above, “deliberation” does not include “informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision.” *Id.*³

Thus, the requirement that decisions be made at meetings that are held in public appears to arise in the context of a “meeting at which a quorum is present.” The requirement of a quorum would also seem to follow from the commonsense concept of a “meeting” of a “governing body.”⁴

As noted above, there is no question that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body meets together to deliberate or decide on matters pending before the public agency—regardless of whether the meeting is formal or informal. The question here is whether the Open Meeting Law requirements must also be complied with when the decision of the majority is reached serially rather than at a single time and place. Idaho law on this question is presently unclear.

For this reason, this office has not previously concluded or given an opinion that serial meetings (person-to-person meetings

by a public official to build consensus on public business) violate the Open Meeting Law. As noted in the recent comment to the *Idaho Statesman*, it has been the concern of this office that the practice could be used to evade public deliberation and thereby circumvent the policy and spirit of the law.

This concern over serial meetings is not novel to this office. Several courts have held that a series of meetings of less than a quorum of a public agency can nonetheless result in a violation of an open meeting law.

For instance, in Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton, 214 Cal. Rptr. 561 (Cal. App. 1985), the transfer of waterfront property by a municipal redevelopment agency to a private party was negotiated by the agency's attorney through a series of one-on-one telephone conversations between the attorney and each member of the agency's board. The plaintiff alleged that this was a common practice by the board and that these serial conversations violated California's Open Meeting Law (the Brown Act). The California Court of Appeals agreed.

The court of appeals focused upon collective activity by a majority of a governing body, whether or not in the presence of one another. This focus was dictated by the fact that the California Legislature had amended the Brown Act in 1961 "to make clear that legislative action within the act was not necessarily limited to action taken at a formal meeting." 214 Cal. Rptr. at 564. The 1961 amendment defined "action taken" as:

- (1) A collective decision made by a majority of the members of a legislative body, (2) a collective commitment or promise by a majority of the members of a legislative body to make a positive or

a negative decision, or (3) an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

1961 Cal. Stat. 1671. Based upon this definition and prior case law, the court of appeals held that the California Open Meeting Law would be too easily evaded if violations could occur only when a quorum was present at a common site:

The foregoing authorities make clear that the concept of “meeting” under the Brown Act comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business. Considering the ease by which personal contact is established by use of the telephone and the common resort to that form of communication in the conduct of public business, no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body is a requisite of such an informal meeting. Indeed if face-to-face contact of the members of a legislative body were necessary for a “meeting,” the objective of the open meeting requirement of the Brown Act could all too easily be evaded.

214 Cal. Rptr. at 565 (emphasis added). The court then concluded:

Thus a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are “planned by or held with the collective concur-

rence of a quorum of the body to privately discuss the public's business" either directly or indirectly through the agency of a nonmember. (65 Ops. Cal. Atty. Gen., *supra*, at p. 66.)

. . . If a quorum of the members of the legislative body so intended to unite in an agreement to agree, a violation of the Brown Act would be established.

Id.

The California Supreme Court adopted the reasoning of this decision in Roberts v. City of Palmdale, 20 Cal. Rptr. 2d 330, 337 (Cal. 1993), stating:

Of course the intent of the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.

The Idaho statutes are not as broad as California's because they do not include collective commitment or promise by a majority to take action, so the California courts are deciding cases under a more proscriptive statutory scheme.

The Tennessee Court of Appeals reached a similar conclusion in an unreported opinion, State ex rel. Mathews v. Shelby County Board of Commissioners, 1990 WL 29276, 18 Media L. Rep. 1440 (Tenn. App. 1990). The case concerned the filling of a vacant position on an 11-member county commission. The facts were similar to those envisioned in your letter:

[V]arious Commissioners either met together or talked among themselves outside the chambers of the Commission, without public notice, and discussed personally and by telephone the pros and cons, merits and demerits of announced candidates for the position.

1990 WL 29276, at *3. The commissioners concluded that none of the announced candidates enjoyed majority support and a new effort would be made to find a “consensus” candidate. A single commissioner took upon himself the responsibility of locating a candidate and lined up the support of two other commissioners. Those three commissioners then garnered the support of three others until the required six-member majority was in place.

The Tennessee Court of Appeals held that the above facts stated a cause of action in alleging a violation of that state’s Open Meetings Law even though no public “meeting” had ever been held: “[T]he Act must apply when public officials meet in secret to deliberate and make decisions affecting the public’s business with the intent to hold an open meeting to announce their decision at a later time” 1990 WL 29276, at *5 (quoting the unreported case of Williamson County Broadcasting Co. v. Williamson County Board of Education, (Tenn. App. M.S., Sept. 3, 1976)). Any other outcome, the court concluded, would frustrate the most fundamental purposes of the act: “One of the purposes of the Open Meetings Law is to prevent, at a non-public meeting, the crystallization of secret decisions to a point just short of ceremonial acceptance.” *Id.* (quoting the unreported case of Selfe v. Bellah, (Tenn. App. E.S., March 11, 1981)). In reaching this conclusion, the Tennessee court relied upon a specific provision of the Tennessee Open Meetings Law which stated that “[n]o such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public busi-

ness in circumvention of the spirit or requirements of this [act].” Tenn. Code Ann. § 8-44-102(d). The Idaho law has no parallel language.

The type of activity set forth in Stockton, Roberts and Mathews pushes the limit of acceptable conduct under Idaho law and circumvents the policy stated at Idaho Code § 67-2340; namely, the legislature finds and declares that it is the policy of this state that the formulation of public policy is public business and shall not be conducted in secret. Whether the Idaho Supreme Court would apply the Idaho Open Meeting Law as the California and Tennessee courts have done remains to be seen.

At least one Idaho district court has so concluded. On April 28, 1994, Judge Gary Haman, ruling from the bench, ruled that the City of Sandpoint’s annexation of 17,000 acres had been made in violation of the Open Meeting Law. According to a report in the *Spokesman-Review* of April 29, 1994, the mayor of Sandpoint admitted to meeting individually, one-on-one, with city council members to garner their support for the annexation before going public with the proposal. The mayor defended his action by saying that the individual council members had not indicated how they would vote. On the contrary, three council members said they were asked how they would vote, and one member said the annexation was a “done deal” after the mayor’s secret meetings. During the public meeting on the annexation, no residents spoke in favor of it and more than 20 opposed it. Then, without any discussion by the city council, members unanimously approved the plan. On these facts, Judge Haman invoked the penalty provisions of the Open Meeting Law and struck down the annexation plan as null and void. Idaho Code § 67-2347. Thus, the decisions of other state courts interpreting their statutes and the only announced decision to date in Idaho conclude that serial meetings violate the Open Meeting Law—at least in fact patterns

where decisions are nailed down prior to presentation of the matter in a public meeting.

Unfortunately, Judge Haman's need to intervene quickly prevented him from issuing a written decision. Thus, we do not know his precise approach to the questions addressed in this opinion. We continue to adhere to our prior statements that the sort of "clandestine practice" described in your letter, if intended to forge a majority decision outside of the public forum, violates at least the spirit of Idaho's Open Meeting Law. In light of Judge Haman's decision, it is clear that public officials who operate in this manner do so at their own jeopardy.

IV.

OPEN MEETING LAW RESTRICTIONS DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF PUBLIC OFFICIALS

Reliance upon the First Amendment's protection of speech to justify noncompliance with a state's open meeting law has not been successful in any court that has addressed the issue. Simply stated, conduct that violates a state's open meeting law is not protected by the First Amendment, and a public officer has no protected right to conduct public business in private. Several state appellate courts have so held.

In People ex rel. Difanis v. Barr, 397 N.E.2d 895 (Ill. App. 1979), for example, the practice of city councilmembers meeting in political caucuses was challenged as violating Illinois' Open Meetings Act. Among other defenses, the defendant public officers asserted that their practice was protected by the First Amendment. The court disagreed, stating:

The Open Meetings Act neither prohibits the expression of any idea, nor makes assembly illegal; the Act requires merely that public bodies meet and deliberate public business openly rather than behind closed doors. The defendants' free speech argument is misplaced. The first amendment to the United States Constitution and article I, section 4, of the Illinois Constitution guarantee the right to express ideas publicly, and the Open Meetings Act does not restrict that right in any way. The defendants in effect argue that the freedom of speech gives them the right to confer privately rather than publicly about public business—business about which they have power to act. Freedom of speech protects the expression of ideas, not the right to conduct public business in closed meetings. The same reasoning applies to the defendants' argument that the Act infringes on their right of free assembly.

397 N.E.2d at 899 (emphasis added; citations omitted). The Illinois Supreme Court affirmed that decision. 414 N.E.2d 731 (1980).

The Colorado Supreme Court has addressed the practice of caucusing by political officials behind closed doors. Cole v. State, 673 P.2d 345 (Colo. 1983). The court first noted the important policy reasons behind the public's right to open discussion and debate:

The First Amendment plays an important role in affording the public access to discussion, debate, and the dissemination of information and ideas. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). A free

self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.

673 P.2d at 350. The court then held that the requirements of the Colorado Open Meetings Law did not infringe on the legislators' First Amendment rights:

The Open Meetings Law does not forbid political discussion among legislators, and does not regulate the content of their discussions. The Colorado Open Meetings Law merely requires that business meetings of policy-making bodies of the General Assembly be open to the public. The Open Meetings Law, as we view it, is a reasonable legislative enactment which seeks to balance the public's right of access to public information with the right of legislators to speak candidly and to associate with whomever they choose.

Id.

The Kansas Supreme Court, in State ex rel. Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982), stressed the unique status of a person elected to public office when it rejected a First Amendment challenge to open meeting requirements:

The First Amendment does indeed protect private discussions of governmental affairs among citizens. Everything changes, however, when a person is elected to public office. Elected officials are

supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it.

646 P.2d at 1099 (emphasis added). *See also* C.R. Dorrier v. Dark, 537 S.W.2d 888 (Tenn. 1976).

The foregoing cases are consistent with the Idaho Legislature's statement of policy when enacting Idaho's Open Meeting Law in 1974:

The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

Idaho Code § 67-2340. To the extent that the conduct described in your letter comes within the scope of Idaho's Open Meeting Law, it must be conducted in conformity with the procedures set forth in the law. Conduct or speech regarding public business is not protected by the First Amendment to the United States Constitution if it otherwise contravenes the state's Open Meeting Law.

V.

CONCLUSION

To summarize, our conclusion is that the Open Meeting Law must be complied with whenever a quorum of the governing body of any public agency assembles together and discusses any issue on which a vote will be required. It does not matter that the meeting is not formally scheduled or called to order. It does not matter that the members of the governing body are not all together in one place. So long as a quorum is present and the members are talking business, the Open Meeting Law is violated if the meeting is not preceded by a notice and agenda, if the gathering is not actually open to the public, and if all votes are not taken publicly and recorded in the minutes.

The question with regard to “serial meetings” is whether the Open Meeting Law is violated when a quorum of the governing body never actually assembles but a member contacts other members—either directly or through an agent—in a deliberate attempt to build a majority for or against a public policy or proposed ordinance. It is our opinion that such a practice is designed to circumvent the Open Meeting Law and clearly violates the spirit of that law. One Idaho district court has held that it violates the letter of the law as well.

Factors that appear likely to trigger court scrutiny, in other states as well as in Idaho, are: whether the members of the governing body deliberately set out to reach a final decision apart from the public eye; whether their meetings are, in fact, conducted in secret; whether the matter in question is specific, controversial and highly visible; whether the secret decision flaunts the will of the public; and whether the final decision is a “done deal,” with no serious discussion or deliberation and with votes already clear-

ly locked in. It is our opinion that an Idaho court will likely find a violation when these factors are present.

Finally, conduct by a public official that violates Idaho's Open Meeting Law is not protected by the First Amendment's rights of free speech or assembly.

Yours very truly,

JOHN J. McMAHON
Chief Deputy Attorney
General

May 24, 1994

Honorable Vaughn Killeen
Ada County Sheriff
7200 Barrister
Boise, ID 83704

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

Re: Illegal Consumption of Alcohol by Minors

Dear Sheriff Killeen:

You have asked for an opinion regarding the law that criminalizes illegal consumption of alcohol by persons under the age of 21. Idaho Code § 23-949. That section makes it a misdemeanor for such a person to possess beer, wine or other alcoholic liquor. The penalty for such a violation is set forth in Idaho Code § 18-1502. Currently, only a fine attaches for a first or second violation. A third offense carries a fine and a 30-day jail sentence. You have asked whether it is legal to arrest an individual for a misdemeanor that does not carry a jail sentence.

In July of this year, Senate Bill 1370 will take effect. This bill increases the monetary penalties for illegal consumption tenfold. In addition, jail penalties were created for second offenses and increased for third offenses. Because no jail penalty was created for a first offense, your question will still have application after July 1.

Idaho Code § 19-603 gives a peace officer discretion to

arrest any person committing a misdemeanor in the officer's presence. The only limitation on this discretion is found in Idaho Code § 49-1407 pertaining to certain traffic misdemeanors. No other limitation pertaining to the power to arrest for a misdemeanor is found in the Idaho Code. From this, it appears that the legislature did not intend to limit arrests to those misdemeanants who face jail sentences.

It has been suggested that it is not proper to arrest someone who only faces a fine because that person, if found guilty, would never have to serve any jail time at all, never have to be booked and photographed, and never have to suffer the indignities associated with a jail sentence. This argument seems compelling until it is considered that the purpose of arrest and pretrial detention is not punishment. Rather, it is designed to ensure a person's presence at the proceeding where a person's guilt or innocence (and possible punishment) can be decided. Thus, additional considerations should be a part of the decision to cite or arrest, including:

1. whether a person has prior failures to appear;
2. whether a person has ties to the community reasonably sufficient to assure appearance;
3. whether a person fails to identify himself or herself satisfactorily;
4. whether a person refuses to sign a citation; and
5. whether an arrest will prevent imminent bodily harm to the accused or to another.

See generally LaFave, Criminal Procedure § 12.5.

Considering the liberal application of creative bail procedures, including the use of telephonic court orders regarding bail and recognizance as well as night and weekend court hearings, the actual time a person is held for illegal consumption should be quite limited. Further, because the taking of fingerprints and other identifying data is discretionary for most misdemeanors, a person arrested for illegal consumption need not suffer the indignity of a typical booking. *See* Idaho Code §§ 19-4812 and 19-4813.

In July, the maximum penalty for a first offense of illegal consumption will be a \$1,000 fine. This is clearly a punitive (as opposed to civil) sanction. State v. Bennion, 112 Idaho 32, 730 P.2d 952 (1986). In addition, the Idaho Legislature has expressly made illegal consumption a misdemeanor. Because the legislature did not attempt to limit a peace officer's discretion as to whether to arrest a person for illegal consumption, and because there are a number of reasons why an arrest would be sensible in a particular situation, this office does not believe that such an arrest would be illegal or improper. However, this office does recommend that arrests for illegal consumption be limited to those situations where a citation is not practical, such as when a person refuses to cooperate with the citation process or where a person does not seem likely to appear in court.

Yours very truly,

MICHAEL KANE
Deputy Attorney
General Chief,
Criminal Law Division

September 21, 1994

Mr. Al Sandner
South Central Region E 911
P.O. Box 504
Jerome, ID 83338

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

Re: Emergency Communications Act

Dear Mr. Sandner:

You have requested an opinion from this office whether cellular phone users may be charged telephone line user fees by the South Central Region E 911 Board. For the reason set forth below, it is the opinion of this office that an emergency communications governing board does not have the authority to charge cellular phone users a telephone line user fee.

The Emergency Communications Act, chapter 48, title 31, Idaho Code, was enacted in 1988. The act was intended to provide a statutory means to finance emergency communication (911) systems. Idaho Code § 31-4801. To this end, counties, cities or jointly created emergency communication boards are authorized to charge a telephone line user fee not to exceed one dollar (\$1.00) per month. Those subject to the fee are set forth at Idaho Code § 31-4804, which provides in relevant part:

The telephone line user fee provided pursuant to the provisions of this chapter shall be a uniform amount

not to exceed one dollar (\$1.00) per month per exchange access line, trunk line, network access register, or equivalent, and such fee shall be used exclusively to finance the initiation, maintenance, or enhancement of a consolidated emergency communications system within the boundaries of one (1) county or 911 service area

(Emphasis added.)

Before discussing whether cellular phone customers come within these categories of users, it must be noted that this office concluded in 1989 that the telephone line user fee provided for in Idaho Code § 31-4804 was, in fact, a tax in lieu of property taxes. 1989 Idaho Att’y Gen. Ann. Rpt. 35. The distinction is significant in this instance. Because the charge is a tax rather than a fee, our analysis does not have to determine whether the charge is reasonably related to the direct public service. *See Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988). More importantly, a statute authorizing the imposition of a tax must be construed “as favorably as possible to the taxpayer and strictly against the taxing authority.” *Futura Corporation v. State Tax Commission*, 92 Idaho 288, 291, 442 P.2d 174, 177 (1968). Further, any ambiguities in a tax statute must be resolved in favor of the taxpayer. *In re: Potlatch Forests, Inc.*, 72 Idaho 291, 240 P.2d 242 (1952).

In this instance, it must be determined whether a single cellular phone user constitutes an “exchange access line,” “trunk line” or “network access register” capable of being charged a telephone line user fee. Unfortunately, these terms are not defined in the Emergency Communications Act, and its legislative history provides no guidance in construing the statute. Nevertheless, these terms do have accepted meanings in the telecommunications industry.

An “access line” is the circuit (often a pair of copper wires) that connects a customer with the switching system used to reach other customers. In non-technical terms, it is the part of the system (either a wire or a radio channel) that sends the message between the customer’s home or business and the switch that connects the line to other customers’ access line. It is the connection that gives the customer “access” to all other customers. A “trunk line” is a circuit (or circuits) that connects switches for more than one line. For example, a telephone company with customers in one town may route all calls in or out of that town through one or more switches. Those switches would be connected to other towns’ switches through trunk lines that can carry a call from any line in one town to any line in the other town. The trunks in this case are not dedicated to any one customer, but may carry any customer’s call.

Alternatively, a large customer with many telephones on the premises may have a private branch exchange (PBX), which will switch all of the customer’s internal calls without using any of the telephone company’s switching equipment. However, the customer will need connections between its internal telephone system and outside telephones. The connections between the customer’s own system (its PBX) and the telephone company’s switches are also called trunks. Like their counterpart described in the previous paragraph, the trunk can carry a call from any one of the customer’s telephones connected to the PBX.

“Network access registers,” or NARs, are a customer’s connections in the telephone company’s switch itself that permits telephones for a large customer to connect to the local telephone company directly. The difference between a PBX and trunk system and an NAR system is that the telephone company connects its own trunk to the customer’s PBX at the customer’s location, but the customer connects the NAR to the telephone company’s switch.

The telephone line user fee for emergency service does not apply to cellular telephone operators. As written, Idaho Code § 31-4804 provides that such fees shall be collected “by all telecommunications entities, which provide local telephone line service.” This section further recites that “[l]ocal exchange companies will be allowed to list the surcharge as a separate item bill” Cellular telephone companies do not provide actual “local telephone line service”; they only act as intermediary between the cellular customers and the local telephone company, which sells local telephone service to cellular companies, not to cellular telephone users. The cellular company is the actual “customer” of the local exchange company and the entity provided “local telephone line service.” Cellular telephone companies are not local exchange companies. It is the local exchange company (*e.g.*, U.S. West) that collects the fees and remits them to the 911 administrator.

Moreover, the Telecommunications Act of 1988 (Idaho Code §§ 62-601, *et seq.*) defines local exchange service as the “provision of access lines to . . . customers [for] switched voice communications within a local exchange area.” Idaho Code § 62-603(1) (emphasis added). The description of “access lines” in this statute supports our interpretation of “access line” as used in the Emergency Communications Act. It is a basic tenet of statutory construction that statutes dealing with the same subject matter be construed together to reach a harmonious result. Dewey v. Merrill, 124 Idaho 200, 858 P.2d 740 (1993). The access lines subject to the surcharge fee are the line or trunk connections between the local telephone company’s switch and the cellular company’s switch. Affording the terms used in both acts their normal meaning and construing all the terms together, leads this office to the conclusion that the telephone line user fee does not apply to cellular telephone users.

Although cellular telephone users may ultimately connect with the local telephone company's network, they are not directly connected to the network. All cellular customers obtain access to the local telephone network via a cellular switch. It is this cellular switch which is, in turn, connected to the public switch network via exchange access lines or trunks. Consequently, the telephone line user fee is assessed against the cellular company's access lines or trunks, not the ultimate cellular users. While it is undeniable that a cellular telephone user can dial 911 and access the emergency dispatch center, this access is not direct. Therefore, until the legislature makes clear that cellular telephone users are to be taxed pursuant to Idaho Code § 31-4804, our advice is that cellular telephone users should not be charged a telephone line user fee.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney
General

September 29, 1994

Honorable Ron Koeper
Nez Perce County Sheriff
P.O. Box 896
Lewiston, ID 83501

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

Dear Sheriff Koeper:

This is in response to your letter in which you requested guidance regarding budget responsibility for the juvenile detention center. You requested an opinion on whether you or the Nez Perce County Commissioners would be responsible for the expenses of the center exceeding the allocation in your budget.

CONCLUSION

You do not have any personal responsibility for liabilities incurred beyond the amount allocated in your budget for juvenile detention. However, the allocation must remain in your budget for this year because the time to appeal has passed. As the money was intended for the juvenile detention center, it must be used for this purpose. Therefore, the county commissioners can cause the money that was allocated in your budget for juvenile care to be applied to the costs associated with the juvenile detention center.

ANALYSIS

1. The County Budget Process

The statutory provisions specifically relating to the establishment of a county budget are found in Idaho Code §§ 31-1602 through 31-1605. As the sheriff, you were required to submit an itemized estimate of revenues and expenditures to the county auditor. Idaho Code § 31-1602. Either you or the county commissioners included an estimate for the juvenile detention center in the sheriff's budget, although the county commissioners had recently assumed responsibility for the facility. The county auditor used this information to prepare a suggested budget for the next fiscal year, which was then filed with the county commissioners as required by Idaho Code § 31-1603. The commissioners then agreed upon the tentative appropriations and published notice of the anticipated revenues and proposed appropriations pursuant to Idaho Code § 31-1604. The commissioners were then required to give any taxpayer an opportunity to appear and be heard at a hearing on the tentative budget. Idaho Code § 31-1605. Thereafter, the budget was finally adopted and filed and the appropriation for the juvenile detention center was formally approved in your budget.

2. **Decisions of the County Commissioners are Appealable—If no Appeal is Filed, There is no Legal Process to Force the Commissioners to Relocate a Budget Line Item**

Under Idaho Code §§ 31-1509 and 67-5273, a petition for judicial review of the budget must be filed within 28 days after the budget becomes final. Because the time to appeal the budgeting decision has passed, the allocation for the juvenile detention

center must remain in your budget for this year. There is no other legal process provided by statute that would force the commissioners to relocate the juvenile detention center allocation.

It is unclear whether the commissioners can voluntarily relocate the line item for the detention center. Commissioners are allowed to adjust the budget to reflect unscheduled revenue from the state or federal government. However, there is no statutory provision addressing whether the commissioners can adjust the budget for any situation other than for emergency expenditures under Idaho Code § 31-1608.

3. If the Item is not Relocated, the Sheriff is not Liable for any Budget Overrun Caused by the Administration of the Center

The sheriff will not be personally liable for any expenditures in excess of the budget allocation for the juvenile detention center. Because the commissioners have assumed the authority and control over the facility, they also have the responsibility for any budget overruns caused by such administration.

Under Idaho Code § 31-1606:

The estimates of expenditures . . . as finally fixed and adopted as the county budget . . . shall constitute the appropriations for the county for the ensuing fiscal year. Each and every county official or employee shall be limited in making expenditures or the incurring of liabilities to the respective amounts of such appropriations.

Further, under Idaho Code § 31-1605:

Said budget as finally adopted . . . shall specify the fund or funds against which warrants shall be issued for the expenditures so authorized, respectively, and the aggregate of expenditures authorized against any fund shall not exceed the estimated revenues to accrue to such fund during the ensuing fiscal year

These statutes clearly apply to the county commissioners as county officials. Idaho Code § 31-2001. Therefore, the commissioners cannot order the expenditure of funds in excess of the approved appropriations within your budget.

Furthermore, Idaho law places liability for any budget overruns connected with the detention center upon the commissioners and/or the auditor. Idaho Code § 31-1607 reads in part:

Expenditures made, liabilities incurred or warrants issued in excess of any budget appropriations . . . shall not be a liability of the county, but the official making or incurring such liability, expenditure, or issuing such warrant shall be liable therefor personally and upon his official bond, as is hereinafter provided. The county auditor shall issue no warrant and the county commissioners shall approve no claim for any expenditure in excess of said budget appropriations . . . except upon an order of a court of competent jurisdiction, or for emergencies as hereinafter provided. Any county officer creating any liability or any county commissioner or commissioners, or county auditor approving any claim or issuing any warrant in excess of any such budget appropriation, except as above provided, shall be liable to the county for the amount of such claim or warrant

(Emphasis added.)

4. The County Commissioners can Control the Expenditures of Other County Officers After the County Budget has been Finalized

County commissioners have broad control in the context of county expenditures. Title 31, chapter 8, Idaho Code, lists the powers and duties of the board of county commissioners. Idaho Code § 31-802 gives the county commissioners the power to supervise all other county officers charged with assessing, collecting, safekeeping, management or disbursement of public money or revenues. Idaho Code § 31-809 gives the county commissioners the power to examine and audit the accounts of all county officers and to order warrants to be drawn therefor. Idaho Code § 31-810 gives the county commissioners the power to examine, settle and allow all accounts legally chargeable against the county and provide for the payment of the same. Furthermore, Idaho Code § 31-828 gives the county commissioners the power to do and perform all things necessary to carry out their other powers.

In addition, the Idaho Supreme Court has held that county commissioners can disallow expenditures that are approved in the county budget. Magoon v. Board of County Commissioners, 58 Idaho 317, 73 P.2d 80 (1937). In this case, a county sheriff bought a new automobile for the sheriff's department. Although the expenditure had been approved by the county commissioners in the county budget, the commissioners rejected the claim. The car dealer then sued the county for the amount due, arguing that the sheriff was authorized to purchase the automobile by virtue of the county budgeting process. The Idaho Supreme Court held for the county commissioners.

Clearly, county officers do not have complete independence in making expenditures on behalf of the county without commissioner approval. Under Idaho law, the county commissioners have some discretion to disallow expenditures that were approved in the county budgeting process. Whether they can then direct this money to another use within the same fund is unclear.

County commissioners do not have absolute control in disapproving expenditures. They can be forced to approve payments for items such as routine supplies and valid contract claims. *See Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929); *H.J. McNeel v. Canyon County*, 76 Idaho 74, 277 P.2d 554 (1954). Furthermore, the commissioners cannot assume the duties of other county officers. *See Meller v. Board of Commissioners*, 4 Idaho 44, 35 P. 714 (1894); *Clark v. Ada County Board of Commissioners*, 98 Idaho 749, 754, 572 P.2d 501, 506 (1977). At some point in interfering with expenditures approved in the sheriff's budget, the county commissioners would be exceeding their power. This point would have to be determined by a court upon the particular facts of the case.

5. If Expenditures in Excess of the Budget are to be Made, Special Procedures Must be Followed

Idaho Code § 31-1608 provides for excess expenditures if needed in the case of emergencies or when mandated by law. If there is insufficient money in the treasury for the expenditures, interest bearing warrants must be issued. These warrants would be included in the next annual budget to be submitted, and money must be included in the appropriations made to cover any unpaid warrants.

If you have further questions on this, please contact me.

Sincerely yours,

STEVE TOBIASON
Deputy Attorney General
Chief, Legislative & Public
Affairs Division

October 14, 1994

Mr. Herb Carlson, Chairman
Idaho Industrial Commission
P.O. Box 83720
STATEHOUSE MAIL
Boise, ID 83720-0041

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

Dear Mr. Carlson:

You have asked our opinion regarding the enforcement of Idaho Code § 72-301 on Indian reservations. Specifically, you have asked whether the Industrial Commission has the authority to maintain a suit in a state district court to compel an employer on a reservation to meet the provisions of Idaho Code § 72-301 and, further, how that state court judgment would be enforced on a reservation.

I.

**THE APPLICABILITY OF IDAHO CODE §
72-301 ON INDIAN RESERVATIONS**

As you noted in your letter, this office issued an opinion in 1988 regarding the applicability of Idaho Code § 72-301 against Indian employers doing business within a reservation. *See* 1988 Idaho Att'y Gen. Ann. Rpt. 34, a copy of which is enclosed for your reference. At that time, we concluded that Idaho Code § 72-301 generally would be applicable to employers doing business

within a reservation. However, we also concluded that such would not be the case if the employer were either the tribal government or a tribally owned business. It was our opinion at that time that the doctrine of sovereign immunity would preclude the Idaho Industrial Commission from bringing an action against either a tribal government or tribally owned business. *See Tibbetts v. Leech Lake Reservation Business Committee*, 397 N.W.2d 883 (Minn. 1986); *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 696 P.2d 223 (Ariz. Ct. App. 1985).

I have reviewed our 1988 opinion and the case law cited therein. Despite the passage of time, I find little change in the law. The cases relied upon in our opinion appear to remain the primary cases in this area.

As we noted in 1988, 40 U.S.C.A. § 290 (1978) extends application of a state's workers' compensation laws to all lands owned or held by the United States within the exterior boundaries of a state. Usually, federal laws of general application such as 40 U.S.C.A. § 290 apply to Indians on reservations and to their property interests. However, there are three exceptions to this. A federal statute of general applicability will not apply to the activities or property interests of Indians on reservations where: (1) Congress expressed an intent that the law not apply to Indians on their reservations; (2) application of the law would abrogate treaty rights guaranteed to Indians; or (3) the law concerns rights of tribal self-governance in purely intramural matters. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

In our 1988 opinion, we reviewed each of these exceptions and concluded they did not apply. With regard to the first exception, an expression of congressional intent that the law not apply to Indians on their reservations, we noted that both federal and

state courts had already recognized that section 290 authorizes application of state workers' compensation laws to all United States territories within a state, including Indian reservations. Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 (9th Cir. 1982); Johnson v. Kerr-McGee Oil Industries, Inc., 631 P.2d 548, 551 (Ariz. Ct. App. 1981), *appeal dismissed* 454 U.S. 1025, 102 S. Ct. 560, 70 L. Ed. 2d 469 (1981); White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d 223, 227 (Ariz. Ct. App. 1985). Turning to the second exception, the abrogation of treaty rights of Indians, we relied upon the reasoning of Johnson v. Kerr-McGee Oil Industries, Inc. to conclude that application of the federal law would not lead to such abrogation. We also noted that the appeal from Johnson had been dismissed by the United States Supreme Court for want of a substantial federal question and that such dismissals are binding upon lower courts until later doctrinal developments indicate to the contrary. Finally, we concluded the third exception, concerning rights of tribal self-governance in purely intramural matters, was also inapplicable. In regard to the third exception, the precedent was somewhat vague as none of the cases specifically addressed Indian employers who were sued, but instead dealt with claims brought by Indian employees against non-Indian employers who operated businesses on an Indian reservation. However, we nevertheless concluded it would be "unlikely that a court would find that tribal interests in self-government would change significantly or somehow be improperly infringed upon or frustrated simply because a tribal member is an employer rather than an employee." 1988 Idaho Att'y Gen. Ann. Rpt. at 38. In short, it was our opinion that none of the three exceptions to enforcing a federal law of general applicability on an Indian reservation applied. Consequently, we reasoned that 40 U.S.C.A. § 290 and, by extension, Idaho Code § 72-301 would apply to businesses on Indian reservations.

Our research has shown little development in this law. We believe the third exception, Indian self-governance, remains the strongest basis for arguably not applying Idaho Code § 72-301 to businesses operating within Indian reservations. However, because there has been little additional case law since 1988 and because the state has strong interest in ensuring that all employees are covered by industrial insurance, this office adheres to the conclusion it reached in 1988.¹

We repeat one final caveat. In your question, you asked only about businesses owned by tribal members. As noted above, if the employer were either the tribe itself or a tribally owned business, then sovereign immunity would bar the Industrial Commission from bringing such an action. Otherwise, as discussed, section 290 should apply to employers doing business on a reservation.

II.

ENFORCEMENT OF STATE JUDGMENT

Your next question involves the enforcement of a state court judgment. You have asked how, assuming a state court has jurisdiction over an underlying claim, the state court's judgment is enforced.

Jurisdiction over an underlying claim does not automatically give a state court the ability to enforce its judgment on an Indian reservation. In Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980), for example, the 10th Circuit Court of Appeals held that it would impinge on tribal sovereignty to allow a state court to run a garnishment against a Navajo Indian's employer and attach wages earned by the Indian for on-reservation labor when the trib-

al code had no garnishment procedure. The court reached this conclusion even though the state court had jurisdiction over the underlying claim and the garnishment proceedings arose from an off-reservation transaction with a non-Indian lending agency. Likewise, in Begay v. Roberts, 807 P.2d 1111 (Ariz. Ct. App. 1990), a state court action of issuing writs of garnishment against the wages of an Indian who lived and worked on the reservation was held to be preempted by tribal law and to infringe upon Navajo sovereignty, even though the state court had jurisdiction over the underlying action. *But see* Little Horn State Bank v. Stops, 555 P.2d 211 (Mont. 1976) (writs of execution from a state court are valid within an Indian reservation when such is a means of enforcing a valid judgment of the state court).

A recent Idaho case that bears upon this issue is State v. Mathews, No. 20154, 1994 WL 376131 (July 18, 1994), the recent search and seizure opinion from the Idaho Supreme Court. In Mathews, the Idaho Supreme Court held that a search warrant issued by a state judge must be approved by a tribal court before it can be executed. According to the Idaho Supreme Court, execution of the warrant without tribal court authorization directly infringed on the tribe's sovereign right to self-government. While this is a criminal and not a civil case, it certainly highlights the deference paid, in Idaho, to the Indian tribes' right of self-government. This is simply not a state where a court is likely to treat lightly the enforcement of state court judgments on Indian reservations without some involvement of the Indian courts.

We have contacted two tribal attorneys and asked each of them how a valid state court judgment would be enforced on an Indian reservation. Douglas Nash, the attorney for the Nez Perce Tribe, informed us that the Nez Perce Tribe has a procedure whereby state judgments are recognized by a tribal court in a manner similar to how this state would recognize foreign judg-

ments. That state court judgment is then treated like a tribal court judgment and is enforced by the tribal court.

We also consulted with Jeanette Wolfley, the attorney for the Shoshone-Bannock Tribes. She gave us similar advice. She stated that one would have to look at the specific procedures for each tribe. But she also said the Shoshone-Bannock Tribes have a procedure in place whereby state court judgments are filed with the tribal court and then enforced by that court. She did note that judgments must be valid state court judgments and that the tribal court is free to review state court jurisdiction over the underlying claim.

In short, it appears that once a district court judgment is entered, with some variation allowed for the specific tribal procedure, that judgment should be filed with the tribal court and that court, after reviewing the state court's jurisdiction, would enforce the state court judgment.

I hope this information is of use to you. If you have any questions, please contact me and I will try to be of further assistance.

Yours very truly,

DAVID G. HIGH
Deputy Attorney
General
Chief of Civil
Litigation

Topic Index
and
Tables of Citations

SELECTED INFORMAL GUIDELINES

1994

1994 SELECTED INFORMAL GUIDELINES INDEX

1994 SELECTED INFORMAL GUIDELINES INDEX

TOPIC	DATE	PAGE
ALCOHOLIC BEVERAGES		
Persons under 21 years of age may be arrested for illegal consumption of alcohol even though misdemeanor crime does not carry a jail sentence	5/24/94	176
AMERICANS WITH DISABILITIES ACT		
City's failure to adopt and enforce ADA as required by I.C. § 39-4116(2) and title II of ADA may subject city to federal, state and private compliance actions	1/12/94	87
BOARDS AND COMMISSIONS		
Emergency communications governing board does not have authority to charge cellular phone users a telephone line user fee	9/21/94	179
CITIES		
City's failure to adopt and enforce ADA as required by I.C. § 39-4116(2) and title II of ADA may subject city to federal, state and private compliance actions	1/12/94	87
City councilman should not participate in consideration of conditional use permit while serving on board of directors of applicant's competitor	2/9/94	107
COUNTIES		
County sheriff's budget is not responsible for liabilities incurred beyond amount allocated by county commissioners in juvenile detention budget	9/29/94	184
EDUCATION		
School districts may not discriminate against religious groups in renting school facilities and must charge religious and non-religious groups same fee	2/25/94	115

1994 SELECTED INFORMAL GUIDELINES INDEX

TOPIC	DATE	PAGE
Statutory qualifications for State Superintendent of Public Instruction are constitutional	3/14/94	153
INDIAN RESERVATION		
Industrial Commission may require Indian employers doing business within reservation to comply with workers' compensation laws; however, Commission may not bring action to enforce laws against tribal government or tribally owned business	10/14/94	191
State district court judgment may be enforced on reservation in an action brought in tribal court	10/14/94	191
INDUSTRIAL COMMISSION		
Commission may require Indian employers doing business within reservation to comply with workers' compensation laws; however, Commission may not bring action to enforce laws against tribal government or tribally owned business	10/14/94	191
INSURANCE		
Requirement for promulgation of rules by Department of Insurance in context of Small Employer Health Insurance Availability Act	1/19/94	99
JUDGMENTS		
Child support judgment is a lien for five years from date of judgment or the date of a renewed judgment	1/14/94	96
State district court judgment may be enforced on reservation in an action brought in tribal court	10/14/94	191
LEGISLATURE		
Legislation creating and appropriating funds for Governor's Residence Account is constitutional and does not violate gubernatorial line item veto provisions	3/8/94	143

1994 SELECTED INFORMAL GUIDELINES INDEX

TOPIC	DATE	PAGE
OPEN MEETING LAW		
Definition of "serial meeting"	5/23/94	158
"Serial meeting" may violate Open Meeting Law	5/23/94	158
Open meeting law restrictions do not violate First Amendment rights of public officials	5/23/94	158
PUBLIC WORKS		
Planning or construction of governor's residence cannot begin without consent of Division of Public Works and Permanent Building Fund Advisory Council	3/8/94	143
PUBLICATION		
Definition of "newspaper of general circulation"	3/3/94	133
SECRETARY OF STATE		
Non-residents doing business in Idaho may qualify to be commissioned as notaries public	1/12/94	83

1994 SELECTED INFORMAL GUIDELINES INDEX

UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE VI		
§ 2	2/25/94	115
First Amendment	2/25/94	115
First Amendment	5/23/94	158

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE 3		
§ 16	3/8/94	143
ARTICLE 4		
§ 3	3/14/94	96
§ 10	3/8/94	143
§ 11	3/8/94	143
ARTICLE 5		
§ 23	3/14/94	96
ARTICLE 7		
§ 13	3/8/94	143
ARTICLE 9		
§ 5	2/25/94	115

UNITED STATES CODE CITATIONS

SECTION	DATE	PAGE
29 U.S.C. § 794a	01/12/94	87
40 U.S.C. § 290	10/14/94	191
42 U.S.C. § 2000d	01/12/94	87
42 U.S.C. § 12131	01/12/94	87
42 U.S.C. § 12132	01/12/94	87
42 U.S.C. § 12133	01/12/94	87
42 U.S.C. § 12134	01/12/94	87

1994 SELECTED INFORMAL GUIDELINES INDEX

IDAHO CODE CITATIONS

SECTION	DATE	PAGE
1-2007	03/14/94	153
10-1110	01/14/94	96
10-1111	01/14/94	96
14-518	03/03/94	133
18-1502	05/24/94	176
19-603	05/24/94	176
19-4812	05/24/94	176
19-4813	05/24/94	176
23-949	05/24/94	176
30-1-35	02/09/94	107
31-802	09/29/94	184
31-809	09/29/94	184
31-810	09/29/94	184
31-828	09/29/94	184
31-1509	09/29/94	184
31-1602	09/29/94	184
31-1603	09/29/94	184
31-1604	09/29/94	184
31-1605	09/29/94	184
31-1607	09/29/94	184
31-1608	09/29/94	184
31-2110	09/29/94	184
33-601	02/25/94	115
33-601(1)	02/25/94	115
33-601(7)	02/25/94	115
34-613	03/14/94	153
39-4101, <i>et seq.</i>	01/12/94	87
39-4104	01/12/94	87
39-4109(3)	01/12/94	87
39-4109(8)	01/12/94	87
39-4116(2)	01/12/94	87
39-4116(3)	01/12/94	87
39-4116(8)	01/12/94	87
39-4125	01/12/94	87
39-4126	01/12/94	87
Title 41, chapter 47	01/19/94	99
41-4702	01/19/94	99
41-4705	01/19/94	99
41-4706	01/19/94	99

1994 SELECTED INFORMAL GUIDELINES INDEX

SECTION	DATE	PAGE
41-4706(k)	01/19/94	99
41-4707	01/19/94	99
41-4708	01/19/94	99
41-4710	01/19/94	99
41-4711	01/19/94	99
41-4711(7)	01/19/94	99
41-4712	01/19/94	99
41-4712(3)(b)	01/19/94	99
41-4715	01/19/94	99
49-1407	05/24/94	176
51-102	01/12/94	83
51-104	01/12/94	83
Title 59, chapter 7	02/09/94	107
67-1501	03/14/94	153
67-2340	05/23/94	158
67-2341	05/23/94	158
67-2342	05/23/94	158
67-2343	05/23/94	158
67-2344	05/23/94	158
67-2345	05/23/94	158
67-2346	05/23/94	158
67-2347	05/23/94	158
Title 67, chapter 52	01/19/94	99
67-5201	01/19/94	99
67-5201(16)(b)	01/19/94	99
67-5273	09/29/94	184
67-5710	03/08/94	143
Title 67, chapter 65	02/09/94	107
67-6505	02/09/94	107
72-301	10/14/94	191