

**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL**

**FISCAL YEAR 1973
(July 1, 1972 through June 30, 1973)**

**W. ANTHONY PARK
ATTORNEY GENERAL
STATE OF IDAHO**

Compiled by Susan Garro with the assistance of Carol Schmidt.

ATTORNEYS GENERAL OF IDAHO

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|--|-----------|
| 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 | 1903-1904 |
| JOHN GUHEEN | 1905-1908 |
| D. C. MCDUGALL | 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 |
| ALLAN G. SHEPARD | 1963-1968 |
| ROBERT M. ROBSON | 1969 |
| W. ANTHONY PARK | 1970- |

W. ANTHONY PARK

Attorney General

Attorney General W. Anthony Park is a lifelong resident of the State of Idaho, having been born in Blackfoot, Idaho on June 4, 1934. His early education was at Pocatello, Idaho until his family moved to Boise in 1943. Mr. Park continued his education in the Boise schools, graduating from Boise High School in 1952 and from the then Boise Junior College with an Associate of Arts Degree in 1954. Following a two year tour of duty with the United States Army, Mr. Park resumed his education at the University of Idaho, receiving his Bachelor's Degree in Political Science in 1958, and later his Juris Doctor Degree from the University of Idaho College of Law in 1963.

Following his graduation from Law School, Mr. Park returned to Boise and opened his law office there in the spring of 1974. He was a private practitioner in Boise until his assumption of office as Idaho's Attorney General on January 4, 1971. During the time he was in private practice, Mr. Park served as Chairman of the Boise Bar Association's Legal Aid Committee and established and implemented a voluntary program for legal aid to indigents, serving Ada and Elmore Counties. The program was entirely dependent upon voluntary services of private lawyers in those counties. He also served as Secretary of the Boise Bar Association in 1970.

Mr. Park is a member of the Boise Bar Association, the Idaho State Bar Association, the American Trial Lawyers Association and the National Association of Attorneys General for which he also serves on the executive committee. In addition to his duties as Attorney General, he serves as Chairman of the Law Enforcement Planning Commission, Chairman of the Idaho Bicentennial Commission and is a member of the State Land Board, the State Board of Examiners, the Idaho Traffic Safety Commission and the Police Officers Standards and Training Council.

Mr. Park is married to the former Elizabeth Jane Taylor, of Moscow, Idaho; they are the parents of three children, Susan, Adam and Patricia.

LEGAL STAFF OF THE OFFICE OF THE ATTORNEY GENERAL

FISCAL YEAR 1973

W. ANTHONY PARK
Attorney General

CLARENCE D. SUITER
Chief Deputy Attorney General

JAY BATES
JAMES W. BLAINE
DONALD BURNETT, JR.
PAUL J. BUSER
TERRY E. COFFIN
JOHN F. CRONER
WAYNE CROOKSTON
WARREN FELTON
NORMAN GISSEL
FRED GRANT
RICHARD GREENER
JOHN HANCOCK
JAMES R. HARGIS
PETER HEISER
JOHN HURST
FRED KENNEDY
DONALD E. KNICKREHM
WILLIAM F. LEE

JOHN MAGEL
WILLIAM MCDUGALL
WAYNE V. MEULEMAN
ROBERT L. MILLER
GARY MONTGOMERY
MICHAEL MORFITT
STEWART A. MORRIS
MATTHEW J. MULLANEY
JAMES G. REID
RICHARD C. RUSSELL
J. RICHARD SHARP
PAUL T. SMITH
G. KENT TAYLOR
RON J. TWILEGAR
THOMAS VASSEUR
JAMES C. WEAVER
J. D. WILLIAMS
CHRISTOPHER WYNE

**OFFICIAL OPINIONS
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THE ATTORNEY GENERAL**

**FISCAL YEAR 1973
(July 1, 1972 through June 30, 1973)**

OFFICIAL OPINION NO. 73-1

July 7, 1972

TO: Gordon Trombley
Commissioner of Public Lands

FROM: Donald E. Knickrehm

Mr. John Brogan of your office has asked the Attorney General for an opinion on the validity of a lease of state lands for a term of 99 years to a state employees association. The land is said not to be endowment lands.

It is our opinion that a lease for that term is precluded by Section 58-307 of the *Idaho Code*, as amended. A lease for a maximum term of 10 years is permissible under the provisions of that section. It is further our opinion that the newly enacted exception allowing 25 year leases to public entities does not extend to a state employees organization. We therefore recommend that the lease provide for a renewal term of 10 years.

OFFICIAL OPINION NO. 73-2

July 7, 1972

TO: W. F. Whittom
Rupert City Councilman

FROM: W. Anthony Park

In your letter of June 26, 1972, you request a formal opinion from this office regarding the following question: Is it proper for a city councilman to cast his vote in a situation regarding the purchase of equipment by the city when the city councilman is affiliated with one of the possible organizations that is offering to sell equipment to the city?

Pertinent sections of the *Idaho Code* dealing with this question are found in Sections 59-201, 59-202 and 59-203. These sections read as follows:

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

"59-202. Officers not to be interested in sales. - State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity.

"59-203. Prohibited contracts voidable. - Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein."

Under the provisions of Section 59-202, it would definitely be a violation of the *Idaho Code* for a city officer to be a vendor in any situation which, by virtue

of his official capacity as a city officer, would also make him a purchaser. If such officer is a vendor in a purchase made by the city, and in his official capacity acts as one of the purchasers, according to Section 59-203, the purchase contract may be avoided at the instance of any other party to the purchase with the exception of that officer.

Therefore, it is the opinion of this office that it would be a violation of the *Idaho Code* for your city councilman to vote on a purchase contract in which he is an interested party.

OFFICIAL OPINION NO. 73-3

July 7, 1972

TO: W. F. Whittom
Rupert City Councilman

FROM: W. Anthony Park

In your letter of June 26, 1972, you inquire as to whether it would be appropriate for the American Legion of the City of Paul to circulate petitions in order to get the State of Idaho to recognize the traditional holidays as being the only legal holidays recognized in Idaho.

Section 67-5327, *Idaho Code*, designates the following days as being "holidays" under the personnel system acts: January 1 (New Year's Day); third Monday in February (Washington's birthday); last Monday in May (Decoration Day); July 4 (Independence Day); first Monday in September (Labor Day); second Monday in October (Columbus Day); fourth Monday in October (Veteran's Day); fourth Thursday in November (Thanksgiving); December 25 (Christmas).

It is apparent from the above-cited section of the *Idaho Code* that certain holidays will not fall on the same day every year, i.e., Washington's birthday, Decoration Day, Columbus Day, Veteran's Day and Thanksgiving.

In view of the fact that the Legislature has designated the third Monday in February as being Washington's birthday, in order for the American Legion contingent to get the State of Idaho to recognize only February 22 as being Washington's birthday, it would be necessary for them to petition the Legislature of the State of Idaho to change the wording in the statute. I, therefore, would suggest that you inform the American Legion that it would take an act of the Legislature to change the various holiday designations and, as such, their effort should be directed toward the Legislature in hopes of convincing them to modify the above-cited statute.

It must be pointed out that it is always the prerogative of the voting public to petition their legislators to change the statutes of the State of Idaho whether this be in the form of a petition to the individual legislator, or in the form of an initiative proposed by the voters themselves. Therefore, it is most certainly appropriate for your American Legion contingent to exercise either of these two methods of obtaining changes in our state law.

OFFICIAL OPINION NO. 73-4

July 10, 1972

**TO: Richard Barrett
State Personnel Director**

FROM: Clarence D. Sulter

We wish to respond to a request for an opinion from this office presented by Mr. George Murphy, then State Personnel Director. That letter request, dated sometime ago, outlined the facts as follows:

The same person now holds two positions: Director of Administrative Services and Director of Administration. The latter is a position on the Governor's staff and one where the incumbent serves at the pleasure of the Governor. There are two assistant positions to the Director of Administration. The question presented is whether or not these two assistant positions are exempt from the personnel system established by Chapter 53, Title 67, *Idaho Code*, by virtue of Section 67-5303.

We are of the opinion that the two assistant positions are exempt because they are positions on the Governor's staff. The incumbents in the two positions would serve at the pleasure of the Governor and would be answerable to him. It is immaterial that the Director of Administration also is the Director of another state agency, the employees of which are not in exempt status. The head of the agency in which the two assistant positions are located is the Governor, not the Director of Administration. The Governor is the appointing authority. Section 67-5303 specifically exempts members of the Governor's staff.

We are not concerned that the Director of Administration also directs another state agency. The Governor can, at his pleasure, appoint another person to be the Director of Administration. Further the Governor has as much and as complete authority over the staff of the Director of Administration as he has over the staff of any other division or function of his office.

OFFICIAL OPINION NO. 73-5

July 14, 1972

**TO: Max A. Boesiger
Commissioner, Department of Public Works**

FROM: Richard Greener

You ask whether or not the Revenue Bond Approach or the Lease Purchase Approach are legal methods of financing under present Idaho state law.

This question may be answered by reference to Article VIII, Section 1 of the *Idaho Constitution*. The provision authorizes both the bond approach and the lease purchase approach within certain limitations.

The limitations placed on the bond approach are found in the language contained in Article VIII, Section 1:

“But no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for or against it at such election, . . .”

Thus, any funding through the fund process must be approved by the people and, further, by a majority of all of the voters who voted on the bond question. It should be noted that this would not be a revenue bond but rather a different type of bond as it is not being issued in anticipation of revenue.

The language of Article VIII, Section 1, does not contain a proviso such as is contained in Article VIII, Section 3, authorizing certain expenditures for ordinary and necessary expenses. Consequently, the lease purchase method of funding a project for state offices could not be undertaken in the direct manner which is provided for in that constitutional provision and was approved in the recent decision, *Pocatello v. Peterson*, 93 Idaho 774. There is no specific language, however, in Article VIII, Section 1, which authorizes a lease purchase method of financing the construction of such a building. This language is in the form of a proviso which states that the State is limited in its indebtedness “unless the same shall be authorized by law, for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt or liability as it falls due, . . .” It is the view of this office that if the Legislature would specifically authorize the Department of Public Works to enter into a lease purchase agreement to build a state office building, it would be legally permissible to do so under the aforementioned quotation.

OFFICIAL OPINION NO. 73-6

July 18, 1972

TO: Pete T. Cenarrusa
Secretary of State

FROM: John F. Croner

This will acknowledge receipt of your letter of July 17, 1972, in which you requested that this office construe the provisions of Section 30-602, *Idaho Code* as recently amended to determine if your office may legally collect a \$3.00 processing fee from religious, scientific and charitable corporations or associations for processing annual statements.

Section 30-602, *Idaho Code*, provides:

“30-602 ANNUAL LICENSE FEE SCHEDULE. — It shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall thereafter engage in business in this state, except such as are exempt by the provisions of section 30-602 to procure annually from the secretary of state a license

authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows:

When the authorized capital stock does not exceed \$5,000, an annual license fee of twenty dollars (\$20.00); when the authorized capital stock exceeds \$5,000 dollars and does not exceed \$10,000, twenty-five dollars (\$25.00); when the authorized capital stock exceeds \$10,000 and does not exceed \$25,000, thirty dollars (\$30.00); when the authorized capital stock exceeds \$25,000 and does not exceed \$50,000, fifty dollars (\$50.00); when the authorized capital stock exceeds \$50,000 and does not exceed \$100,000, seventy-five dollars (\$75.00); when the authorized capital stock exceeds \$100,000 and does not exceed \$250,000, one hundred dollars (\$100); when the authorized capital stock exceeds \$250,000 and does not exceed \$500,000, one hundred fifty dollars (\$150); when the authorized capital stock exceeds \$500,000 and does not exceed \$1,000,000, one hundred eighty dollars (\$180); when the authorized capital stock exceeds \$1,000,000 and does not exceed \$2,000,000, two hundred fifty dollars (\$250); when the authorized capital stock exceeds \$2,000,000, three hundred dollars (\$300).

Said license tax or fee shall be due and payable on the first day of July of each and every year, to the secretary of state, who shall pay the same into the state treasury. If not paid on or before the hour of four (4) o'clock p.m. of the first day of September, next thereafter, the same shall become delinquent, and there shall be added thereto, as a penalty for such delinquency, the sum of ten dollars (\$10.00).

The license tax or fee hereby provided authorizes the corporation to transact its business during the year, or for any fractional part of such year, in which such license tax or fee is paid. "Year", within the meaning of this chapter, means from and including the first day of July, to and including the thirtieth day of June next thereafter."

From a reading of the above statute, there would appear to be some degree of ambiguity with respect to whether or not the legislature intended, and in fact provided for, the imposition of a processing fee for nonprofit corporations other than the following: "nonproductive mining corporations, all cooperative telephone and irrigation corporations, incorporated canals, lateral and drainage ditches, which are operated on a cooperative plan solely, and not conducted wholly or in part, for revenue purposes."

Reading Sections 30-601, *Idaho Code*, and 30-602, *Idaho Code*, an argument could be made that a processing fee applies to all nonprofit corporations required to file an annual statement. On the other hand, a strong argument is available for the proposition that certain of the nonprofit corporations are not properly included.

It is my opinion that were this fee imposition as it applies to scientific, religious, and charitable corporations challenged in court, that the probable decision would be that such is not legally provided by statute, and thus cannot be properly charged by your office.

OFFICIAL OPINION NO. 73-7

July 20, 1972

TO: George Treviranus
Managing Auditor
Legislative Auditor

FROM: James G. Reid

In your letter of July 13, 1972, you request a formal opinion from this office regarding the following question: Is it proper for a state agency to own shares of stock in a public corporation?

The pertinent section of the *Idaho Constitution* which deals with this problem is Article VIII, Section 2. The section reads as follows:

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

It is definitely unconstitutional for a state agency to own stock in a corporation, no matter how it was acquired. Therefore, it is the opinion of this office that it is unconstitutional for the state agency to which you refer to own stock in a railroad company.

OFFICIAL OPINION NO. 73-8

July 20, 1972

TO: Nolan Hancock
State Democratic Headquarters

FROM: W. Anthony Park

This is in response to your recent question concerning the interpretation to be given Section 34-715, *Idaho Code*, as it pertains to the filling of vacancies which occur in the slate of candidates of a political party after the primary election, but before the general election.

I believe that it is important here to read Section 34-715, *Idaho Code*, in harmony with its related section, Section 34-714, *Idaho Code*, and the recent interpretation which this office has given that section.

Section 34-714, *Idaho Code*, provides:

"FILLING VACANCIES IN SLATE OF CANDIDATES OCCURRING PRIOR TO PRIMARY ELECTION. — Vacancies that occur before the primary election in the slate of candidates of any political party shall be filled in the following manner if only one (1) candidate declared for that

particular office or if no candidate filed a declaration of candidacy for that particular office:

- (1) By the county central committee if the vacancy occurs on a county level.
- (2) By the legislative district central committee if it is a vacancy by a candidate for the state legislature.
- (3) By the state central committee if it is a vacancy by a candidate for a federal or state office.
- (4) No central committee shall fill any vacancy which occurs within three (3) days prior to the primary election. Vacancies which occur during this three (3) day period shall be filled according to the provisions of section 34-715."

Section 34-715, *Idaho Code*, provides:

"FILLING OF VACANCIES OCCURRING AFTER PRIMARY ELECTION. — Vacancies that occur after the primary election but before the general election in the slate of candidates of any political party shall be filled in the following manner:

- (1) By the county central committee if it is a vacancy by a candidate for a county office.
- (2) By the legislative district central committee if it is a vacancy by a candidate for the state legislature.
- (3) By the state central committee if it is a vacancy by a candidate for a federal or a state office.
- (4) If more than one (1) candidate was seeking the party nomination for a particular office at the primary election, the person receiving the next highest number of votes at that primary election shall be designated the party nominee for that office by the appropriate central committee, provided that he had polled at least twenty-five per cent (25%) of the total vote for that office at that primary election."

In an opinion issued by this office on June 14, 1972, Section 34-714, *Idaho Code*, was interpreted as follows:

"As I read Section 34-714 it is apparent that the Legislature is speaking to the occurrence of a vacancy in two ways. First, a vacancy which occurs in the slate of candidates of a particular party where the candidates have filed their respective declarations and one of them is incapacitated for some reason or other, constitutes a fillable vacancy in that test. Second, if a party has no candidate who has filed for office, then a vacancy exists which can be filled by the party in the manner prescribed."

Your specific question is whether a party may fill a position for which neither a candidate has filed nor one for which the party has nominated a person after the primary election in view of the provisions of 34-715, *Idaho Code* (supra).

As above stated with respect to the provisions of Section 34-714, *Idaho Code*, a vacancy "occurs" in one of two ways:

(1) By virtue of the fact that no candidate has filed for office, a vacancy occurs,

(2) By virtue of the fact that a candidate who has filed cannot for some reason remain on the slate of candidates, a vacancy occurs.

The introductory language of both statutes is, save for the periods of time involved, essentially the same. Our construction of that language in Section 34-714, *Idaho Code*, seems clearly applicable therefore, to Section 34-715, *Idaho Code*. Given that construction, a ballot position for which neither a candidate had filed and one for which the party had nominated no one prior to the primary election would constitute a fillable vacancy after the primary election.

OFFICIAL OPINION NO. 73-9

July 24, 1972

TO: Donald Rowe
Chairman, Boise Auditorium District

FROM: Clarence D. Suiter

You have asked for a *formal* opinion from this office as to whether a contract for the services of an architect must comply with the requirements for a bidding procedure set forth under Section 67-4912(d), *Idaho Code*. The relevant portion of the statute reads as follows:

"Except in cases in which a district will receive aid from a governmental agency, a notice shall be published for bids on all construction contracts for work or material, or both, involving an expense of \$5,000.00 or more."

The question resolves itself into whether a contract for the services of an architect is regarded as a construction contract. Although there are no Idaho cases on this point, courts in other jurisdictions have frequently held that a state or municipality can contract for the services of an architect without complying with a requirement that bids must be called for before entering into a public contract. You can see 15 ALR 3d 739, for this view. Therefore, in answer to your question, it is not necessary that bids be taken on a contract for the services of an architect.

An answer to your second question depends upon a cost calculation that is unknown to me at this point, but I can give you the law on the subject. You have asked whether the architects' contract in question, which is a standard form agreement between the owner and architect, violates Article 8, Section 3 of the *Idaho Constitution*. The contract itself does not give the amount owing the architect, or the exact time periods in which the amount owing must be paid, for the reason that those things are made to depend on several unknown variables.

Article 8, Section 3 of the *Idaho Constitution* reads as follows:

"No county, city, town, township, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided it for such year, without the assent of two-thirds of the qualified electors . . ."

The Idaho Supreme Court has said that the provisions of this section apply only where the debt is contracted for an extraordinary expense in excess of the revenue provided for the year. The contract must create an indebtedness in excess of your current revenue after deducting indebtedness incurred by the Auditorium District up to the time of the creation of the indebtedness by this contract.

Therefore, it is the opinion of this office that if this contract creates an extraordinary expense in excess of the revenue provided the Auditorium District for the year, after deducting indebtedness already incurred by the Auditorium District, then the contract is in violation of Article 8, Section 3 of the *Idaho Constitution*.

OFFICIAL OPINION NO. 73-10

July 25, 1972

TO: Steve Bly
Director, Department of Parks

FROM: Donald E. Knickerehm

A question has arisen as to funding from the revolving fund created by §58-141 *Idaho Code*, of a proposed study of the water quality in Lake Chatcolet (Heyburn State Park). Section 58-141 provides:

"58-141. REVOLVING FUND FOR PLANNING AND DEVELOPMENT OF SEWAGE COLLECTION AND DISPOSAL FACILITIES FOR STATE LANDS - APPROPRIATION. - All moneys received by the state of Idaho from the United States of America, its agencies, boards, departments, bureaus and commissions for planning and development of sewage collection and disposal facilities for state lands shall constitute a revolving fund, which fund is hereby created. All moneys in the fund are hereby appropriated continually to the state board of land commissioners for planning and development of sewage collection and disposal facilities for state lands."

The original contract proposal (submitted by a private engineering firm upon a general call for proposals by the Park Department) provided for "conduct [of] sufficient water test(s) to determine the present status of water quality in Lake Chatcolet," recommendations on methods of improvement of water quality, including anticipated impacts of improvements on water quality, and develop-

ment of a "ten-year water quality monitoring program." This study was proposed as a part of a larger sewage and water study. These other proposals have been contracted for (see attached copy of contract).

The precise question presented is whether the proposed water quality study can qualify for funding under the provisions of § 58-141, *Idaho Code*. In my opinion, the study does qualify. Attached to this Memorandum is a second Memorandum from the study project director engineer, Mr. Richard Day, outlining briefly the tie-in of the water quality study proposed to proper sewage planning. In basic terms, the water quality study is necessary in order that we know with some certainty what waste loads the lake can bear without deteriorating quality. To this end, Doctor Lee Stokes (Water Quality Improvement Section, Department of Environmental Protection and Health) has indicated this study will not be duplicative of any data or ongoing studies available to his division.

My conclusion is that there are ample ties between this proposed study and the concept of planning and development of sewage treatment facilities to satisfy the legal requirements of § 58-141, *Idaho Code*. This choice comes down to one of policy.

OFFICIAL OPINION NO. 73-11

July 26, 1972

TO: C. H. Goeckner
Idaho County Assessor

FROM: W. Anthony Park

An opinion has been requested from our office on the following questions:

Is an Idaho resident required to pay sales or use tax on the purchase of a mobile home outside the boundaries of Idaho from a nonresident of Idaho where the sale is an occasional sale as defined in § 63-3612, *Idaho Code*?

It is our opinion that neither the transfer of the mobile home, nor the use of the mobile home in this state, are taxable.

§ 63-3612(a) defines an occasional sale, but does not include any requirement that the seller be a resident of the State of Idaho nor that the sale occur within the State of Idaho.

Section 63-3622, *Idaho Code*, provides:

"There are exempted from the taxes imposed by this act the following:
* * * (1) occasional sales of tangible personal property; providing, however, that this exemption shall not apply to the sale, purchase or use of self-propelled motor vehicles . . ."

A mobile home certainly could not be classified as a "self-propelled motor vehicle," nor do we understand this to be questioned. Arguably, some ambiguity is created since the express language of § 63-3622(1) only refers to "sales" and

not uses. However, the introductory clause refers to "taxes imposed by this act" which would include both the sales and use tax. While it could be argued that subsection 1 exemption applied only to sales, such a construction would not be logical. It would serve no purpose to exempt the *sale* of tangible personal property without at the same time exempting the *use*; the consequences of exempting from tax the sale but not the use would be exactly the same as not exempting the sale or the use.

Substantial constitutional questions would be presented by a construction of the Idaho Sales Tax Act which would create an exemption for Idaho transactions where no similar exemption was created for the same transaction entered into with a nonresident. However, it is our opinion that such a differentiation between residents and nonresidents is not contained in the Act itself, so no point would be served by discussing the constitutionality of such a distinction if it had been made.

OFFICIAL OPINION NO. 73-12

No opinion is assigned to this number.

OFFICIAL OPINION NO. 73-13

July 28, 1972

TO: Ray W. Wooton
Director, Department of Health
Youth Rehabilitation Division

FROM: G. Kent Taylor

The recent passage of Senate Bill 1426 by the 41st Idaho Legislature, which amends Section 32-101, *Idaho Code*, presents the issue of whether the reduction in the age of majority from 21 to 18 affects present commitment orders issued by Magistrates to the Board of Health under the Youth Rehabilitation Act. The present orders read (under the indeterminate sentence concept) that the child is committed to the Board until his 21st birthdate or sooner by the Board.

The effect of this change is to bring the age limits in Section 32-101, *Idaho Code*, more in line with the intent of the Youth Rehabilitation Act, rather than to necessitate a change in procedure under the Youth Rehabilitation Act. Under both Section 16-1802 of the Youth Rehabilitation Act and Section 32-101, the pivotal age used is 18.

The use of the terms "child" and "adult" in the Youth Rehabilitation Act rather than "minor" as in Section 32-101 indicate an intent not to be bound by changes in the definition of the latter. Also, Section 16-1805 of the Youth Rehabilitation Act expressly gives jurisdiction to the court until the child is 21, even though he is considered an adult at age 18.

Thus, it would appear that the continuance of orders committing a child to

the Board or death until his 21st birthday would be fully in line with the intent and provisions of the Youth Rehabilitation Act.

OFFICIAL OPINION NO. 73-14

August 1, 1972

TO: Milton Small
Executive Director for Higher Education

FROM: G. Kent Taylor

Idaho's Anatomical Gifts Act, adopted in 1969, offers an affirmative answer to your question of whether Idaho law permits dissection of the human cadaver.

The Act allows, in Section 39-3402, *Idaho Code*, "... any individual of sound mind and 18 years or more to give all or part of his body for any purpose in 39-3403". In the same section, other persons, in order of priority, are allowed to give a decedent's body in the absence of actual notice of contrary indications given by the decedent or others of the same or a prior class.

Idaho Code 39-3403(2) states that donees include "... any accredited medical or dental school, college or university for education, research, advancement of medical or dental science, or therapy".

Thus, the University of Idaho, as an accredited university, could permit dissection of the human cadaver for the above named purposes.

OFFICIAL OPINION NO. 73-15

August 3, 1972

TO: Winston Churchill
Legal Counsel
Air National Guard

FROM: Stewart A. Morris

This letter is in response to your request, as counsel for the Air National Guard, for an opinion as to the State's liability for property damage caused by an Idaho Air National Guard F-102. You have made reference to a specific accident on March 20, 1972, where one of the Idaho Air Guard's F-102's crashed on property near the Boise airport. Property damage amounted to \$202.80.

Your inquiry is directed more specifically to the issue of whether the State or the Federal government is liable for the property damage. Prior to the enactment of the Idaho Tort Claims Act (Section 6-901, *Idaho Code*, et seq), claims against the Idaho Army National Guard and the Idaho Air National Guard were paid under the provisions of 32 USCA, Section 715, more commonly known as the National Guard Tort Claims Act. That Act, however, does not create liability as

to the federal government, it only "authorizes" settlement of claims for certain tortious acts committed by guardsmen. Thus, the National Guard Tort Claims Act is a discretionary provision which does not authorize claimants to file suit, either against the State or the Federal government.

The regulations implementing the processing of claims under the Act require the State involved to furnish evidence that it has not waived its sovereign immunity from suit, or that it has not purchased insurance providing coverage for the claim, or both. This is for the reason that the Act is intended to be a "secondary" source of payment of claims and that the State, in instances where it waived immunity or has insurance coverage on the claim, is to be considered the primary source of funds to satisfy the claim. Prior to the enactment of the Idaho Tort Claims Act, both the Departments of the Air Force and the Army had been advised by Idaho's Adjutant General that the State had not waived its sovereign immunity and there was no insurance covering the State of Idaho. As a result, all claims were processed under the National Guard Tort Claims Act. Since the enactment of the Idaho Tort Claims Act, and the consequent purchase of comprehensive general liability insurance covering the State of Idaho, the question has again been raised as to whether the State has waived its immunity with respect to the tortious conduct of Idaho's National Guardsmen.

Aside from the waiver of immunity issue under the Idaho Tort Claims Act, one of my initial concerns when studying this matter, was whether the Idaho Guardsmen do in fact act as agents of the State, as opposed to agents of the Federal government, when on active duty. For example, it could be argued that Idaho Air Guardsmen are actually agents of the Federal government for the reason that they are paid with federal funds, and most of the equipment utilized by Guardsmen in the performance of their duties is furnished and owned by the Federal government. Further, the President of the United States, as Commander-in-Chief, and also Congress, has the power to order the National Guard to active duty.

At the same time, the National Guard is designated by statute as one of the three classes of the militia of the State of Idaho. Section 46-103, *Idaho Code*. The Governor of the State is Commander-in-Chief of the National Guard, except at such times as the Guard is deemed to be in the service of the United States. Section 46-110, *Idaho Code*. Idaho's Adjutant General serves as the Commanding General of the State's military forces, and is appointed to his position by the Governor. Section 46-111, *Idaho Code*.

It is apparent from the above, therefore, that the members of the Idaho National Guard, at any one given time, could be acting as agents of the State of Idaho, or as agents of the United States. It would appear that the National Guardsmen are acting as agents of the State of Idaho in the instances where they are transacting matters on behalf of the State, and acting under orders of the Governor or the Adjutant General, and thereby subject to the control and authority of the State of Idaho. *Thornton v. Budge*, 74 Idaho 103, 257 P. 2d 238 (1953). Thus, in the instance at hand, where the Guardsmen in question had not been federalized pursuant to call of the President or of the Congress, it is apparent that the Guardsmen would be acting as agents of the State of Idaho.

The question of whether the State is liable for the damages in question, then, will be determined by whether the State has waived or retained its immunity in this area. Section 6-904 of Idaho's Tort Claims Act provides certain exceptions to the liability of governmental entities for torts. Paragraph 5 thereof provides an exemption for certain activities of National Guardsmen, said Section providing as follows:

"A government entity shall not be liable for any claim which:

5. Arises out of activities of the Idaho National Guard when acting under a call of the Governor, or when engaged in combatant activities, or during a time of war."

I am informed that at the time of the crash, the aircraft and its pilot were involved in normal training activities, as opposed to any specific call of the Governor. It appears that under a similar exception to the Federal Tort Claims Act, training activities do not constitute "combatant activities". See *Skeels v. U.S.*, 72 Fed. Sup. 372, at page 374; and *Johnson v. U.S.*, 170 F. 2d 767, at page 770. It is therefore our opinion that the exception provided by Section 6-904(5), *Idaho Code*, does not extend to normal training activities by Guardsmen, and that the State is therefore liable for damages caused by their tortious conduct at such times.

We conclude, accordingly, that the State of Idaho has not waived its immunity in the situation presented, and that the State "could" be liable for the damages resulting from the crash. Whether the State "is" liable would consequently depend upon the factual determination of whether the accident was proximately caused by the tortious conduct of Idaho's guardsmen who were engaged in training activities. That factual determination, however, should not be made by this office, and we therefore offer the following advice to assist you in the final processing of the subject claim.

Under Section 6-905, *Idaho Code*, the claimant must file his claim within 120 days of the accident with the Secretary of State. I have already advised the claimant, Wes Zimmerman, of this fact, and have forwarded the necessary forms to him for this purpose. Under the procedure established, the Secretary of State then notifies the Department of Insurance, who in turn notifies the State's insurance carrier. Section 6-913, *Idaho Code*, authorizes the Board of Examiners to compromise and settle any claim allowed by the Tort Claims Act, subject to the terms of the State's insurance policy. The terms of the current policy give complete authority to the insurance carrier to adjust the claim and either to pay or deny it. Thus, ordinarily, within a short time after the claim is filed, the claimant receives written notice from the insurance carrier as to whether the claim will be honored.

The state's liability policy, however, contains an exclusion of coverage for damages caused by aircraft, and the instant claim would not, therefore, be adjusted by the insurance carrier. This exclusion subjects the State to a glaring tort liability exposure and I am, by forwarding a copy of this opinion, notifying the Department of Insurance of this fact, and hereby suggest that consideration

be given to the possibility of purchasing insurance coverage in this area, or perhaps removing this exposure by an appropriate amendment to the Tort Claims Act.

Since the subject claim is not covered by the State's liability policy, the Board of Examiners would have jurisdiction to settle or compromise this claim. I would anticipate, however, that the Board of Examiners would in turn rely upon the position taken by the Adjutant General as to whether the crash resulted from the tortious conduct of Idaho National Guardsmen. The Guard should, therefore, be prepared to submit its conclusions as to the cause of the accident and the damage proximately caused thereby. For possible future reference I note in this regard that under Section 21-205, *Idaho Code*, the "operator" (the operator in this case apparently being the Idaho Air National Guard), as well as the owner of the aircraft, is liable for damages in accordance with the rules of law applicable to torts on land in this State.

In view of the above it appears that the following should transpire. Wes Zimmerman should, of course, file his claim with the Secretary of State within 120 days of March 20, 1972. The claim would then be forwarded to the Board of Examiners for its review. The Air Guard can expect an inquiry from the Board as to the cause of the accident and the damages resulting therefrom. If the Board then determines that the damage was in fact caused by the tortious conduct of Idaho's Guardsmen, then, in accordance with the opinion expressed herein, the State would be liable and payment of the claim should be approved.

OFFICIAL OPINION NO. 73-16

August 7, 1972

TO: Clair S. Hanks, DDS
Executive Secretary
Board of Dentistry

FROM: Stewart A. Morris

You have inquired whether an Idaho dental license authorizes the practice of anesthesia in non-dental operations. Your inquiry has been prompted by a request submitted by Dr. Gaither B. Everett, DDS, for an opinion on his interpretation that the Idaho dental law does, in fact, authorize such a practice of anesthesia.

Dr. Everett bases his interpretation upon Section 54-901, *Idaho Code*, which provides in pertinent part as follows:

"The practice of dentistry is the doing by one person, for a direct or indirect consideration, of one or more of the following with respect to the teeth, gums, alveolar process, jaws, or adjacent tissues of another person, namely:

Examining for diagnosis, treatment, extraction, repair, replacement,

substitution, or correction;

Diagnosing of disease, pain, injury, deficiency, deformity, or physical condition;

Treating, operating, prescribing, extracting, repairing, taking impressions, fitting, replacing, substituting, or correcting;

Cleaning, polishing, or removing stains or concretions, or applying topical medication;

Administering anesthetics or medicaments in connection with any of the foregoing."

Dr. Everett's contention is apparently that since the "administering anesthetics" clause appearing at the bottom of the above quoted provision is not exclusionary in nature, it does not prohibit a dentist from administering anesthetics in non-dental operations.

Dr. Everett may be correct in his conclusion that Section 54-901 does not contain an express restriction upon a dentist practicing general anesthesiology, however, neither does the above provision authorize a dentist to practice anesthesiology. Section 54-901, defines what acts constitute the practice of dentistry, and the dental act generally requires that a person be licensed as a dentist to perform the acts specified. Conversely stated, if a person is licensed to practice dentistry in the State, he is thereby authorized to perform the acts specified in Section 54-901 and to administer anesthetics in connection with any of the above specified acts. But that Section does not authorize a dentist to administer anesthetics in regard to any operation not involving the activities specified in Section 54-901.

Accordingly, it is our opinion that the Idaho Dental Act does not authorize the practice of anesthesiology in non-dental operations. It would therefore appear that Dr. Everett would have to qualify under the rules and regulations of the Board of Nursing to practice as a nurse anesthetist, or qualify under the rules and regulations of the State Board of Medicine to practice as an anesthesiologist.

OFFICIAL OPINION NO. 73-17

August 7, 1972

TO: Marden Wells
President, National Farmers Organization
By request of the Department of Agriculture

FROM: W. Anthony Park

The 1972 Idaho Legislature passed House Bill 790, Chapter 399, 1972 Idaho Session Laws, which law provides for a referendum of potato growers to determine whether or not a one cent increase per hundred weight in the Potato Commission Tax should be continued. Section 22-1211A, *Idaho Code*, provides in part:

“... If a majority of the eligible growers voting, who grow a majority of the hundredweight of potatoes grown by those voting in the referendum, or if two-thirds (2/3) of the eligible growers voting in the referendum, are in favor of continuance of the additional tax of one cent (1¢), the additional tax of one cent (1¢) shall be continued, but if the results of the referendum do not show the required majority or majorities, the additional tax of one cent (1¢) shall be discontinued immediately upon declaration of the results of the referendum by the commissioner of agriculture”

We understand that 812 ballots were counted, and that 399 growers, growing 19,746,427 hundredweight of potatoes, were in favor of the continuation of the increased tax, and that 413 growers, growing 13,273,900 hundredweight of potatoes, were not in favor of the continuation of the tax increase.

From reading the above section of law it appears that in order for the referendum to have passed it would have been necessary for a majority of the growers to have voted for it, and that a majority of growers growing a majority of hundredweight of potatoes was necessary, or for two-thirds (2/3) of the growers to have voted in favor of the continuation of the additional tax. Neither one of these conditions has been fulfilled, therefore, the additional tax of one cent on each hundred weight of potatoes is to “be discontinued immediately upon declaration of the results”.

The referendum for continuation of the additional one cent (1¢) tax on each hundred weight of potatoes has failed.

OFFICIAL OPINION NO. 73-18

August 9, 1972

TO: Winston H. Churchill
Legal Counsel
Air National Guard

FROM: Stewart A. Morris

You have inquired whether Idaho Air National Guardsmen, while acting as security guards at Gowen Field, are protected by provisions of the Tort Claims Act of Idaho or any other provision of law. Your inquiry makes reference to a situation where a guardsman, while acting as security guard at Gowen Field, kills or injures an unlawful intruder. You have also indicated that the Idaho guardsmen will be compensated out of Federal funds pursuant to a contract negotiated between the Idaho Guard and the United States Government, which provides and authorizes the United States to bear 100% of the cost of operating and maintaining Gowen Field, a State controlled National Guard annual and weekend training facility.

First, I question whether, under Idaho law, an unlawful intruder would have a cause of action against a property owner or his agent for damages resulting out

of the owner's actions incident to protecting his property. However, for purposes of this letter, I will assume that recovery is possible in such a situation. Further, I can foresee that the person injured may not, in fact, be an unlawful intruder, but a person authorized to be on the premises who is injured through the mistake or negligence of a security guard.

Secondly, having reviewed the terms of negotiated contract No. DAAA 10-73-C-10, negotiated between the Federal government and the Idaho National Guard, it is my opinion that the guardsmen would be acting as agents of the State of Idaho, despite the fact that their services would be compensated from Federal funds. I can find no specific provision in the contract to cover this, but I assume that the guardsmen, when acting as security guards, would be fulfilling their duties as national guardsmen, and acting under orders of the Adjutant General or some subordinate officer.

In the situation outlined above, I believe there are two Code provisions which would protect the guardsmen from personal liability. The first is Section 6-917, *Idaho Code*, which provides that recovery against a governmental entity under the provisions of the Tort Claims Act, constitutes a complete bar to any action by the claimant against the employee whose negligence or wrongful act or omission gave rise to the claim against the government entity. A second provision is Section 46-402, *Idaho Code*, which provides that members of the Idaho National Guard who are ordered into active service by any proper authority shall not be liable for any acts done by them in the performance of their duty. The latter provision additionally discourages suits against guardsmen by providing that if the plaintiff is non-suited or has a verdict or judgment rendered against him, the guardsman can recover treble costs.

In view of the above two provisions, it is my opinion that National Guardsmen would not be liable for damages resulting from injury or death they may inflict upon unlawful intruders in the course of their duties as a security guard.

OFFICIAL OPINION NO. 73-19

August 14, 1972

TO: Bill Webster
State Liquor Dispensary

FROM: James G. Reid

In your letter of July 10, 1972, you inquire as to how the funds generated by the 7½% surcharge which went into effect on July 1, 1972, would be divided pursuant to the recent amendments of Section 23-217, *Idaho Code*. The pertinent sections of that amendment read as follows:

"(d) The revenues generated by the additional surcharge of seven and one-half per cent (7½%) imposed pursuant to subsection (c) of this section less its pro rata share of the discount shall be collected and remitted to the state auditor monthly, . . ."

In order to understand what the legislature was referring to when they state "less its pro rata share of the discount," we must examine subsection (a) of Section 23-217, *Idaho Code*, which in part reads as follows:

"Provided, however, that after any surcharge or surcharges have been included, the superintendent of the state liquor dispensary is hereby authorized and directed to allow a discount of five per cent (5%) from the price of each unbroken case lot of goods sold to any licensee as defined in Section 23-902(d), *Idaho Code*."

By virtue of the fact that an additional surcharge of 7½% will be added on to the price of merchandise after July 1, 1972, it would necessarily follow that if a licensee is allowed a 5% discount on his purchases, a certain portion of the 5% discount would fall within the 7½% surcharge imposed by subsection (d) of Section 23-217, *Idaho Code*, as amended. Therefore, it would be the opinion of this office that in the event a licensee at the end of any month applies for a 5% discount for merchandise purchased during that month, the remittance to the State Auditor of the sums earned by virtue of the 7½% surcharge imposed on the price of merchandise would necessarily be lessened by that portion of the 5% discount which would be applicable to the 7½% surcharge.

OFFICIAL OPINION NO. 73-20

August 14, 1972

TO: Bill Webster
State Liquor Dispensary

FROM: James G. Reid

In your letter of July 10, 1972, you ask for a formal opinion in regard to how the 7½% surcharge which was passed by the last session of the Legislature will be computed by the Liquor Dispensary. The pertinent section of the amendment to Section 23-217, *Idaho Code*, reads as follows:

"... (c) In addition to the surcharge imposed by subsection (a) of this section, the superintendent of the state liquor dispensary is hereby authorized and directed to include in the price of goods hereafter sold in the dispensary, and its branches, a surcharge equal to seven and one-half per cent (7½%) of the current price per unit computed to the nearest multiple of five cents (5¢)."

The term "current price per unit" would mean the current retail price of any unit sold by the dispensary or one of its stations. Therefore, it would be the opinion of this office that the 7½% surcharge contemplated by subsection (c) of Section 23-217, *Idaho Code*, as amended would be computed by taking 7½% of the current retail price of each unit sold. This would amount to a net surcharge in the amount of 17½%; 10% of which would be remitted to the State Auditor monthly to be credited to the General Fund and 7½% of which would be remitted to the State Auditor monthly to be credited partially to the Permanent Building Fund and partially to the General Fund.

OFFICIAL OPINION NO. 73-21

August 18, 1972

TO: Robert Hay
Commissioner of Insurance

FROM: Stewart A. Morris

Mrs. Katherine Huff of your Department has inquired as to the legality of split life insurance in the State of Idaho.

This office previously issued an opinion on this subject on December 1, 1971, essentially stating that split life insurance is legal in the State of Idaho, provided (a) violation of Section 41-1314 is avoided by specifying the availability of the companion policy in the master policy, and (b) violation of Section 41-1313 does not occur due to a difference in rates or premiums being charged as to persons of like risks, unless those differences are actually reflected by savings or additional costs involved.

Mrs. Huff has now inquired, however, whether issuing insurance in the State of Idaho on the split life plan would be in violation of Section 41-1906, Idaho's "entire contract" provision, since it has come to her attention that some states have construed similar provisions to mean that the entire insurance agreement between the insured and the insurer must be contained in one policy, as opposed to two policies being issued as in the split life plans. Section 41-1906 provides as follows:

"There shall be provision that the policy, or the policy and the application therefor if a copy of such application is endorsed upon or attached to the policy when issued, shall constitute the entire contract between the parties, and that all statements contained in such application shall, in the absence of fraud, be deemed representations and not warranties."

In my opinion, the above quoted provision is simply intended to be a "statute of frauds" type of provision which simply requires that the entire agreement between the parties be reduced to writing. It should be noted along this line, in accordance with the previous opinion issued, the master policy must specify the availability of a companion policy. If, therefore, such provision sufficiently identifies the terms and conditions of the offer, and adequately identifies the policy form or type of coverage to be offered, the master policy does, in effect, contain the entire agreement existing between the parties at that time. This is for the reason that when the master policy is issued, the agreement between the parties at that time is only that the insured has the "right" to purchase the companion policy provided the master policy is in force. To adequately protect the insured, however, I feel that the provision in the master policy should identify the companion policy to be offered by policy form designation, or by attaching a specimen companion policy to the master policy.

While insurance may be issued on a split life plan in the State of Idaho without violating Sections 41-1313, 41-1314 and 41-1906, there are still several pitfalls which the insurer will have to avoid in marketing insurance in this

manner. First, as mentioned previously, any savings by premium reduction afforded the purchasers of the companion policy will have to accurately reflect a savings to the insurer by virtue of issuing the two policies as a package. If a savings is not afforded on the purchase of the companion policy, as compared to a person of like risk purchasing the same policy separately, the proposed insured should not be misled into believing that a premium savings is being afforded. Also, the proposed insured should not be misled into believing that the companion policy will provide special coverages which will not be made available to the proposed insured by that company without purchase of the master policy, unless that is actually the case. For example, the proposed insured should not be misled into believing that he cannot acquire term life coverage provided by the companion policy through the insurer, in the instance where the insurer in fact offers essentially the same term life coverage to the public through an individual policy.

Accordingly, with the limitations specified above, it is our opinion that "split life" insurance programs are legal in the State of Idaho.

OFFICIAL OPINION NO. 73-22

August 22, 1972

TO: Commissioner Ewing H. Little
State Tax Commission

FROM: Christopher M. Wyne

An opinion has been requested on the following question:

"Does the production exemption contained in *Idaho Code* § 63-3622(d) of the Idaho Sales Tax Act apply to tangible personal property used by 'contract loggers' in curring operations?"

It is our opinion that the applicable portion of *Idaho Code* § 63-3622(d) does not require that title of the goods produced for sale at retail be in the manufacturer, processor, miner, producer or fabricator in order that a "production exemption" from sales and use tax liability be properly claimed on tangible personal property used in the production process.

The relevant portion of *Idaho Code* § 63-3622 reads as follows:

EXEMPTIONS. — There are exempted from the taxes imposed by this act the following: . . . "Receipts from the sale, storage, use or other consumption in this state of tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, mined, produced or fabricated for ultimate sale at retail within or without this state, *and tangible personal property primarily and directly used or consumed in or during such manufacturing, processing, mining, farming, or fabricating operation by a business or segment of a business which is primarily devoted to such operation, provided that the use or consumption of such tangible personal*

property is necessary or essential to the performance of such operation.
[Emphasis added.]

The production exemption for tangible personal property used in the production of other tangible personal property for ultimate sale at retail is granted by statute to all engaged in "manufacturing, processing, mining, farming, or fabricating operation" if the property utilized is consumed "primarily and directly" in such operation. The exemption is further narrowed by limiting it to producers who are primarily devoted to such operations who utilize only "necessary and essential" personal property in the operations.

It is our opinion that the primary limiting terms, i.e. "manufacturing, processing, mining, farming or fabricating," do not impliedly require that the processing entity own the raw materials which are the subject of the process. "Manufacture" is defined as "the process or operation of making wares or other material products by hand or by machine". Thus the person who contracts for the performance of the process can "manufacture" tangible personal property and thereby become eligible for the exemption on the processing equipment just as easily as the producer who owns the materials processed.

The key concept is whether or not the contractor can be fairly characterized as a person performing one of the operations set out in § 63-3622(d). The "contract logger" in performing cutting operations on a stand of timber is fairly characterized as a processor of tangible personal property and the equipment he uses in the performance of such operation is exempt from sales and use tax under the Idaho Sales Tax Act if the remaining limitations set out in § 63-3622(d) are met.

OFFICIAL OPINION NO. 73-23

August 29, 1972

TO: James W. Mills
Candidate for Public Office

FROM: John F. Croner

This will acknowledge receipt of your letter of August 14, 1972, in which you expressed dissatisfaction with certain procedures employed in a recent election. In substance, your questions asked the following:

1. Whether it is permissible to write in a candidate by placing a sticker with his name upon it to the ballot.
2. Whether it is proper for an election official to remind voters that a particular person is actively seeking election through the write-in procedure.
3. Whether it is proper for the stickers which are to be placed in the write-in blanks (supra) to be passed out to electors within the building in which the polling place is located.

In response to your first question, we do not see where there is any violation of the statutes of this state where a sticker with a candidate's name is affixed to the ballot in place of a write-in.

Your second question asks whether the described conduct of the election official might constitute a crime. I think that it could be argued that the described action would constitute "electioneering at the polls," under Section 18-2318, *Idaho Code*. Likewise, it could be argued that the distributing of name stickers inside a building wherein there is a polling place is also "electioneering" under the same statute.

Any complaints which local citizens have respecting the above should be lodged with the County Prosecuting Attorney.

OFFICIAL OPINION NO. 73-24

September 1, 1972

TO: Commissioner Robert Hay
Department of Insurance

FROM: Stewart A. Morris

We have reviewed the proposed agreement between Gem State Mutual Life Association, Inc., and Gem State Mutual Health and Accident Association, which relates to the withdrawal of the Health and Accident Association from business in the State of Idaho.

Basically, the contract provides for a bulk transfer of all assets of the Accident and Health Association to the Mutual Life Association, with the Mutual Life Association assuming all debts of the Accident and Health Company, and the Accident and Health Company ceasing to transact any further business.

It is our opinion that the proposed agreement constitutes a merger between the two companies, and that therefore the provisions of Section 41-3034, *Idaho Code*, must be complied with. Accordingly, since the various requirements of Section 41-3034 have not been complied with, approval of the subject agreement should not be given.

We realize that compliance with Section 41-3034 will be costly, however, we see no other alternative to accomplish the purposes proposed in the agreement, other than through a bulk reinsurance agreement pursuant to Sections 41-512 and 41-2858, which alternative would require almost identical procedures and costs.

We note that the proposed agreement provides that the Mutual Life Association will attempt to contact all members of the Accident and Health Association to afford them the option of (a) receiving unearned premium upon surrender of their policies, or (b) accepting new life insurance policies from the

Mutual Life Association which would contain options for disability benefits. We further note that the last sentence of Section 41-3034 provides that existing membership certificates of the Accident and Health Association shall continue in full force and effect, and that therefore, the above referenced options, would not be in compliance with Section 41-3034. It would appear that the members of the Accident and Health Association should also be afforded the option of maintaining their existing policies in force.

For future reference, if a decision is made to voluntarily dissolve the Accident and Health Association, rather than merge it with the Mutual Life Association, we note that Section 41-3024 provides that any investments, securities, surplus and sums over and above all proper liabilities, expenses and claims of the Accident and Health Association shall be the sole property of the members of the Association in good standing, and that if such Association ceases to do business and is dissolved, the property fair and equitable manner. Thus, if the merger approach is not employed with the conditions specified above, it would appear that the only other alternative would be to voluntarily dissolve the Accident and Health Association with a distribution of the equity in cash to the members in good standing, or to dissolve the Company pursuant to delinquency proceedings conducted under Chapter 33 of the Insurance Code.

OFFICIAL OPINION NO. 73-25

September 1, 1972

TO: Idaho Friends Retirement Homes, Inc.

FROM: Robert L. Miller

You have requested this office for an opinion whether or not property held by Idaho Friends Retirement Homes, Inc., a non-profit corporation, will be subject to ad valorem tax pursuant to Title 63, *Idaho Code*.

(1) It is the opinion of this office that a not-for-profit organization incorporated for the sole purpose of implementing a program as provided by Sec. 236 of the Housing and Urban Development Act of 1968 is a charitable organization within the provisions of Section 63-105C, *Idaho Code*.

(2) It is the opinion of this office that the rental or leasing of a building constructed pursuant to Sec. 236 of the Housing and Urban Development Act of 1968 is the purpose for which the charitable organization exists as set forth in (1) above, and consequently, the revenue derived from the rental or leasing of that building is revenue derived from a business purpose which is directly related to the charitable purpose for which the charitable organization exists. Consequently, the rental or leasing of the building falls within the exemption provided for in Section 63-105C, and the operation does not fall within any exception to this exemption.

OFFICIAL OPINION NO. 73-26

September 6, 1972

TO: J. W. Crutcher
Valley County Clerk

FROM: W. Anthony Park

This will acknowledge receipt of your letter of August 18, 1972, in which you asked that this office address itself to several election law questions which you framed as follows:

- “1. If a candidate properly files a declaration of candidacy under Section 34-704 I.C. for one political party and receives the highest number of votes as a write-in candidate for one or more additional parties, shall he — after fulfilling the requirements of Section 34-702 I.C. — become the candidate for all parties for which he has been nominated?
2. If a candidate has not filed a declaration of candidacy for any political party under Section 34-704 I.C. and is nominated as a write-in candidate for two or more political parties shall he, after fulfilling the requirements of Section 34-702, I.C., become the candidate for all political parties for which he has been nominated?
3. If a candidate is allowed to file a declaration of candidacy for two or more political parties shall he be required to pay the filing fee for each candidacy?
4. If a candidate is not allowed to file a declaration of candidacy for more than one political party, shall a vacancy be declared in the slate of candidates for the party refused by the candidate with highest number of votes and may the slate be filled by the candidate having the next highest number of votes either under Section 34-702 I.C. or Section 34-715 Paragraph 4?”

In answer to your first question, we are of the opinion that where a candidate has filed his declaration of candidacy for one political party and has prevailed in the nominating election for that party, he cannot represent more than one party. Further, in such a case it is clear that once a person has filed a declaration of candidacy for a certain party's nomination, he has thereby made his election as to which party he will represent if successful in the primary election.

Your second question presents the situation where an individual is written in by both parties for a given office, and receives the prevailing nominating vote for each party. We are of the opinion that in this instance the candidate should be accorded the opportunity of choice inasmuch as he has not made a declaration of candidacy. In no instance, however, do we think that it is proper to award the office to such a candidate by virtue of his having won both primaries and accordingly are of the opinion that once the candidate exercises his choice the central committee of the party not selected should then be able to select a candidate for the general election according to law.

Having concluded that it is improper for a candidate to file for more than one office or for the same office representing more than one political party, your third question is moot.

In answer to your fourth question, the candidate receiving the next highest number of votes would be the party nominee so long as he polled the requisite 25% pursuant to the provisions of Section 34-715, *Idaho Code*.

OFFICIAL OPINION NO. 73-27

September 11, 1972

TO: Helen McKinney
State Representative

FROM: J. Dennis Williams

Recently you requested an opinion from this office comparing Section 18-3302 of the Criminal Code now in effect and Section 18-506 of the Penal Code relating to possession of firearms by sportsmen.

As you are aware the Second Session of the Forty-First Legislature repealed the penal code which had been in effect from January 1, 1972 to March 31, 1972, and substantially reenacted the former criminal code.

The present Section 18-3302, *Idaho Code*, thus became effective April 1, 1972, and is the same law as was in effect prior to January 1, 1972. This section provides in pertinent part:

"If any person, ***, shall carry concealed upon or about his person any dirk, dirk knife, bowie knife, dagger, sling shot, pistol, revolver gun or any other deadly or dangerous weapon within the limits or confines of any city, town or village, or in any public assembly, or in any mining, lumbering, logging, railroad or other construction camp, public conveyances, or on the public highways within the State of Idaho, *** shall upon conviction, be punished by a fine of not less than \$25.00 nor more than \$200.00 and by imprisonment in the county jail for a period of not less than twenty days nor more than ninety days: ***." [Emphasis added.]

Section 18-506 of the repealed penal code provided in pertinent part:

(1) Criminal instruments generally. A person commits a misdemeanor if he possesses any instrument of crime *with purpose to employ it criminally*. "Instrument of crime" means:

(b) Anything commonly used for criminal purpose and possessed by the actor under circumstances which do not negative unlawful purposes.

(2) Presumption of criminal purpose from possession of weapon. If a person possesses a firearm or other weapon *on or about his person in a*

vehicle occupied by him, or otherwise available for use, it is presumed that he had the purpose to employ it criminally unless:

- (a) *the weapon is possessed in the actors home or place of business;*
- (b) *the actor is licensed or otherwise authorized by law to possess such weapon; or*
- (c) *the weapon is of a type commonly used in lawful sport . . ."*
[Emphasis added.]

A comparison of these two statutes to determine their effect upon sportsmen who possess firearms reveals that the present law, Section 18-3302, *Idaho Code*, restricts anyone including sportsmen, from carrying concealed firearms or other delineated weapons upon or about their persons in any place prohibited by the statute. Section 18-506 of the repealed penal code restricted the possession of "any instrument of crime with purpose to employ it criminally." And also established a presumption that a person was criminally possessing a weapon on his person or in his vehicle unless the weapon was possessed in the *home or place of business* or was the type of weapon *commonly used in lawful sport*. These specific references to the possession of weapons in the home, place of business or for lawful sport make it clear that sportsmen could possess weapons on their persons or in their vehicles under that statute.

In summary, both the present statute and the one repealed allow sportsmen and anyone else to possess weapons for lawful purposes. The primary difference between the laws is that the present statute prohibits carrying of any type of concealed weapons in certain places, whereas the repealed law allowed possession of a weapon on a person in his home or business, or if the weapon was a type commonly used in lawful sport.

OFFICIAL OPINION NO. 73-28

September 11, 1972

TO: Paul Gregersen
Chairman, Bannock County Commissioners

FROM: John F. Croner

This will acknowledge receipt of your letter of September 6, 1972, regarding whether or not a certain absentee ballot should be counted.

The essential facts are that a qualified elector of legislative district #34 made application for an absentee ballot for his district and for some reason listed an incorrect precinct number upon the ballot application. As a result, he was issued an absentee ballot for legislative district #33. The question is whether his write-in vote for a representative nomination of district #34 should be counted in that district.

There is no statute which clearly provides an answer. However, Section 34-1203, *Idaho Code*, provides in pertinent part:

“... When a ballot is sufficiently plain to determine therefrom a part of the voter's intention, it shall be the duty of the judges to count such part ...”

Here, we find that the elector in question, by receiving a ballot from district #33 could not cast a valid vote for any of the district #33 candidates as he was not qualified to vote for them. The only alternative which he undoubtedly contemplated was to write-in the candidate in his district for whom he had the power to vote.

It seems to me that the mistake in the elector's receiving the improper ballot was a joint mistake between him and the election officials inasmuch as he had listed an address from which any cursory investigation would have revealed his proper district.

Election laws should be construed to favor enfranchisement and to disfavor disenfranchisement. Therefore, it is my respectful opinion that the write-in vote at issue should be counted.

OFFICIAL OPINION NO. 73-29

September 13, 1972

TO: Robert McAbee
Executive Director, Ada Council of Governments

FROM: Donald E. Knickrehm

This is in response to your letter of May 15, 1972, in which you posed the following problem:

“If an irrigation company has built its canal in such a manner as to cross and block natural drainage ways without providing passageway for the storm water to flow, and as a result the downstream region of said drainage way becomes built up with building and roadway encroachments to the point to re-open said drainage way would cause considerable expense and disruption; and if the irrigation canal has sufficient capacity to receive storm water from said drainage, does not the fact that the canal blocked the natural route of drainage obligate it to allow the storm flow into its canal?”

I apologize for the burdensome delay in this response. As you know, we responded to your letter by telephone conversation with Mr. Tom Davis of your staff this Summer. Our response then was that there appeared to be little legal basis for the proposition that there was an obligation on the part of the canal company to continue to accept the storm flows into its canal. Subsequent research has verified that opinion.

The downhill property holders have no right to abatement of natural flows of rain or other runoffs over their land from uphill sources. On the other hand, the uphill property holder cannot make these runoff flows more burdensome, by

channeling the runoffs into a single stream, or otherwise. Thus, if the flow of runoffs has not been augmented or intensified, there is no right in the downhill property holder to force the canal to accept natural runoff.

There is no authority for the proposition that this set of rights and obligations is altered by the temporary diversion of natural runoff waters into a canal. That is, there is no clear authority that temporary diversion of runoff creates some new legal burden or duty on the part of the diverter.

There is a possible theory upon which a legal duty to continue to divert runoff waters might be based. That is an equitable theory of estoppel. It can reasonably be argued that the actions of the canal company in diverting these runoff waters for a number of years were reasonably relied upon by the lower owners in developing their lands. To end the diversion of the runoff at this date would impose a real hardship on the lower owners, and, relatively, increase the burden of the runoff waters. The canal company should have foreseen this when downhill development began, and warned the downhill property owners that the runoff would one day be allowed to resume. This argument would be strengthened appreciably if the canal company received some benefit from the development of the properties below the canal. Even if that were the case, there is no clear precedent establishing this sort of duty on the part of an uphill canal company in Idaho. It is, however, an arguable point.

OFFICIAL OPINION NO. 73-30

September 20, 1972

TO: Joe Schreiber
Chairman, Housing Authority

FROM: W. Anthony Park

You have requested an opinion from this office regarding the following question:

“Is the Idaho Housing Agency which was created by Chapter 324 of the 1972 Idaho Session Laws a ‘state agency’ or an independent autonomous body?”

It must first be decided whether the Legislature of the State of Idaho has the power to create an autonomous body. In *State v. Dolan*, 13 Idaho 693, 92 Pac. 995, the Court stated that a constitution is in no manner a grant of power to the Legislature, but is a limitation placed thereon; if no interdiction of a legislative act is found in the *Constitution*, then it is valid. Upon examination, it is clear that the *Constitution* of the State of Idaho does not specifically prohibit the creation of an autonomous body by the Legislature. There being no specific limitation, it is the opinion of this office that the Legislature can, in fact, create an autonomous body whose powers would be separate and distinct from that of a “state agency”.

Having decided the Legislature has the power to create an independent

autonomous body, the question remains as to whether the Legislature in passing Chapter 324 of the 1972 Idaho Session Laws did, in fact, create such a body as opposed to a "state agency". Section 2 of Chapter 324 defines the Idaho Housing Agency as a "public body corporate". Section 6 defines the agency as an "independent body corporate and politic, exercising public and essential government functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act". Section 6 further defines the powers of the Idaho Housing Agency, which include the right to sue and be sued, to have a seal, to have perpetual succession, to make and execute contracts and other instruments, to lease dwellings, to own and hold real property, and to invest funds. Section 10 of the Act enables the agency to issue bonds for any of its purposes and also the power to issue refunding bonds for the purpose of paying or retiring bonds previously issued.

Article VIII, Section 1 of the *Idaho Constitution* provides for a limitation on public indebtedness and in part reads as follows:

"The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, . . . exceed in the aggregate sum of two million dollars . . ."

If the Idaho Housing Agency is, in fact, a "state agency" Article VIII, Section 1 of the *Idaho Constitution* would, in effect, preclude the agency from performing the exact purpose for which it was created. In defining the purpose of the Idaho Housing Agency, the Legislature stated in Section 1(b) of Chapter 324:

"It is imperative that the supply of housing for persons and families of low income be increased and that coordination and cooperation among private enterprise, state and local government be encouraged to sponsor, *build* and rehabilitate residential housing for such persons and families."

In order to effectuate the purposes of the Act, the Agency would necessarily have to engage in financial agreements and, as such, incur indebtedness. If it is defined as a "state agency," the *Constitution* of the State of Idaho would preclude any act that would place it in debt. (Article VIII, Sec. 1, *supra*.)

In view of the definitions used by the Legislature in creating the Idaho Housing Agency as well as the powers which have been conferred upon such Agency, it becomes clear that the Legislature intended to create an autonomous body. To have intended otherwise would place the operative sections of the Act in constitutional jeopardy. The Supreme Court of Idaho has stated that a Court is under a duty to adopt a construction of legislation that will sustain, rather than overturn it, where it is open to both constructions. *Idaho Gold Dredging Co. v. Balderstone*, 58 Idaho 692, 78 P.2d 105; *State v. Peterson*, 61 Idaho 50, 97 P.2d 603.

Based on the fact that the Legislature in creating the Idaho Housing Agency clearly used language that would support the conclusion that the Agency is autonomous, and further that a different construction would lend itself to constitutional challenges, it is the opinion of this office that the Legislature did,

in fact, create an autonomous body in adopting Chapter 324, 1972 Idaho Session Laws.

Although there are not many cases which deal with the question here raised, the Supreme Court of Alaska was called upon to determine whether or not the Alaska State Housing Authority was a "state agency" as that term was used and defined in the Administrative Procedure Act. (*Alaska State Housing Authority v. Dixon*, 496 P.2d 649 (1972)). The Alaska court held that the Alaska State Housing Authority was, in fact, a "state agency" for the following reasons:

1. It was created as a "public corporate authority" . . . "within the Department of Commerce".
2. The Commissioner of Commerce was a member of the Board of Directors of the Authority.
3. The other four members of the Board in addition to the Commissioner of Commerce, were appointed by the Governor and served at his pleasure.
4. The authority was required to submit several annual reports to the Department of Commerce.

While the Idaho Housing Agency was created as a public corporate authority, it was not created within any division of state government and can accordingly be distinguished from the Alaskan situation. There is no member on the Idaho Housing Agency who also holds an office in any other state agency. The Idaho commission is not required to submit annual reports to any other state agency as was the case with the Alaska agency. Therefore, the Idaho Housing Agency, unlike the Alaskan Authority, does not possess the characteristics of a "state agency" which were controlling on the Supreme Court of Alaska.

It is the opinion of this office that the Legislature of the State of Idaho does have the power to create an independent autonomous body and in the case of the Idaho Housing Agency did just that.

OFFICIAL OPINION NO. 73-31

September 21, 1972

TO: Budget & Fiscal Committee

FROM: Clarence D. Suiter

This office has had an opportunity to examine closely the bidding procedures followed by the State Purchasing Agent in regard to the awarding to IBM the contract for leasing additional computer equipment for the Department of Highways and the Auditor's Office. It is the opinion of this office that all procedures set forth in Title 67, Chapter 16, *Idaho Code*, were followed to the letter by the State Purchasing Agent in the awarding of the bid. As such, the actions were entirely proper under the circumstances.

Attached please find a copy of an Attorney General's opinion written April 20, 1972, dealing with computer leasing by state departments. It is very possible

that the situation regarding the IBM leases in the above instance may be covered by that opinion and as such it would not have been improper for the Highway Department or the Auditor's Office to enter into the leases without any bidding process whatsoever.

OFFICIAL OPINION NO. 73-32

September 21, 1972

TO: Ralph H. Haley
Magistrate, District Court
Second Judicial District

FROM: W. Anthony Park

This letter is in response to your request for an opinion concerning Section 66-329(b), *Idaho Code*.

Because of the urgency expressed in your letter, it has been impossible for this office to conduct an extensive research project with respect to the due process requirements of adequate notice and hearing. However, it is generally accepted that it is contempt of court for a person to violate a court order of which he has knowledge and which was within the court's jurisdiction to make. See: 17 Am Jur 2d, *Contempt*, § 34. Likewise, to hold a person in contempt for violating a court order, such person must have had knowledge of the order. 17 Am Jur 2d, *Contempt*, § 41.

In respect to the above cited rules, it would appear that due process of law is not violated where the person subject to contempt had notice of the court order directed toward him and said order was properly within the jurisdiction of the court.

It is the view of this office that Section 66-329(b), *Idaho Code*, gives a court in a commitment proceeding proper jurisdiction to issue an order designating a medical examiner and compelling said examiner to perform such examinations of the proposed patient as may be practicable under the circumstances, and to report to the court the findings as to the medical condition of the proposed patient.

Your letter indicates that the doctors were personally served with copies of all papers arising from the commitment proceeding under consideration. Therefore, it must be concluded that the doctors were provided adequate notice of the court order designating them as examining officers and notice of their responsibility to perform reasonable examination of the proposed patient.

Under the circumstances described in this case, this office concludes that the court may properly proceed in a contempt action against the designated examiners as being in violation of the court order issued pursuant to Section 66-329(b), *Idaho Code*.

OFFICIAL OPINION NO. 73-33

September 28, 1972

TO: Tim Eriksen
Bannock County Clerk, Auditor & Recorder

FROM: John F. Croner

This will confirm our telephone conversation wherein you informed me that a certain candidate for county commissioner of a particular district did not actually reside in the district for which he seeks to serve, if elected, at the time he filed his declaration of candidacy. You further related that since the time of the individual's filing that he has moved and established residence in the district for which he wishes to serve.

Your question was whether the initial declaration is invalid by virtue of said residence change.

I believe the candidate in question has done all that needs to be done in order to have his name placed upon the ballot. Section 34-617, *Idaho Code*, provides:

"34-617. ELECTION OF COUNTY COMMISSIONERS – QUALIFICATIONS. – (1) A board of county commissioners shall be elected in each county at the general elections as provided by section 31-703, Idaho Code.

(2) No person shall be elected to the board of county commissioners unless he has attained the age of twenty-one (21) years at the time of the election, is a citizen of the United States, and shall have resided in the county one (1) year next preceding his election.

(3) Each candidate shall file his declaration of candidacy with the county clerk. Each declaration shall have attached thereto a petition which contains the signatures of not less than five (5) nor more than ten (10) qualified electors from his commissioner district.

(4) Each candidate who files a declaration of candidacy shall at the same time pay a filing fee of forty dollars (\$40.00) which shall be deposited in the county treasury."

This statute simply imposes that a person be qualified at the time of his election. It would appear that the candidate in question has the requisite qualifications, and thus, I can see no reason not to place his name upon the ballot by virtue of his residence change subsequent to his declaration of candidacy filing.

OFFICIAL OPINION NO. 73-34

September 29, 1972

TO: Cecil D. Andrus
Governor

FROM: Donald E. Knickrehm

This is in response to your letter of September 7, 1972, requesting this office

issue an opinion on the following questions:

- (1) In the context of the Human Rights Legislation, does Executive Secretary mean the same as Executive Director of the Commission?
- (2) Related to the above question, who has the primary responsibility for hiring staff to be employed by the Commission?
- (3) Also related, who has the primary responsibility for determining whether or not there will be a supervisor of the Commission staff other than the Executive Secretary, and who has the primary responsibility for determining who that supervisor will be if there is to be one?"

The authority and duties of the "Secretary" of the Commission must initially be gleaned from the statute creating the Commission and the office of "Secretary". Section 67-5904, *Idaho Code*, provides in relevant part: :

"The commission shall annually select a president and vice president. The director of the Economic Opportunity Office for the State of Idaho shall serve as its secretary."

Section 67-5905, *Idaho Code*, provides further, in relevant part:

"The secretary shall attend all meetings of the Commission, serve as its executive and administrative officer, have charge of its office and records, and, under the general supervision of the commission, be responsible for the administration of this act and the general policies and regulations adopted by the board."

It would appear from the specific assignment of duties as the "executive and administrative" officer to the director of the Economic Opportunity Office that the intent of the legislature was to vest broad executive authority in that person. The qualifying phrase, "under the general supervision of the commission," clearly applies only to the last part of Section 67-5905, which confers responsibility for the administration of the Act and the Commission's policies upon the Secretary. This is added weight for a reading of the statute vesting broad executive authority and discretion in the director of the Office of Economic Opportunity. Therefore, the answer to your first question is that, while the term "executive secretary" is not used in the Act, the designation of the director of the State Economic Opportunity Office as the Secretary of the Commission is also a designation of that person as the executive director of the Commission.

The answers to the second and third questions posed are not clearly set out in the Act in question. These answers must flow by implication from the answer to the first question.

There is no explicit authority to hire staff vested in the Commission. While that authority may reasonably be implied from the broad authorities vested in the Commission by Section 67-5906, *Idaho Code*, such implied authority must be read as being subject to the explicit vesting of executive authority by the preceding statutory section in the Secretary of the Commission. The Commission cannot usurp the statutorily vested executive authority of the Commission Secretary by hiring a "director" and authorizing that person to exercise

executive authority. Thus, it must be concluded that a "director" of the Commission, if he or she is to have any executive authority, must be delegated that authority by the statutorily designated Secretary of the Commission. If the Secretary so chooses, he or she may continue to personally exercise the executive functions assigned by the state.

The hiring of other, subordinate staff (investigators, secretaries) would normally be a function of the executive officer of the Commission. However, that is not spelled out in the terms of the Act. Indeed, as discussed above, the authority to hire staff at all is an implied authority. It can certainly be argued, from the sparse terms of the Act, that the authority of the Commission to hire staff remains in the Commission itself, since it is not delegated to a "director" or the Secretary of the Commission by the terms of the statute. However, to avoid undue friction it would seem that if the Commission chooses to hire its own staff, consultation and agreement with the executive officer, be that the Secretary of the Commission or a director delegated executive functions by the Secretary, is essential.

To summarize briefly, then, the answers to your questions are:

- (1) The "Secretary of the Commission" is the statutorily designated executive officer, and is the same as the executive director;
- (2) The primary responsibility for hiring staff seems to be vested in the Commission, but that authority is as a practical matter limited by the fact of the statutory designation of an executive officer;
- (3) The determination of whether there should be a supervisor other than the Secretary of the Commission, and if so, who it should be, must be a joint determination of the Commission and the Secretary.

I have attached a briefer and perhaps clearer statement of the legal relationship of the Commission and the director of the state's Economic Opportunity Office, which is in response to a request for an opinion from the President of the Commission, as well as a copy of the request for that opinion.

OFFICIAL OPINION NO. 73-35

October 4, 1972

TO: Pete T. Cenarrusa
Secretary of State

FROM: John F. Croner

This will acknowledge receipt of your letter of September 27, 1972, in which you requested that this office render an opinion regarding the proper design of machine-type ballots.

You related that as Chief Elections Officer for the State you possessed the power to design the ballot in a manner consistent with law. You have certified

the paper ballots used in most counties in this state, and these list parties in columnar form. You related that:

“Idaho Code 34-2416(2) would indicate that, as nearly as practical, machine ballots should conform to the paper ballots. Other voting machine sections, however, head in a different direction. These appear to indicate that candidates should be grouped by office title rather than by party column.”

After having reviewed the relevant ballot design provisions of Title 34, *Idaho Code*, I cannot find where anything expressly requires a single manner for listing the candidates on the ballot for either paper ballots or machine ballots. In final analysis, it would appear that the ballot design is the prerogative of the Secretary of State, and either a party grouping or office grouping of candidates on the ballot would be permissible with either kind of ballot.

The question which presents itself is whether you must list candidates in party column on machine ballots in view of the fact that the certified paper ballots employ the party grouping design.

Section 34-2416, *Idaho Code*, provides, in part:

“The arrangement of offices and names of candidates upon the ballot labels shall conform as nearly as practicable to the *provisions of law* for the arrangement of names on paper ballots . . .” [Emphasis added.]

We do not see where this section is directly applicable to the question before us. As stated earlier there does not appear to be any express statutory language compelling the use of party grouping upon paper ballots. Since the above quoted statutory language would only compel machine ballots to be designed as nearly as practicable to the statutory design of paper ballots (if there were a definitive statutory design) inasmuch as there exists no such language or design form it seems fair to conclude that the decision of design here is not governed by 34-2416, *Idaho Code*. In other words because no law compels that paper ballots be by party grouping, Section 34-2416, *Idaho Code*, does not require consistency in the design of machine ballots. The administrative decision to certify the party grouping method on the paper ballots does not in our opinion, set Section 34-2416, *Idaho Code*, into motion, and thus said statute provides no direction.

There are numerous arguments for the proposition that the machine ballots should list the candidates by office rather than party:

1. Section 34-2419, *Idaho Code*, requires the rotation of candidates – not parties.
2. Section 34-2419, *Idaho Code*, requires (a) the names of the offices to be filled and (b) the names of candidates to be voted for, together with their proper party designations.
3. Idaho’s law respecting ballots was adopted substantially from Oregon and Nevada. Both states group candidates by office rather than by party column.
4. Independent voters as well as any other voter not desiring to vote a

straight party ticket would find the party grouping ballot a much more difficult one to follow, and ballot spoilage would probably be greater.

5. The Chief Elections Officer should design a ballot in a non-partisan fashion which assures fairness to all candidates, and one which is as simple as possible for most electors to comprehend. Office grouping on the voting machines' ballot is simple and fair. The alternative is questionable.

As Chief Elections Officer of the state, you do have latitude with respect to the design of the ballot under the present law. You have, however, asked that this office provide direction. We, therefore, advise that the most fundamentally fair design for the voting machine type ballot is by listing the candidates according to the office and not by party column.

OFFICIAL OPINION NO. 73-36

October 5, 1972

TO: Executive Mansion Committee
FROM: W. Anthony Park

In response to a request for our opinion regarding the legal requirements of the place of residence of the Governor of the State of Idaho, we would advise all requirements as to residence of the Governor are contained in *Idaho Code* Section 59-103, where it is provided:

"Residence of certain officers. — The following officers must reside within the county of Ada and keep their offices in Boise City:

The Governor . . ."

The above cited provision of the *Idaho Code* is the only requirement contained in Idaho law for the residence of the Governor. The requirement that the Governor maintain an office in Boise City does not mean that the Governor must reside within the corporate limits of Boise City as long as he lives within Ada County.

OFFICIAL OPINION NO. 73-37

October 5, 1972

TO: John Bender
Commissioner of Law Enforcement
FROM: James W. Blaine

You have asked for an opinion from this office as to whether or not a person who has been accepted in the Driver Rehabilitation and Improvement Program (Chapter 319, 1971 Session Laws) is required to furnish a Form SR-22 as a condition of participation in such program.

entered recently by the magistrate courts since the Alcohol Safety Action Project has been put into effect. These judgments, of course, are not convictions, and therefore do not give the insurance carrier an opportunity to relieve itself of the burden of carrying the risk of this particular person although such person may participate in the Driver Improvement and Counseling Program.

OFFICIAL OPINION NO. 73-38

October 6, 1972

TO: Seward H. French III
Bonneville County Prosecuting Attorney

FROM: W. Anthony Park

This will acknowledge receipt of your letter of September 28, 1972, which you sent to Mr. Croner. Because there has been some uncertainty as to the position of this office with regard to the placing of a candidate's name upon the ballot in Bonneville County, I have decided to answer your inquiry personally.

The question which must be answered is whether a county clerk may refuse to place a candidate's name upon the general election ballot where the candidate has timely filed a declaration of candidacy, has been certified as the nominee of his party, and subsequently it appears to the clerk that the candidate is not qualified to hold the office.

You have correctly concluded that there is "no specific statutory authority permitting the county clerk to remove a candidate's name in the manner I [you] have advised."

I am of the opinion that once a candidate has been certified to appear upon the general election ballot it is not within the province of the county clerk to refuse to place that name upon the ballot. The duty of the county clerk is, in my opinion, purely ministerial. Thus, there is no latitude for discretion in the matter. The determination of candidate qualifications, or lack of them, is a judicial question — one which should be left entirely to the courts.

The reason for this is that there are many factors of a strictly legal nature which must enter into any decision as to residency. Notwithstanding the fact that most county clerks are not attorneys, it is clear that the information upon which they would have to rely for a decision must by its very nature be hearsay, unsworn and not subject to cross-examination by the challenged candidate. Needless to say, such a procedure, if permitted, would be extremely prejudicial and unfair to a candidate subjected to it.

I might also add that where, as in the instant case, the candidate is refused ballot status after he has already won the primary election, he is precluded as a practical matter from seeking meaningful relief since the time factor militates strongly against him. That is, by the time he can get into court and obtain a decision, it is too late to get on the ballot. Further, he is denied, for all intents and purposes, his right to an appeal if the initial decision is adverse to him.

I should first call to your attention to the fact that the official name set by the legislative act is "Driver Rehabilitation and Improvement Program" but is commonly referred to as the Driver Improvement and Counseling Program for the reason that the defensive driving course conducted by the Department of Education is also known as the Driver Rehabilitation Program.

Section 49-1517(a), *Idaho Code*, provides:

"Whenever the commissioner, under any law of this state, *suspends or revokes* the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person."

You will note that this provision of the Safety Responsibility Act requires a *suspension or a revocation* based upon a *conviction or forfeiture of bail* before the errant driver is required to post or maintain proof of financial responsibility, which proof is evidenced by filing what is known as a Form SR-22, which is a certificate issued by the insurance company certifying that the insured is covered by a minimum liability insurance policy and guarantees that such policy will not be cancelled, withdrawn or terminated without giving the department at least ten days notice.

The purposes of the Driver Improvement and Counseling Program, established by the legislature, was to promote highway safety through programs for improving driving skills, attitudes and habits and to initiate the rehabilitation and instruction and counseling of drivers with poor driving records. Under the provisions of Chapter 319 of the 1971 Session Laws, the Department of Law Enforcement is authorized to stay the suspension or revocation of an operator's license during the time an errant driver is actually participating in the program. While he is participating, the driver would be operating under a legal and valid operator's license.

Provisions of Section 49-1517 only require the furnishing of the Form SR-22 *after an operator's license is suspended or revoked*. It is therefore the opinion of this office that, so long as a person who has been convicted of an offense under Title 49 calling for a mandatory or permissive suspension but who has been entered in, and is participating in, the Driver Improvement and Counseling Program, need not furnish a Form SR-22, and that upon the completion of participation in that course, his full driving privileges would be restored without the necessity of furnishing proof of further financial responsibility.

You will note, however, that a *person convicted of an offense under Title 49*, which requires a suspension or revocation were it not for the provisions of Chapter 319 of the 1971 Session Laws, would give grounds to his insurance company to cancel such person's insurance.

It has become apparent to this office as well as to other departments of the state government that there has been a great rash of withheld judgments being

Section 59-905, *Idaho Code*, provides further:

"59-905. OTHER STATE OFFICES – COUNTY AND CITY OFFICES. – VACANCIES, HOW FILLED. – Vacancies shall be filled in the following manner: In the office of the clerk of the Supreme Court, by the Supreme Court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices, by the county board; and in the membership of such board, by the governor. In city and village offices, by the mayor and council or board of trustees."

Where the *Idaho Code* sets forth a definitive procedure to correct the result of an invalid election of a candidate by virtue of his being unqualified at the time of his election and where the election laws provide no authority for the county clerk to refuse to place a certified candidate's name upon the ballot, the conclusion that a county clerk cannot refuse ballot status to a certified candidate seems to me inescapable.

° OFFICIAL OPINION NO. 73-39

October 10, 1972

TO: Thomas D. McEldowney
Commissioner of Finance

FROM: Stewart A. Morris

You have inquired whether a consumer credit lender or seller may, in addition to the loan finance charge or credit service charge permitted by the Uniform Commercial Credit Code, contract for and receive an additional charge for vendor's single interest insurance.

Essentially, vendor's single interest insurance, commonly referred to as "VSI," is insurance designed to protect the creditor's interest in collateral in the event the buyer defaults. VSI provides two basic types of coverage; that which indemnifies the creditor in the event of actual loss or destruction to the property pledged as collateral (sometimes referred to as "VSI-1"), and coverage providing indemnity to the creditor for losses resulting from repossession expenses, conversion, embezzlement or secretion by the debtor (sometimes referred to as "VSI-2"). VSI coverage is generally limited by the insurer to the physical damage to the collateral, or the outstanding balance of the debt, whichever is less. The indemnification is paid only to the creditor and is in no event paid to the debtor. Section 28-34-302, *Idaho Code*, prohibits subrogation by the insurer against the debtor unless the damage is wilfully caused by the debtor.

Sections 28-32-202 and 28-33-202, *Idaho Code*, are the provisions pertaining to permissible additional charges with relation to consumer credit sales and consumer credit loans. Sub-paragraph (1)(c) of Section 28-32-202, and sub-paragraph (1)(d) of Section 28-33-202, essentially permit additional charges for other benefits, including insurance, conferred upon the buyer if the benefits are

Section 34-2001, *Idaho Code*, provides the machinery for remedying whatever evil may come from electing an unqualified candidate. That section provides in pertinent part:

"34-2001. GROUNDS OF CONTEST. – The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested.

1. -----

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

Section 34-2024, *Idaho Code*, further provides:

"34-2024. ELECTION DECLARED VOID. – When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

Section 59-901, *Idaho Code*, provides:

"59-901. HOW VACANCIES OCCUR. – Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such, as follows:

1. The resignation of the incumbent.

2. His death.

3. His removal from office.

4. The decision of a competent tribunal declaring his office vacant.

5. His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected.

6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto.

7. A forfeiture of office as provided by any law of the state.

8. Conviction of any infamous crime, or of any public offense involving the violation of his oath of office.

9. The acceptance of a commission to any military office, either in the militia of this state, or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period of not less than sixty days."

This section would appear to provide the direction were a person elected, and later determined by a court in an election contest not to be qualified to hold the office.

It is argued that since VSI-1 is not insurance protecting the lender against the debtor's default or other credit loss, it therefore qualifies to fall within the provision above as a permissible additional charge, provided proper notice is given to the consumer. The primary reasons given for this argument are that, first, VSI-1 coverage could not be considered credit insurance because, in the instance where the debtor has defaulted, but there is not damage to the collateral, no benefit is paid by the insurer. Second, even if there is damage to the collateral, upon default of the debtor, it is rare that the amount of the credit loss is a measure of the benefits, but usually the benefits approximates the amount of damage to or the value of the collateral. Thus, it is asserted that VSI-1 coverage is no more a guarantee or insurance against credit loss than is that portion of a physical damage insurance contract protecting the lienholder against fire damage, windstorm or hail.

We do not agree with the argument set forth above, however. Most significantly, the benefits of the VSI-1 coverage are paid to the creditor, not the debtor. Thus, the insurance is designed primarily to protect the lender's interest in the property. We feel that upon the debtor's default, the "credit loss" or the "costs of default" includes the existing damage to the collateral. This loss is just as real to the lender or seller as is the expense incurred in repossession, etc. Thus, the cost of repairing the damaged collateral, or conversely, the decrease in value of the collateral resulting from the physical damage, is, in our opinion, part of the credit loss occasioned to the lender or seller upon the debtor's default. If a debt is completely unsecured, for instance, the credit loss upon default will obviously be larger; if collateral is pledged, its repossession and sale will result in reducing or eliminating the creditor's loss. In turn, therefore, VSI-1 insurance, which protects against physical damage to collateral, is acquired for the purpose of reducing or eliminating the credit loss occasioned by the debtor's default. We note also that although in many instances the measure of benefits may be the value of the collateral or the cost of repairs thereto, the benefits are nevertheless limited to the outstanding balance of the debt, which is certainly a characteristic of credit insurance. We, accordingly, feel that VSI-1 coverage is insurance protecting the lender against the debtor's default or other credit loss for the reasons that (a) the debtor's default is a condition precedent to the benefits being provided, (b) the benefits are paid only to the creditor, not the debtor, and (c) although the benefits provided by the coverage are measured by the extent of damage to or the value of the collateral, they are nevertheless limited to the outstanding balance of the debt.

We note that under Sections 28-32-208 and 28-33-208, if the debtor has covenanted to insure the collateral, but does not do so, the creditor would then be able to insure the collateral and add the cost thereof to the debt. However, for the reasons expressed above, it is our opinion that neither VSI-1 nor VSI-2 coverage is a permissible additional charge authorized by Section 28-32-202 and 28-33-202, *Idaho Code*.

of value to him, the charges are reasonable and are "excluded as permissible additional charges from the credit service or loan finance charge by rule adopted by the administrator." Considerable argument has been made by the persons interested that an additional charge may be made under these provisions for VSI coverage, since the benefits are of value to the debtor and the charges are reasonable in relation to the benefits provided. However, since no rule has been adopted by the administrator excluding VSI as a permissible additional charge, it does not appear that these provisions may be relied upon for authority to exclude charges for VSI coverage from the credit service or loan finance charge. It is questionable whether the benefits provided by VSI coverage are of value to the debtor, since the benefits are paid directly to the creditor, and it is also questionable in view of the fact that VSI is generally more expensive than first party coverage, whether the charges are reasonable in relation to the benefits provided; however, we feel that this is a policy decision to be made by the administrator, and that if any decision is to be made in this regard and under these provisions, it will have to be made by the administrator through promulgation of a rule or regulation. Since no rule has been adopted by the administrator in this regard, we conclude that other statutory authority will be necessary in order to find that VSI is a permissible additional charge.

The only other provisions relating to additional charges for insurance are found in sub-paragraph (2)(a) of Section 28-32-202, and sub-paragraph (2)(a) of Section 28-33-202. Section 28-32-202(2)(a) provides in pertinent part as follows:

"An addition charge may be made for insurance written in connection with the sale, *other than insurance protecting the seller against the buyer's default or other credit loss . . . with respect to insurance against loss of or damage to property . . .*" [Emphasis added.]

Section 28-33-202(2)(a) contains an identical provision pertaining to consumer credit loans.

We believe it is significant that the above provisions provide for an additional charge with the exception of "insurance protecting the lender against the debtor's default or other credit loss". In our opinion, VSI is insurance protecting the creditor against the debtor's default or other credit loss, and that therefore, an additional charge for VSI coverage may not be made under the provisions set forth above.

The above provisions, in our opinion, were designed to allow an additional charge for "first party coverage," that is, insurance protecting the debtor's interest in the collateral, or dual interest policies with loss payable clauses in favor of the creditor. It was not intended that additional charges could be made under these provisions for insurance which protected only the creditor's interest in the collateral.

It has been argued by some, however, that at least the VSI-1 coverage is entitled to exclusion from the finance charge under the provisions quoted above, since it does not come within the above emphasized exception. That is, VSI-1 coverage is simply property damage coverage, and therefore is not the type of insurance protecting the lender against the debtor's default or other credit loss.

OFFICIAL OPINION NO. 73-40

October 10, 1972

TO: Weaver Bickle
Director of Driver's Services
Department of Law Enforcement

FROM: Jay F. Bates

A two-part question has been propounded regarding the Driver Improvement Counseling Program.

Part 1: Can a counsellor, in the Driver Improvement Counselling Program, issue a 30 day temporary restricted permit and accept the surrender of the regular driver's license of the icensee pending compliance with the requirement of the Driver Improvement Counseling Program?

It is assumed that there has been a signed agreement by the driver to enroll in the Driver Improvement Counseling Program, or that the driver has been ordered to the program by the court and the time for appeal has expired. Under either of the above two, the counsellor can issue a thirty day temporary restrictive permit and pick up the regular driver's license. The discretion outlined above should be exercised cautiously. In other words, if there appears to be any question that an insurance company will not issue an SR 22, in those cases so requiring an SR 22, either direct or through the assigned risk program, the counsellor and the Department should not be a party to putting an uninsured driver upon the road.

Part 2: Whether an out-of-state driver can voluntarily surrender his driver's license to a counsellor and participate in the Idaho driver improvement counselling program?

A licensee can voluntarily surrender his license to a counsel or and participate in the Idaho Driver Improvement Counseling Program, if otherwise acceptable to the program.

Contrary to some expressions that a driver's license is a right, the overwhelming weight of law is that the obtaining of a license to operate a motor vehicle upon the highways of a state, is a privilege. The conclusion of the courts is based upon a lawful exercise of police power of the state in issuing, denying, or revoking a driver's license, because the public health, welfare, and safety are involved. The Idaho Supreme Court, *Mills vs Bridges*, has so held. I would think that a proper analogy would be the implied consent statute of the State of Idaho (49-352). The implied consent statute imposes a condition of assent to a chemical test upon the issuance of a license to operate a motor vehicle upon the public highways and roads of this state. The basic premise is that there is no absolute right to obtain and hold a driver's license.

Even (for the sake of argument only) if it was to be concluded that a driver's license was a right rather than a privilege, the answer would be unchanged. The essence of the implied consent law is that an operator of a motor vehicle by the act of driving his car upon the public highways and roads of this state waives any

privilege, constitutional or otherwise, since those rights, always personal, may be so waived by the individual. The implied consent statute has been construed as such waiver. This being so, then, of course, if an individual can waive his rights he can voluntarily surrender them.

OFFICIAL OPINION NO. 73-41

October 11, 1972

TO: Weaver Bickle
Driver Services Section
Department of Law Enforcement

FROM: James W. Blaine

On October 2, 1972, you requested an Attorney General's Opinion as to whether or not a magistrate court has the power to suspend driver licenses either on an Order of Withheld Judgment or by an order whereby the judgment is suspended and certain probation conditions are imposed.

This is to advise you that a district court or a magistrate court may not, under any circumstances, revoke or suspend a motor vehicle operator's license since this prerogative is placed with the Department of Law Enforcement under the provisions of Sections 49-329 and 49-330 of the *Idaho Code*. However, there is one exemption, that being in the case where a defendant is convicted under the provisions of Section 49-1103(c), *Idaho Code*, of the crime of Inattentive Driving, in which case a statutory provision for a permissive suspension shall be left to the discretion of the judge.

Under certain circumstances as set forth in Section 49-328, *Idaho Code*, the court may, upon the conviction of a person violating a provision in the Motor Vehicle Law, require a mandatory revocation or suspension of an operator's or chauffeur's license requiring the surrender of such license to the court, which license the court must forward to the Department of Law Enforcement either immediately, upon the defendant signing an affidavit waiving his right to appeal or, in the case where no such affidavit is made, such license must be forwarded to the department upon the expiration of a ten-day period pending a filing of notice of appeal. The court is further required to supply the department with a report of conviction.

In the event your division receives any judgments of conviction in which the court suspends an operator's license, that portion of the judgment is surplussage and shall be disregarded by you. However, I suggest you advise the individual magistrate or judge of the action your division takes and the reason therefore.

In this connection, I should call your attention to the fact that the court may, as a condition of withholding a judgment, require as a condition that the defendant shall not operate a motor vehicle for such period of time the order may set; however, that particular defendant's operator's license would not be suspended, as such, and the defendant cannot be charged with operating a motor

vehicle when his operator's license is suspended. Such action would merely constitute a violation of the probation conditions attached to the withheld judgment.

OFFICIAL OPINION NO. 73-42

October 11, 1972

TO: Gordon Trombley
Commissioner, Department of Public Lands

FROM: James R. Hargis

Reference is made to your letter requesting an opinion from this office concerning cash payment for overtime work during fire emergencies for all employees of your agency, especially those employees in pay grade 11 and above. From the information you have furnished, the Idaho Personnel Commission exempted employees in pay grade 11 and above from cash compensation for over time. You have requested that only for fire emergency purposes where employees in pay grade 11 and above participate in the fire suppression activities that the exemption from cash compensation for over time be waived. You have emphasized that your request for a waiver of the exemption is very restricted, limited only to fire suppression activities.

Section 67-5324, *Idaho Code*, provides that certain supervisory and/or administrative personnel shall be excluded from receiving cash compensation for working beyond the normal work day-work week required for the positions held. However, this section presumes that the employee holding the position designated as supervisory and/or administrative shall be utilized in that position. Apparently fire suppression activities are not the normal functions of those in pay grade 11. Utilization of employees in that pay grade and above in fire suppression emergencies could not fall within the normal work day-work week hours of the positions. Compensatory time off, as an alternative measure of compensation, is apparently unsatisfactory, especially where the employee may incur financial obligations as a result of the fire suppression emergency. We are of the opinion that where the State, as an employer, requires an employee, otherwise exempt from the cash compensation for overtime provision of the law, to perform duties not normally required of the position, and where these additional extra duties are to be compensated with cash for the over time required for the performance of those duties, then the appointing authority may petition the Personnel Commission for a waiver of the exemption from the cash compensation provisions. The Personnel Commission, then, is empowered to evaluate the justification for the waiver request.

We cannot determine whether or not sufficient justification has been presented. That is a function of the Personnel Commission. But we are of the opinion that while the appointing authority and Personnel Commission may designate those positions not eligible for cash compensation for over time because the positions are supervisory and/or administrative in nature, so may the

Commission at any time reevaluate the designation or modify it so that extra or additional functions may be compensated in cash.

Your petition, then, should it be granted by the Personnel Commission, would not violate the over time provisions of Title 67, Chapter 53, *Idaho Code*.

OFFICIAL OPINION NO. 73-43

October 11, 1972

TO: Glenn W. Nichols
Director, State Planning & Community Affairs

FROM: James R. Hargis

We wish to respond to your letter of recent date concerning the authority of the Clearwater Economic Development Association (CEDA) to conduct comprehensive public planning. As recently constituted, CEDA is a private non-profit association, although certain cities, counties and other local units of government are members thereof. Other members of the Association are chambers of commerce organized in the member counties. Basically, then, the Association is private, set up for non-profit economic planning and development purposes. No where in the Articles of Incorporation or the by-laws of the Association can comprehensive planning as a purpose of the organization be found. These facts raise the two questions you have asked: Does the Association have the authority to conduct comprehensive planning? Are the current by-laws sufficient to empower the association to conduct comprehensive planning?

Since CEDA is basically private, this office can offer no opinion as to its functions, powers, duties, organization, or sufficiency of its purposes. Apparently, the Department of Housing and Urban Development, the primary source of planning grants, expresses some reservation as to the authority of CEDA to plan comprehensively and to the recognition which can be given to such planning. The legislature, by enacting a series of statutes relating to public planning, has authorized the State and local units of government to conduct public planning, either jointly or separately. Reference Title 67, Chapters 19 and 23; Title 50, Chapters 11, 12, and 13; Title 31, Chapter 28, *Idaho Code*. Because of the authorization to enter into such a function, we are of the opinion that for units of government to perform public planning, they should do so in compliance with the applicable statutes.

However, CEDA predates the statutes on public planning. Apparently the major concern of CEDA has been effective in the service area. To amend its charter and by-laws to reflect the authority to plan comprehensively is entirely up to CEDA, but is a step we strongly recommend. However, we envision a very real risk that such planning done by CEDA, a non-profit private corporation, may not receive the recognition as an authorized public planner from the various funding sources available to public planners, because of its private nature.

Inasmuch as public planning may be jointly performed by public agencies, we

are also of the opinion that those public agencies now members of CEDA could organize separately for planning purposes under the inter-governmental agreement provisions of the above cited chapters of the *Code*. Such an agreement could be accomplished in addition to CEDA. As an alternative CEDA could amend its charter and by-laws, as pointed out above, this should be done with complete understanding of the risk created thereby.

OFFICIAL OPINION NO. 73-44

October 11, 1972

TO: D. F. Engelking
State Superintendent of Public Instruction

FROM: James R. Hargis

This office has been contacted several times recently concerning the residency of a student in a public school who lives and attends school in a district other than the district in which the parents of the student reside. Our conversations with you and your staff indicate that your office has been approached with the same questions. So that a uniform statement resolving the question can be issued, we wish to express the opinion of this office on the matter.

The Second Regular Session of the 41st Legislature, 1972, amended several sections of *Idaho Code* which defined and otherwise restricted certain legal and social activities by age. Prior to the last session, a minor was defined as a male under the age of 21 years and a female under the age of 18 years. Authority to contract, marry, convey real and personal property, sue and be sued, was limited or conditioned on age 21 or other facts not here pertinent. Sale to and consumption of liquor were prohibited to anyone under 21 years and beer was prohibited to those under 20 years. The right to vote was restricted to those who had attained the age of 21 years. Most importantly for this discussion, the residency of the 18 year old, who was still defined by law as a minor, was determined by the residency of the parent or guardian of the minor. But the legal position of those persons 18 years of age to 21 years of age has been drastically altered by the statutory amendments referred to and by the adoption of the 26th Amendment of the United States Constitution.

With the exception of purchase and consumption of liquor, beer, and wine where our age limitation is now 19 years, the rights, privileges and responsibilities heretofore enjoyed by those persons 21 years of age and older are extended to those 18 years of age and older. In short, then, the incidences of adulthood, with the exception noted, have now been extended to those persons 18 years old and older. One traditional incident of adulthood has been the establishment of residency. Therefore, we are of the opinion that the 18 year old may establish a residence separate and apart from and without regard to the residence of his or her parent or guardian.

The effect of the emancipation of the 18 year old student on the schools of the State is important to note. The legislature established the school system of

the State in such a way as to make schools locally available to the students. The system encourages, almost to the point of requiring, attendance in schools of the district in which the parent or guardian of the student resides. Reference, as an example, is made to Section 33-202, Title 33, Chapter 14, *Idaho Code*. This system as established is in no way affected or altered by the emancipation of the 18 year old student. However, the application of the system to the 18 year old student has been altered. Because the 18 year old has been emancipated and can establish a residence separate and apart from that of his or her guardian, we are of the opinion that the 18 year old student may attend the schools of the district in which he or she has established residence. The student may attend the schools based on his own residence and without regard to the residence of his parent or guardian.

We hope we have clarified one of the areas of concern arising from the emancipation of the 18 year old person in this State.

OFFICIAL OPINION NO. 73-45

October 11, 1972

TO: Gordon C. Trombley
Commissioner, Department of Public Lands

FROM: Matthew J. Mullaney, Jr.

You have asked to be advised whether any property of a cottage site lessee on state land is subject to the two (2) mill levy to finance county solid waste disposal systems. Title 31, Chapter 44 of the *Idaho Code* authorizes the board of county commissioners in each of the several counties to establish, maintain and operate solid waste disposal systems and to "levy a tax of not to exceed two (2) mills on the assessed value of property within the county," to finance the system. Other methods of financing to be used either singularly or in combination with the tax levy are also provided. I.C. § 31-4404.

There is concern that private fee owners in certain counties may be unfairly impacted by the presence of numerous cottage site lessees on state land within the county. These lessees generate solid waste that must be disposed of in the county system, but a question has arisen whether any property interest of a cottage site lessee may be taxed.

State owned property is exempt from taxation. Article VII, Section 4, *Idaho Constitution*; I.C. § 63-105A. This exemption does not flow through to state lessees, however. I.C. § 63-1223 provides:

"All improvements on government, Indian or state land and all improvements on all railroad rights of way owned separately from the ownership of the rights of way upon which the same stands or in which nonexempt persons have possessory interests shall be assessed as personal property and entered upon the personal property assessment rolls."

Normally, improvements on real estate become a part of the realty, but in the

case of improvements upon government, Indian or state land, the legislature has specifically provided an exception to this general law and requires that these improvements be treated as personal property. Consequently, if the improvements are owned by the lessee, and if the lessee is a nonexempt person, the improvements are subject to assessment and taxation as personal property. *Russet Potato Co. v. Board of Equalization of Bingham County*, 93 Idaho 501, 506, 465 P.2d 625, 630 (1970).

Improvements on state land made by a cottage site lessee remain the property of the lessee and do not become the property of the state. I.C. §§ 58-307, 58-313. Standard cottage site lease forms are consistent with the *Idaho Code*. Consequently, the improvements may be taxed. The leasehold or possessory interest of a cottage site lessee in state land, apart from the improvements made thereon is not subject to assessment and taxation. I.C. § 63-105G.

Accordingly, I am of the opinion that the boards of county commissioners within the State of Idaho may levy a tax of two (2) mills on the assessed value of cottages and other improvements on state land to finance solid waste disposal systems.

OFFICIAL OPINION NO. 73-46

October 11, 1972

TO: Michael D. Kunz
Franklin County Clerk

FROM: John F. Croner

This will acknowledge receipt of your letter of October 6, 1972, in which you asked that this office construe the meaning of Section 34-619, *Idaho Code*, as it pertains to the residency requirement for the office of county clerk.

Section 34-619, *Idaho Code*, provides:

- “34-619. ELECTION OF CLERKS OF DISTRICT COURTS – QUALIFICATIONS.** – (1) At the general election, 1974, and every four (4) years thereafter, a clerk of the district court shall be elected in every county. The clerk of the district court shall be the ex-officio auditor and recorder.
- (2) No person shall be elected to the office of clerk of the district court unless he has attained the age of twenty-one (21) years at the time of his election, is a citizen of the United States, and shall have resided within the county one (1) year next preceding his election.
- (3) Each candidate shall file his declaration of candidacy with the county clerk. Each declaration shall have attached thereto a petition which contains the signatures of not less than five (5) nor more than ten (10) qualified electors.
- (4) Each candidate who files a declaration of candidacy shall at the same time pay a filing fee of forty dollars (\$40.00) which shall be deposited in the county treasury.”

We read the above quoted section as imposing a one (1) year residence requirement as a precondition to one's qualifying for the office of county clerk.

You related that you have maintained a continuous voting residence for several years in Franklin County although you left the county for a three month period in the past year. If at the time you left Franklin County, it was your intent to leave temporarily and to return after a brief sojourn, we cannot see where such would have the effect of making you unqualified pursuant to the provisions of Section 34-619, *Idaho Code*.

OFFICIAL OPINION NO. 73-47

October 12, 1972

TO: Milford Kenney
Audit Supervisor
Legislative Auditor

FROM: Warren Felton

I have gone over the request of Jackson and Adams for opinions on the following questions: 1) In the case of the county, through the use of its own equipment and labor constructing bridges and/or roads, are these items required to be charged to capital outlay and accordingly reflected in the general fixed assets funds of the county? 2) Are new bridges and roads constructed by the county required to be a separate item in the county budget as compared with maintenance materials, supplies, and salaries?

I do not find any requirements in the Idaho laws that would require that either of these questions has to be answered yes or no, and for that reason, we then looked to see who is responsible for the accounting procedures to be followed.

The law in this respect is that it is the duty of the State Auditor to provide for a uniform system of bookkeeping for counties, Sections 67-2706 to 67-2710 and 31-1612, *Idaho Code*, and the State Auditor is to "instruct state and county officers in the proper mode of keeping such accounts," Section 67-2706, *Idaho Code*. See also Section 31-1612, *Idaho Code*, where it is made the duty of the State Auditor to prescribe the forms necessary under the County Budget Law so that a uniform system of estimates, budgets, and accounts may be kept in each county.

For the above reasons we suggest that you should direct your questions to the State Auditor since it is the State Auditor who determines the procedures, sets the policies, and sets up the forms as to county accounting.

After the accounting has been done the audits of such funds are, of course, in the hands of the BPA and the Legislative Auditor is required to review such audit reports, under Sections 31-1701 to 31-1707, *Idaho Code*.

OFFICIAL OPINION NO. 73-48

October 17, 1972

TO: Human Rights Commission

FROM: Donald E. Knickrehm

We are pleased to respond to your October 10, 1972, inquiry concerning the above mentioned subjects. We will answer your questions in the order in which you raised them.

1. *Whether the Idaho Commission on Human Rights has the jurisdiction to deal with alleged sex discrimination against students in public educational institutions as listed in section 18-7302(e), Idaho Code.*

Yes. Section 67-5911(2) gives the Commission the power and authority to deal with discrimination on the basis of sex as defined in Sections 18-7301(2) and 18-7302(e). Respectively, those sections assure the right to the full enjoyment of any of the accommodations, facilities or privileges of any place of public resort, accommodation, assemblage or amusement and include "any public library or any educational institution wholly or partially supported by public funds."

Section 18-7303 makes it a misdemeanor for any person to deny to any other person, on the basis of sex, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement.

2. *Whether sex discrimination in the extension of the credit sales comes within the Commission's jurisdiction under section 18-7302(c), Idaho Code, as the right to purchase of a service.*

Yes. Section 67-5909(5)(a) states that it is a violation for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation. A place of "public accommodation" means a business whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. (Section 67-5902(9), *Idaho Code*). The only other issue would be whether Section 67-5901 limits the Commission's authority in sex discrimination matters to discrimination in employment. There is an apparent conflict between Sections 67-5901 and 67-5909, which we resolve in favor of the broader coverage of Section 67-5909. This issue was raised in the Idaho Falls "hair" case, and is now before the State Supreme Court. We expect it to be resolved in our favor.

Since the Commission has the power and authority to recognize and pursue violations of Chapter 73, Title 18, *Idaho Code*, its jurisdiction can also be extended to the credit sales issue in question through that statute. Sections 18-7301(2) and 18-7302(c) recognize the right of full enjoyment of any facilities or privileges of any place of accommodation, including the full enjoyment of the right to purchase any service offered by any establishment to the public. The

extension of credit is a service offered to the public which gives a right to purchase to "any person" in any place of public accommodation. Both Title 18, Chapter 73, and Title 67, Chapter 59 are authority for the Commission to extend its jurisdiction to sex discrimination in credit sales matters.

As to your third question concerning the use of school property and time for religious education, we are now composing a formal opinion which should reach your hands in the near future. The files given to us by the former director of the Commission are extensive and the legal issues involved are several and complex. Rest assured that we are on top of the matter and will forward the opinion to you soon.

We hope this letter does answer your questions. It is our opinion, and our present working hypotheses, that the statute, setting out the kinds and areas of discrimination with which the Commission is authorized to deal, should be read broadly in favor of coverage whenever possible. This is so because ultimately, the contested cases will be resolved by courts of law, so that the Commission should be careful not to eliminate authority it might be said to have, and because the Commission is essentially an advocacy agency, and in that role ought to advocate the broadest protection of individual rights possible under a reasonable interpretation of the authorizing legislation. The advocacy of limitations can well be left to interested others.

OFFICIAL OPINION NO. 73-49

October 17, 1972

TO: Bob Richel
President, Pierce Recreation Districts

FROM: John F. Croner

This will acknowledge receipt of your letter of September 30, 1972, in which you requested that this office discuss and offer suggestions regarding the election of directors for recreation districts, pursuant to Title 31, *Idaho Code*.

You related that pursuant to the provisions of Section 31-4304(f), *Idaho Code*, the governor, on January 21, 1971, appointed three directors of the newly formed recreational district at Pierce, Idaho. You were primarily concerned with:

1. Whether an election was necessary;
2. Who would run for election; and
3. Whether a recreational district election could be held in conjunction with a general election.

Section 31-4304(f) *Idaho Code*, provides:

"(f) Upon receipt of a certified copy of the order of the county commissioners, the governor shall appoint a qualified elector from each director's sub-district who shall constitute the first board of such district.

The appointees from director's sub-districts one (1) and two (2) shall serve until the first district election thereafter held at which their successors shall be elected and the appointee from director's sub-district three (3) shall serve until the second district election thereafter held at which such appointee's successor shall be elected. The certificate of appointment shall be filed with the clerk with a copy forwarded to each appointee."

This section sets forth the order in which the directors are to be elected. The directors from sub-districts one (1) and two (2) will need to run for election in November of this year and the director from sub-district three (3) will need to run for election in November of 1974 pursuant to the provisions of both this section and Section 31-4306, *Idaho Code*.

With regard to holding a district-type election contemporaneously with a general election, this office has taken the position that such can be done. There are pitfalls, however, and we strongly advise that if this is your decision that you comply with the letter of the law in the conduct of each election.

OFFICIAL OPINION NO. 73-50

October 18, 1972

TO: Robert Hay
Commissioner of Insurance

FROM: Stewart A. Morris

This letter is in response to your inquiry as to whether various employee benefit funds established throughout the State by various employers constitute transacting insurance in this State, thereby subjecting said funds and employers to the State Insurance regulatory provisions.

Basically, these programs are set up on a payroll deduction basis, with both the employer and employee contributing to the fund, out of which certain health care benefits are to be provided. In some instances, the programs are established by a formal trust agreement providing for specified benefits upon the happening of certain contingencies, and providing for specified contributions by both the employer and the employees. In some cases, these programs are established pursuant to collective bargaining agreements, and often the claims adjusting and other administrative functions are performed by an insurance consultant or company.

The most interesting example of these programs is that currently existing with Boise Winnemucca Stages. Apparently their program was established pursuant to a collective bargaining agreement. In return for the employee's contribution, which is matched by the employer, the employee is promised payment of all medical expenses, including monies expended for drugs. There is no written trust agreement, or sales literature whatever, but the simple promise that by participating in the program, all of the employee's and employee's dependents medical costs will be paid for by the Boise Winnemucca Stages

benefit fund. The contributions are deposited in a trust account which is apparently administered by a claims committee comprised of three individuals. This program has apparently operated satisfactorily without any problems until just recently, when several complaints were received pertaining to non-payment of claims.

Whether these programs constitute contracts of insurance in the State of Idaho will be determined with reference to Section 41-102, *Idaho Code*, which defines the term "insurance":

"'Insurance' is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit under determinable risk contingencies."

As can be seen, our statutory definition of the term "insurance" is very broad and far-reaching. The above provision is a model provision and is identical to statutory definitions in a substantial number of other states. It is our opinion that the benefit programs described above fall within the above definition and that therefore these programs are subject to the regulatory provisions of Title 41, *Idaho Code*. Essentially, in these programs, the agreement to provide the benefits specified does constitute a contract whereby the employer undertakes to indemnify his employees by providing certain specified or ascertainable benefits upon determinable risk contingencies; that is, the occurrence of medical expenses by the employee.

Although there is not an abundance of case law on this point, all of the reported litigation that I have discovered on this point agrees with the conclusion expressed above. In *Haynes v. United States*, 353 U.S. 81, 77 S.Ct. 649 (1957), it was held that an employer's plan for paying sickness disability benefits to its employees in accordance with a pre-arranged schedule constituted health insurance despite the fact that the employees paid no fixed periodic premium and the employer set aside no definite fund from which the benefits were to be paid.

Analogous situations have been considered in a number of cases where the benefits are provided through a union or association to its members, instead of by an employer to its employees. In these cases, the unions or associations have undertaken by agreement to provide specified benefits such as health, hospital, surgical or disability benefits, and such arrangements in each case were held to constitute the transaction of insurance.

Thus, in *Bost v. Masters*, 361 SW 2d 272 (Ark., 1962), it was held that a benefit fund set up as a trust by a union, to pay specified amounts to beneficiaries of union members, constituted insurance, despite the fact that no payments were made by the individual members of the union. The court in so ruling, construed Section 2 of the Arkansas Insurance Code, which is identical to Section 41-102, *Idaho Code*. The court, in *National Federation of Post Office Clerks v. District of Columbia*, 173 Atl. 2d 483, (D.C., 1961) held that the appellant Federation was transacting insurance by providing health, hospital and surgical benefits to its members who participated in a plan by paying fixed amounts in proportion to the type of benefits received. Also see *State v.*

Memorial Benovolent Society of Texas, 384 SW 2d 776 (Tex. 1964), in which a non-profit corporation which undertook to pay its members specified benefits upon the death of its member in return for certain contributions provided by said members, was held to be engaged in the business of insurance.

It should be mentioned, however, that it is possible for an employer to establish a program to provide health care services for its employees which would be exempt from the provisions of our insurance code. Such a program should be established pursuant to Section 41-3401(2)(c), *Idaho Code*, which provides an exemption in the manner set forth below:

“Health care services provided by an employer to his employees and their dependents, with or without contribution to the cost thereof by such employees, through health care service facilities owned, employed or controlled by the employers.”

The above plan does have the disadvantage that the employees are limited in their choice of physicians and hospitals to those facilities secured to provide the same by the employer. However, this limitation appears to be necessary in order to secure the many advantages of the exemption. Thus, in *People v. California Mutual Association*, 441 P.2d 97 (Cal. 1968), it was held that when indemnity, as opposed to providing health care services, becomes a significant financial portion of the program, the organization will be classified as an insurer, and would not qualify for the exemption provided health care service organizations. This rule has apparently been codified in Idaho under Section 41-3413, which allows “indemnity in reasonable amount.” Accordingly, as an alternative to becoming qualified as an insurer, the programs could be set up as an exempt health care service plan under Section 41-3401 (2)(c).

However, as to the basic inquiry, it is our opinion that employers subject themselves to the regulatory provisions of Title 41, *Idaho Code*, by undertaking to indemnify their employees for various medical expenses, and it would appear that this is the case regardless of whether or not the employer is receiving contributions for these benefits from its employees.

OFFICIAL OPINION NO. 73-51

October 18, 1972

TO: Ed Simmerman
Executive Director
Association of Idaho Cities

FROM: Richard Greener

You ask whether or not a public depositing unit may disregard the requirements of Section 57-128, *Idaho Code*, in depositing moneys which are in its custody as a result of the Federal Revenue Sharing Act. It is the view of this office that cities are subject to Section 57-128, *Idaho Code*, insofar as these funds are concerned.

This position is based upon the following considerations. Section 57-105, *Idaho Code*, which defines public moneys which are subject to the public depository law states that "public moneys are *all moneys* coming into the hands of a treasurer of a depositing unit". This language clearly requires that *any and all moneys* in the custody and control of a city treasurer must be regarded as being subject to the act.

The above consideration leads to the conclusion that Section 57-128, *Idaho Code*, which requires allocation among depositors must be adhered to. Again, this is based upon the fact that these moneys in question are "funds of a depositing unit".

OFFICIAL OPINION NO. 73-52

October 19, 1972

TO: E. L. Mathes
State Highway Engineer
Department of Highways

FROM: Stewart A. Morris

This letter is in response to your request for an Attorney General's opinion concerning the problem of whether compensation should be paid to the owners of highway billboard signs currently existing within easements paralleling various Idaho State highway right-of-ways, pursuant to the Federal Billboard Act and Idaho's Highway Beautification Act, compiled as Chapter 28, Title 40, *Idaho Code*. Although you have provided me with an extensive statement of the facts and background concerning this problem, I would like to reiterate your comments in this regard and also remark upon comments submitted by others, for purposes of clarification.

Since the early 1950's, and I understand as far back as the early 1930's, the State has been acquiring right-of-ways for highways, in many instances by deeds which contain either one or both of two basic types of easements. These easements have generally provided as follows:

"Grantor agrees that no building or other structure will be permitted to be constructed closer than 20 feet from the right-of-way line."

"Grantors further agree that no advertising or other signs will be permitted closer than 100 feet from the highway right-of-way line."

Essentially, then, the first easement above, often referred to as the "20 foot setback" prohibits the construction of any structure within 20 feet of the highway right-of-way, and the second easement, commonly referred to as the "100 foot setback," prohibits the erection or maintenance of advertising signs within 100 feet from the highway right-of-way. It appears that the main purpose of the 20 foot setback was for the safety reason to keep sight distance clear, and also to prevent commercial establishments being constructed so close to the right-of-way as to encourage business being transacted on the right-of-way itself.

An additional purpose in acquiring this type of easement was to reduce costs and bother in the event that it became necessary to widen the highway right-of-way some time in the future. As to the 100 foot setback, I understand that the primary purpose was that the State anticipated that eventually some kind of program for eliminating advertising displays along highway right-of-ways would be implemented, and that these easements would make such a program less costly.

The consideration paid for these easements was minimal, in the neighborhood of \$25.00, although some times up to \$700.00 was paid for them when it became expedient in connection with the settlement of a difficult transaction.

Despite the existence of these easements, numerous signs have been erected and maintained for a long period of time, in violation thereof. According to a survey taken by the State Department of Highways, as of June 1, 1972, there are approximately 1236 signs which must be removed pursuant to the State and Federal Acts, and out of this, approximately 350 signs are situated within the easement areas. No new signs have been constructed within the easement areas since 1965, when the Federal Act became effective.

Despite the fact that the easements were recorded as a matter of record and that the State Department of Highways has apparently been aware of their existence since their creation, little or no attempt has been made to remove those signs existing within the easement areas. The various sign owners have stated that they know of no attempt by the State to remove a sign existing in violation of one of these easements. At least, from the statement contained in your letter, it would appear that in most cases the non-conforming signs were not immediately disturbed.

In 1965 the Federal Act was enacted, which was designed to eliminate advertising structures from areas adjacent to highway right-of-ways, except in cases where highways run through commercial or industrial areas. Under the Federal Act, the Federal government will reimburse the various states for 75% of the cost of condemning and removing the non-conforming advertising displays.

In 1967, in order to implement a plan taking advantage of the Federal funds offered, the Idaho Legislature enacted Idaho's Highway Beautification Act, compiled as Chapter 28, Title 40, *Idaho Code*. In the fall of 1971, however, local Federal highway department officials raised the question of whether or not the Federal government should or could participate in payment under the provisions of the Federal Act for those signs constructed and existing *within the easement* areas, the problem being that the Federal Act provided for compensation only for those signs "Lawfully maintained" and those signs existing in violation of the easements were apparently not lawfully maintained. Once this issue had been raised by the Federal Highway Department, both the sign owners and the Idaho State Highway Department felt that the matter should be clarified by the Idaho Legislature, and, after numerous discussions and negotiations, House Bill No. 735 was drafted and submitted to the Second Regular Session of the Forty-First Legislature of the State of Idaho. House Bill 735 contains amendments to Idaho's Highway Beautification Act which waives the State's rights to those

easements so that the signs could then be considered "lawfully maintained" and thereby pave the way for compensation for the signs erected in the setback areas without the necessity of extended litigation or the other problems necessarily involved.

House Bill 735 amended the Highway Beautification Act in three separate areas to accomplish this purpose. In Section 1 of the Bill, Section 40-2812, *Idaho Code*, was amended by the addition of a new sub-paragraph 2 which reads as follows:

"'Lawfully maintained' means a sign maintained on private land in accordance with state law and with the consent or acquiescence of the owner, or his agent, of the property on which the sign is located. With respect to certain easements held by the state restricting the erection of structures on certain lands, the state of Idaho and the department shall be deemed to have waived such restrictions with regard only to each sign erected prior to October 22, 1965."

Section 4 of House Bill 735, amended Section 40-2822, *Idaho Code*, by adding the following language:

"... And further provided that no permit shall be withheld or denied for a non-conforming sign which is to be removed pursuant to the terms of this act by reason of the sign being located upon land to which the state of Idaho or the department has acquired a restrictive covenant regarding the erection of signs if the sign was in existence prior to October 22, 1965."

Section 8 of House Bill 735 amended Section 40-2832, *Idaho Code*, to add the following language:

"Provided, however, that where the setback easements restricting the erection of structures or advertising displays have been recorded by the state on lands where such structures have been erected, the land owners of such lands shall be deemed to have been fully compensated therefor."

The Bill, of course, received substantial support and was enacted. It was initially felt by all that the amendments would provide for just compensation due the various sign owners, and would also pave the way for prompt administration of the Federal and State plans, and avoid a multitude of time and cost problems incident to numerous litigations that would probably result in attempting to condemn the 350 signs existing in the setback areas.

House Bill 735 provided for an effective date of July 1, 1972. However, almost immediately after its enactment, concern arose as to the constitutionality of the amendments to Idaho's Highway Beautification Act. The Idaho Department of Highways attorneys eventually concluded that the amendments to House Bill 735 were unconstitutional, for the general reason that they constituted special legislation and a gift by the State in violation of Article 8, Section 2 of the *Idaho Constitution*. On July 12, 1972, James F. Zotter, Assistant Regional Counsel for the U.S. Department of Transportation, in written correspondence directed to the Department's counsel, stated that after consultation with Assistant Chief Counsel, Edwin J. Reis, it was their conclusion that

they would not permit Federal funds to be used in the acquisition of the signs existing in the easement areas, for the reason that they were not lawfully maintained, and that House Bill 735 was an attempt to circumvent the Congressional intent of the Federal Act (23 U.S.C. 131 (g)(1)).

As a result, despite all of the above referenced efforts to effectuate a prompt administration of the Federal and State plans to eliminate the non-conforming advertising signs, the question still exists as to whether just compensation can legally be made by the State and Federal government to the owners of those signs now maintained within the setback restrictions. Although most of the controversy to date has centered around the issue of whether or not the amendments contained in House Bill 735 are constitutional, for the reasons set forth below, it is our conclusion that, despite the fact that the amendments may be unconstitutional, the signs existing in the setback areas are, nevertheless, "lawfully maintained" and that therefore they cannot be removed without the payment of just compensation therefor.

A memorandum in my file, which was apparently authored by counsel for the State Department of Highways, contains what I believe is the Department's position as to the constitutionality of House Bill 735. The constitutional issue as to the amendments contained in House Bill 735 is simply whether the Legislature may enact a provision providing for compensation to various individuals in return for removal of signs existing contrary to easements previously granted in favor of the State prohibiting the construction of those signs. In other words, can the State compensate an individual for removing a sign, when the State already has available to it the remedy of enforcing its easement and thereby effectuating removal of the sign without the payment of compensation.

Counsel for the Department of Highways refers to the case of *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959), wherein the Idaho Supreme Court spoke to a very similar question. That case concerned the constitutionality of a statute providing that the utility companies should be reimbursed for their costs in relocating utility facilities when the same became necessary pursuant to reconstruction or widening of highway right-of-ways. Prior to enactment of the statute, the rule, as established by common-law, was that the utilities were required to relocate their facilities at their own expense, the reason being that the use of the highway right-of-ways by public utilities did not constitute a public use and therefore public money could not be expended for a "non-public use." Accordingly, the Court held that the statute provided for a gift of public property to private persons for private purposes contrary to the implied constitutional limitations of *Idaho Constitution*, Article 8, Section 2. If the Idaho Supreme Court feels that expenditure of funds to remove public utility facilities from a highway right-of-way, pursuant to a project to widen that highway, is not for a public use, then I feel we must also conclude that neither would expenditure of public funds for removal of highway billboard signs within the 100 foot setback easements constitute an expenditure for a public use. Additionally, since the State presumably need not pay for their removal, but could simply enforce its easements prohibiting the signs, it would appear that

the statutory amendments waiving those easement rights would constitute a legislative gift to private individuals in violation of the implied constitutional limitations as mentioned above.

Despite the constitutional defects of the amendments set forth in H.B. 735, however, it is our conclusion that the State, as a result of its "inactivity" in enforcing these easements, has lost its right to enforce the same and that therefore, the signs must now be considered to be "lawfully maintained" and that their removal can be effectuated only by paying just compensation therefor.

A review of the files and records of the Idaho Board of Highway Directors has shown only three instances in which matters concerning easements outside the highway right-of-ways have been officially considered. On February 7, 1952, several representatives of the Boise Ad Club appeared at a Board meeting and objected to the easements as being discriminatory against the outdoor advertisers. The Board replied that this was the first notice they had had of the problem and that as far as they were concerned the only policy they had issued was the one of removing advertising signs from the Department's right-of-way. On June 10, 1963, the minutes reflect that the Board concurred in its policy of acquiring the 100 foot setback easement provisions when purchasing right-of-ways, and authorized counsel to proceed with court action, if necessary, to enforce the setback easements. On September 10, 1968, the minutes indicate that the Board directed the Department to continue acquiring the 100 foot setback easements on secondary road projects. Except for the first instance mentioned above, however, none of these occurrences would appear to overtly indicate to the public that constructing advertising signs within 100 feet of a highway right-of-way was prohibited. Additionally, this office has not been informed of one specific instance, through litigation or otherwise, that the Department has enforced these easements and required removal of a sign outside the right-of-way without compensation.

In any instance, following the granting of these easements, the landowners subsequently executed lease agreements with the various sign companies, who then proceeded to construct signs within the easement areas in defiance of the easements. These signs, of course, were easily seen and their construction, location and existence would be well known to the Idaho State Highway Department. Despite this, for many years, the State Highway Department apparently has done little or nothing to enforce its easement rights, and has allowed the various sign companies to construct additional signs and to make improvements thereon.

Under the circumstances, from the case law I have reviewed on this matter, it would appear that if the State attempted to enforce its easements at this time, it would be estopped from doing so. Allowing the sign owners to construct signs and improvements within the easement areas would appear to be inequitable conduct subject to estoppel similar to that involved in the case of *Dalton Highway District of Kootenai County-City v. Sowder*, 88 Idaho 556, 401 P.2d 813 (1965). In the *Dalton* case, the Dalton Highway District was estopped from asserting the actual legal boundary to certain property in view of the substantial

improvements that the Sowders had made upon the property in reliance on the boundaries erroneously set forth on a plat provided Sowder by the Highway District. The State's failure to assert the easements in this instance and allowing signs and improvements to be constructed in violation thereof, appears to be conduct just as inequitable as was found on behalf of the officers of the Dalton Highway District in providing Sowder with an erroneous plat and later attempting to assert that the boundaries were other than as set forth in the plat that they provided Sowder. Of course, the doctrine of equitable estoppel would not apply against the State when acting in a governmental capacity; but it would apply to the State when acting in a proprietary capacity. See *Yellow Cab Taxi Service v. City of Twin Falls*, 68 Idaho 145, 190 P.2d 681 (1948); *Idaho Falls v. Grimmett*, 63 Idaho 90, 117 P.2d 461 (1941). Although the acquisition of the easements were not acquired as an actual part of the highways, it would nevertheless appear that their acquisition pertained to the construction and maintenance of highways which is a proprietary function in this State. See *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970), wherein the Court stated at page 802:

"The construction and maintenance of highways is a proprietary function and has been so held by this Court: *Eaton v. City of Weiser*, 12 Idaho 544, 86 Pac. 541 (1906); *Carson v. City of Genessee*, 9 Idaho 244, 74 Pac. 862 (1903); *Strickfadden v. Green Creek Highway District*, 42 Idaho 738, 248 Pac. 456 (1926); *Lively v. City of Blackfoot*, 98 Idaho 80, 416 P.2d 27 (1966)."

Reference is further made to the case of *City of Long Beach v. Mansell*, 476 P.2d 423 (Calif. 1970). In that case, serious and complex title problems existed as to the lands in question, which problems were known to state and city officials. However, despite the fact that the state and city officials were in a position to resolve such problems, they did not do so, but instead conducted themselves relative to such lands as if no title problems existed, by granting building permits, approving subdivision maps, collecting taxes, etc. In reliance on the state's conduct, the various land owners filled and improved the lands with the knowledge and acquiescence of the state and city officials. Thereafter, the state and city officials initiated legal action which in effect asserted paramount title to the lands in question. The California Supreme Court, sitting in Bank, ruled that the state and city officials were estopped from asserting paramount title. The Court's reasoning for its decision is summarized by its statement at page 444:

"We conclude without hesitation that the activities, representations, and conduct of the state and its sub-trustee, the city, during the period here in question rise to the level of culpability necessary to support an equitable estoppel against them relative to the lands described in Section 2(a) of Chapter 1688. The stipulated facts clearly establish that from an early date the state and city have been aware of serious and complex title problems in the Alamedos Bay area. More importantly, those public entities have been in a position to resolve such problems and to determine the true boundaries between the public and private lands. This they have not done.

Instead they have conducted themselves relative to settled and subdivided lands in Section 2(a) area as if no title problems existed and have misled thousands of home owners in the process. Under the circumstances we think it clear that knowledge of the true boundaries between the state and private lands in the Section 2(a) area must be imputed to the public entities in question, and their conduct in light of this imputed knowledge must be deemed so culpable that fraud would result if an estoppel were not raised."

The Court also stated at page 442:

"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

In my opinion, a very analogous situation giving rise to estoppel against the State exists here. As in the *City of Long Beach* case, the State officials in this instance were aware of the easement restrictions, and were in a position to enforce such easements. However, they did not. Instead, the State Board of Highway Directors has generally conducted itself as if no easements existed, which obviously has misled the various sign owners. Accordingly, it would appear that equitable estoppel should also be applied in this instance.

It further appears, in those instances where the signs existed in the easement areas for five years prior to the enactment of the Highway Beautification Act, that the State had lost its right to assert the easements by prescription. See *Thompson on Real Property*, 1961 Edition, Volume 2, Section 445, at page 792, wherein it is stated:

"The owner of the servient tenement can extinguish an easement by adverse use of the servient tenement against the owner of the easement just as one can acquire an easement by prescription. In order to extinguish an easement created by grant, there must be some conduct on the part of the owner of the servient estate adverse to and in defiance of, the easement, and the non-use must be the result of it, and must continue for the statutory period of limitation."

Also see 28 C.J.S. "Easements," Section 63, page 729.

The case of *Rutledge v. State*, 94 Idaho 121, 482 P.2d 515 (1971), has been cited to me for the proposition that the State could not lose the subject easements by prescription. Although the case did hold that a private individual can acquire what was once public land by adverse prescription, it does additionally state that there are two categories of land which may not be acquired by adverse possession against the State, namely, land dedicated to a public use and school endowment land. It is further urged that since the easements would fall within the statutory definition of the term "highway" under Section 40-107, they must be considered land dedicated to a public use. Although the term "highway" as it appears in Section 40-107, would encompass all of that area within the limits of the right-of-way itself, it does not appear to

encompass interests in land extending outside of the right-of-way. See *State v. Kelley*, 89 Idaho 139, at page 146, 403 P.2d 566 (1965). It further appears that the definition of the term "highways" in Section 40-107, as it existed at the time the easements in question were acquired, would not include interests in lands adjacent to, but outside of the highway right-of-way and that therefore the easements in question do not fall within the term "highway". The fact that Section 40-107 was amended by our Legislature in 1966 to include within the definition of highways the phrase "adjacent lands or interests therein lawfully acquired" which amendment was apparently enacted in response to the *State v. Kelley* decision, would evidence the fact that prior to the adoption of that amendment, the term "highway" was not considered to include easements in favor of the State existing outside the right-of-way.

Accordingly, the easements in question, being outside the highway right-of-ways, do not fall within the definition of the term "highway" as set forth in Section 40-107, as it existed prior to 1966, and since the easements must be considered to be held in a proprietary capacity (*Smith v. State*, supra), it is my opinion that they are not to be considered immune from adverse prescription under the *Rutledge* case. The construction and maintenance of the signs in violation of the easements would, therefore, constitute an open, notorious, continued and uninterrupted use, which, when continued for the prescriptive period of five years, would extinguish the easement in favor of the State. See *Sinnott v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961). In my opinion, therefore, as to those signs existing in the easement areas for a period of five years without any attempt by the State to remove them, the State has been adversed of its right to enforce those easements.

In view of the above, therefore, it is the conclusion of this office that the signs existing in the easement areas are "lawfully maintained" and that just compensation must be paid for their removal.

OFFICIAL OPINION NO. 73-53

October 20, 1972

TO: Joe R. Williams
State Auditor

FROM: Stewart A. Morris

This letter is in response to your inquiry of October 3, 1972, as to the propriety of various pending transactions pertaining to inter-account billing.

You have attached copies of various inter-account bills (DA 18 forms), indicating the basic situation at which your inquiry is directed. Essentially, the Department of Administrative Services has been supplying various articles, such as gasoline, oil, etc., to other state agencies as a part of its operation of the state motor pool and service station. Administrative services has been inter-account billing the receiving agencies for these articles, which agency, in turn, charges its other current expense account and reimburses Administrative Services. Admin-

Administrative Services then credits its "salary and wages" account. You have asked, therefore, whether Administrative Services may legally credit its salary and wages in the situation outlined above. This particular procedure has apparently been given specific legislative approval by virtue of Section 67-5706, which provides as follows:

"Any division of the department of administrative services providing services to departments of state government as authorized in this chapter may charge and receive payment in advance of performance thereof for a period of time not to exceed the current appropriation on the department requesting such services. *Such payments may be used for salaries and wages, travel and other current expenses of the division providing the services.*" [Emphasis added.]

Since the particular DA 18 forms you have provided me constitute charges for tangible articles provided, such as gasoline, oil, etc., one might first question whether providing these articles would constitute "providing services" within the meaning of that term appearing in Section 67-5706. However, these matters have involved the general operation of the state motor pool and service station, and in my opinion are therefore an integral part of providing a service. Therefore, the charges for oil and gas, being simply a part of the motor pool service provided by the Department of Administrative Services, would be includable in the above provision, which in turn means that Administrative Services may legally credit the reimbursements received to its salary and wages account.

OFFICIAL OPINION NO. 73-54

October 24, 1972

TO: Ellen Louise Bettinson
Mayor, City of Culdesac

FROM: Warren Felton

This is in reply to your recent letter to this office. Your first question concerns granting or refusing to grant a bar or liquor license.

I notice that your ordinance, Section 3, says that "if the applicant is in the opinion of said Board, a proper person to carry on such liquor business" This gives the Board some discretion as to whether to issue the license but the determination should be based on the language of the statute not on a city referendum. In other words, if there is some valid reason for not granting the license, to be found in the ordinance you can refuse to grant the license, but you should not do this on the basis of a referendum of citizens since that is not part of the law.

As to your second question concerning the question of appointment of one of the councilmen, unless you can come to some understanding on this matter as between the Mayor and the City Council, the only practical method to obtain an answer to such a question is to take the matter to court in an action such as an

action for usurpation of office, or writ of review, etc. I do not believe you will accomplish anything by trying to tell him to get out.

As to your third question relating to the fact that the councilmen voted themselves free water in lieu of fees for acting as city councilmen, although this might be possible if properly done it is quite probable that it was not properly done and was thus invalid. In any case, they cannot just cancel their back water payments.

In order to do this properly they would have had to set up their regular fees or salaries as councilmen in each annual appropriation ordinance and then offset their water fee individually against their salaries. It might be possible to force them to pay this money back or it might not. A court action brought to recover \$664.50 does not appear to be a wise decision inasmuch as attorneys' fees and possible costs would undoubtedly consume most, if not all, of the recovery sought. Where the city is short of funds, and does not have a city attorney such an action in court would financially accomplish little or nothing.

As to your fourth question, Culdesac is a city under the *Idaho Code*; it does not have a charter.

I would suggest that you need a city attorney and you need to talk these matters over at length with him.

OFFICIAL OPINION NO. 73-55

October 25, 1972

TO: Wayne Miller
Executive Director
Childrens' Home Society of Idaho

FROM: W. Anthony Park

We have received your October 5, 1972, letter and would like to comment on the two possible methods which you mentioned might be used to secure Title IV matching funds from the federal government (H.E.W.), to-wit:

1. Whether the Childrens' Home could contract directly for IV-A funds since the legislature makes its appropriations directly to the Home.
2. Whether the \$75,000.00 could be transferred by the Childrens' Home to the Department of Social and Rehabilitative Services or to the Department of Environmental Protection and Health.

The appropriations allowed by Title IV are expressly for "the purpose of enabling the United States, through the Secretary to cooperate with the State Public Welfare Agencies in establishing, extending, and strengthening child welfare services . . ." 42 U.S.C.A. 620. It is questionable whether the Childrens' Home Society of Idaho is a "State Public Welfare Agency."

Though the Home does provide "child welfare services," as defined in 42 U.S.C.A. § 625, this office cannot summarily conclude that the Home could

successfully contract directly for Title IV matching funds. Section 622, for example, states that funds shall from time to time be paid to "each State."

In recognition of this statutory language and acknowledging your belief that there is some precedent for direct appropriations for welfare services such as the Home, we recommend at this juncture that you seek a formal opinion from H.E.W.'s legal counsel as to the Home's capacity and qualification for receiving funds directly from H.E.W. Since the federal government is providing the financial assistance, it is the federal government which makes the determination who is qualified to receive. It would be presumptuous on our part and possibly misleading to answer your question in the affirmative at this time.

With proper documentation and explanation of (a) the Home's role in child services in Idaho, (b) the past direct appropriation of the Idaho legislature to the Home, and (c) a discussion of what you believe is precedent for your request, H.E.W. should be able to answer your status inquiry with dispatch. Also, in that letter you might request an opinion as to the possibility of gaining a three-to-one match with Title IV funds (§ 623 of the Act should be read by Home officials prior to such request. See attached pertinent federal law on "Allotment Percentage and Federal Share").

Several problems enter into the second suggested method of gaining a match for the Home.

The first is whether the Home can transfer its \$75,000.00 per annum appropriation from the State legislature to the Department of Social and Rehabilitative Services or to the Department of Environmental Protection and Health. The second is whether those latter two agencies can accept the appropriation from the Home and act in its behalf. The third is the problem of getting back at least your appropriation from those agencies and negotiating for the additional matching funds which they may have received from them.

The appropriation given the Home by the State legislature is "for major programs and prescribed expenditure classifications . . ." The by-line item to be expended for all programs includes "relief and pensions." Chapter 215, Idaho Sessions Laws 585, 586 (1972). It is this office's interpretation that the appropriation is in very general terms and therefore can be construed to permit the Home to transfer its appropriation in order to improve and financially "beef up" its major programs. If an Idaho State Department has the power to receive the transfer and work as an agent in soliciting matching funds to the Home (an issue to be discussed later in this opinion), there is no statutory prohibition preventing the *Home* from receiving such monies for its programs. In fact, the legislature undoubtedly approves of any Home attempt at getting additional funds from other than legislative sources.

We must give you a flat "no" to your question whether the Department of Environmental Protection and Health can accept a transfer of the Home's appropriation. The statutory powers of E.P.H. are not so broad as to include action and solicitation of funds on behalf of a non-governmental service such as the Home. The powers and duties of the E.P.H.'s administrator do not encompass such activity. Chapter 347, Idaho Session Laws, § 5 and § 6 (1972).

Even if E.P.H. qualifies for Title IV funds for itself, it is not the proper vehicle for the Home to gain matching grants. The Department's supervisory powers and duties for administration of mental health programs and institutions throughout the State do not include actions on behalf of the Home which, in fact, does not accept children with brain dysfunctions, mental retardation, or neurological diseases. It would be stretching the point and purpose of E.P.H. to say it does have the power to solicit funds for the Home whose objectives are far from similar to those of the Department and its statutory predecessors.

In a more positive vein, it is this office's opinion that the Department of Social and Rehabilitative Services is a proper vehicle for the Home's search for matching funds. S.R.S. is required by law to furnish "social services," meaning "activities of the Department in efforts to bring about economic, social and vocational adjustment of families and person." Section 56-201(d) *Idaho Code*. Likewise, it is the duty of the Department to:

"a. Administer public assistance and social services to people who are in need;

g. Cooperate with the federal government through its appropriate agency or instrumentality in establishing, extending and strengthening services for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent; and to undertake other services for children authorized by law." Section 56-202, *Idaho Code*.

Also, the Department has the power to:

"a. Enter into contracts and agreements with the federal government through its appropriate agency or instrumentality whereby the State of Idaho shall receive federal grants-in-aid or other benefits for public assistance or public welfare purposes under any act or acts of Congress heretofore or hereafter enacted;

b. Cooperate with the federal government in carrying out the purposes of any federal acts pertaining to public assistance or welfare services, and in other matters of mutual concern;

c. Cooperate with county governments and other branches of government and other agencies public or *private*, in administering and furnishing public welfare services." Section 56-203, *Idaho Code*.

This expressed statutory authority can be construed to permit a transfer of the Home's appropriation to S.R.S. so that the latter will be its representative for matching funds. The statutory language of duties and powers of S.R.S. is clear. The only reservation the Home should have in arranging such a relationship with S.R.S. is that the Home should make sure to effectively contract with S.R.S. so that the Home receives the money it seeks after a match has been made. Any funds S.R.S. receives from the federal government is commingled in a "cooperative welfare fund":

"There shall be placed in the cooperative welfare fund all federal grants-in-aid made to the state of Idaho under Title I, IV and X and part three of Title V of the Act of Congress known as the Social Security Act

as amended; all cooperative funds received from the counties under the provisions of the Public Assistance Law; and any funds received from federal, state, personal, or other sources, subject to administration by the Department of Social and Rehabilitative Services for public assistance and welfare purposes." Section 56-402, *Idaho Code*.

Problems could arise in getting your "dues" unless the Home contracts agree with S.R.S. that a certain amount or percentage of the funds will be regenerated or reimbursed to the Home after the solicitation for a match.

In summary, should you decide as a policy matter that the Home would better strengthen its financial base by requesting direct funding from the federal government, you should write H.E.W. concerning your status and qualification to receive (as mentioned above). Should you decide as a policy matter that the help of S.R.S. would be most advantageous in getting the desired funds, you should make sure that any agreement with S.R.S. provides for proper regeneration or reimbursement once the Home's \$75,000.00 appropriation leaves your hands.

OFFICIAL OPINION NO. 73-56

October 26, 1972

TO: D. F. Engelling
State Superintendent of Public Instruction

FROM: James R. Hargis

We are in receipt of your letter wherein you have asked for our opinion on Section 33-1402A, *Transfer of Student in Youth Care Facility*. This section is part of the Chapter of *Idaho Code* which deals with situations where it is found that a student should not attend or is not attending the schools in his home district. The cited section deals specifically with the factual situation where a student is transferred to a non-state-supported youth care facility by court order, which is located in a district other than the home district of that student. Your questions have to do with the education of students who, by court order, are transferred from their home districts to the Idaho Youth Ranch. The Youth Ranch is located in the Minidoka County School District.

Where by court action a student is transferred to the Youth Ranch, that facility takes over the care, custody, and control of the student. The Ranch assumes the duty to continue the student's education. But the home district of the student must continue to support that continued education. Section 33-1402A, *Idaho Code*, provides that the Youth Ranch, when a court has transferred a student to that facility, is to make application to the board of trustees of the student's home district for approval of the transfer of the student to the Minidoka County School District, setting forth the facts and reasons why the transfer is to be made. We assume that the findings and order of the court transferring the student to the Youth Ranch would be included in and made part

of the application. The application is of great importance, since it may be the only method by which the home district will gain the information that the student has been transferred.

The home district must also be informed that the Minidoka District has agreed to the transfer of the student to the schools therein. Once the application has been made and acceptance of the student by the Minidoka District has been assured, the board of trustees of the home district *shall* enter its order approving the transfer. [Emphasis added.] We read this to mean that the home district has discretion, but must enter its order approving the transfer. To hold otherwise would be tantamount to permitting the home district to challenge the order of the court. Once the home district has entered its order transferring the student, then it is liable for the tuition fees charged by the Minidoka County District as if the proceedings were had pursuant to Section 33-1402, *Idaho Code*. Rates and bills of tuition to be paid by the home district shall be provided as for in Sections 33-1405 and 33-1406, *Idaho Code*.

We are of the opinion that the students transferred to the Youth Ranch are to be educated by the Minidoka School District. The basis for the legislative program is to cure the obvious inequity that would occur by permitting the court to order a transfer to the Youth Ranch without making provisions for the education of the student and the cost thereof. The economic hardships alone on both the Youth Ranch and Minidoka County Schools is apparent. To remedy those problems, the legislature enacted Section 33-1402A, which requires the home district to participate in the cost of educating the student.

At this time we do not wish to discuss any contractual arrangements that exist or may exist between Minidoka School District and the Youth Ranch other than to point out that, in the area of the exceptional child, school districts are authorized to contract for educational services. The validity of such a contract, of course, must be based on the quality of the educational services contracted for. In that area, the State Superintendent and State Board have a duty to determine and monitor.

OFFICIAL OPINION NO. 73-57

October 27, 1972

TO: Joseph Schreiber
Chairman, Housing Authority

FROM: Clarence D. Suiter

In answer to your inquiries concerning the alleged conflict of interests of Mr. Dick Mullins, a Commissioner of the Idaho Housing Agency and the Chairman of the Boise City Housing Authority, we would like to respond as follows:

Despite the fact that the Commissioners have, in their by-laws, delegated to the executive director of the Agency the power to appoint such other necessary officers and employees as deemed necessary for the proper functioning of the

Agency's duties under the act, the Commissioners are still ultimately responsible for the selection process. Please refer to section four (4) of this Act.

Neither the Idaho Housing Agency Act (I.S.L. ch. 324, 1972) nor any other Idaho constitutional or statutory law requires Mr. Mullins to resign his Commissioner's position because he is applying for a salaried position on the Housing Agency's staff. Notwithstanding that fact, Mr. Mullins' conflict of interest is patent since he, similar to other Commissioners, has the power to influence the decision-making process. Additionally, should he not be appointed, his position as Commissioner is one which allows him to influence and/or criticize the policy undertaken by the successful applicant for the same salaried position.

Mr. Mullins cannot be forced to resign his commission unless the by-laws and regulations of the Agency provide procedures for resignation or suspension in matters such as those which have arisen in this case. This is not to say the Commission may make "ad hoc" rules the day immediately proceeding the selection of the proper applicant. Procedural due process must be accorded in amending and supplementing the Agency's by-laws as they appear today. Proper notice, discussion and evaluation of amendments are necessary prerequisites, lest arbitrary action be taken.

Notwithstanding the lack of governing law in this conflict of interests case, it is this office's opinion that Mr. Mullins should resign his commission.

Public policy demands that a Commissioner discharge his duties with undivided loyalty. This opinion does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiries of that kind would be too subtle. Rather, Mr. Mullins' position as a Commissioner is one of public trust, plain and simple. He, like any other Commissioner in any other state agency, should avoid impropriety or even the *appearance* of impropriety in the public eye. This is particularly important in light of the fact that the Agency has only recently come into existence.

In answer to your second question, if Mr. Mullins is selected to serve as a salaried employee of the State Housing Agency, he *will* be required to resign his position as Chairman of the Boise City Housing Authority. The common-law rule is that the acceptance of a second office vacates the first office and terminates it as effectively as a resignation.

Just as state legislators are precluded from holding local office in certain situations, state agency commissioners must do the same. The allegiances of a person on the Idaho Housing Agency and a local, city or county housing authority would be split. The *Idaho Constitution* requires that there be no special legislation. Article 3, Section 19. Analogously, a Commissioner of any state agency should not be in a position whereby he can favor one locale over the other, particularly when that favoritism is ostensibly a conflict of interests because of a local position of responsibility in the same area of concern (here, public housing).

Again, the impropriety of derogating a public trust and confidence in our governmental positions and duties is in issue. The ramifications of Mr. Mullins'

proceeding with the Chairmanship of the Boise City Housing Authority would not be in the best interests of the Idaho Housing Agency nor of our governmental institutions generally.

OFFICIAL OPINION NO. 73-58

October 30, 1972

TO: Marian Mesenbrink
Boundary County Auditor

FROM: John F. Croner

This will acknowledge receipt of your letter of October 26, 1972, in which you questioned whether a write-in candidate could count the total number of votes cast for him regardless where such votes appeared on the paper ballot.

As you know, there are 5 parties appearing on the general election paper ballot this year, and one column is left for write-in votes. Thus, it is conceivable that a write-in vote could appear in any of the aforementioned 6 columns.

We must carefully distinguish between the purposes of a primary and general election in order to understand the credit to be given a particular vote. A primary election accords each political party the opportunity to select its candidates who will represent it in the coming election; on the other hand, a general election accords the entire electorate the opportunity to select any candidate for the office whether such candidate is a party nominee or a write-in. The election we are concerned with here is a general election, therefore the paramount concern is the total number of people who want a given candidate to represent them in a given office — not what party has endorsed a candidate. With this in mind, the following statement may be helpful to you in tallying votes in the coming election.

Any candidate who receives one vote upon a ballot anywhere for a particular office whether it be a check beside his name or his name written in should have that vote tallied as one vote for that candidate for that office.

To illustrate this principle, let us assume that senatorial aspirant, William E. "Bud" Davis did not receive a check beside his name as Democrat for senator, but instead was written in under the Peace and Freedom Column in the empty space for United States Senator. The election officials should tally one vote on such a ballot for Mr. Davis for the office of U.S. Senator.

In the case of the voting machines used in most counties using machines, this is not a perplexing problem, inasmuch as all candidates are grouped by office with a single write-in space available. In no instance may a candidate receive more than one vote for a given office.

OFFICIAL OPINION NO. 73-59

October 31, 1972

TO: D. F. Engelking
State Superintendent of Public Instruction

FROM: James R. Hargis

We wish to respond to your question concerning the coverage of students enrolled in the teacher education programs at colleges and universities in the State by the provisions of the Workmen's Compensation Act when those students participate in the practice teaching requirements for their degrees and teaching certificates.

Pursuant to Sections 33-1201 and 33-1203, *Idaho Code*, every person employed to serve in any elementary or secondary school of the State in the capacity of teacher, supervisor, administrator, education specialist, school nurse or school librarian shall be required to have and to hold a certificate issued under the authority of the State Board of Education. The State Board is required to set professional training and educational requirements which a candidate for a certificate must meet in order to receive the certificate. One of the elements of training and education which must be met is satisfactory completion of a course in practice teaching.

The practice teaching courses have been made part of the degree granting teacher education programs of accredited colleges and universities in the State. Students enrolled in teacher training degree granting programs are required to enroll in the course in practice teaching to fulfill degree and certification requirements. The course requires that the student actually experience the school environment for a period of time, usually for at least 9 weeks. During that period of time the student observes and participates in the instructional and administrative processes. Through cooperation between the colleges and universities and the individual school districts, the student is assigned to a participating district, not as a member of the faculty, but still as a student under the supervision of the college director, the district administration, and the supervising or cooperating teacher. The student is not an employee of the district, but is a student who enters the schools of the district as an observer and participant, not for the benefit of the district or its pupils, but for his own benefit for purposes of earning a degree and certificate. No contract of employment exists between the student and the local district. The student is not paid by the district, nor does the cooperating teacher alone award any grade to the student. The only relationship which exists between the student and the district is the opportunity afforded by the district to the student to use the schools of the district in which to practice what the student has learned in his academic discipline and professional courses. The schools of the participating districts, then, are controlled laboratories for the student.

The Workmen's Compensation Law, Title 72, *Idaho Code*, applies to all public employment as defined in Section 72-101, *Idaho Code*, and to all private employment not expressly excepted by the provisions of Section 72-105A,

Idaho Code. Section 72-101, *Idaho Code*. Public employment as defined by Section 72-103, *Idaho Code*, includes employees and officials of the state and of all school districts, including school districts under special charters. Teachers are specifically recognized as being covered by the act. The issue is raised, then, whether or not students who are participating in the practice teaching course of the college or university carried out in the schools of a district are also covered by the act.

Where Workmen's Compensation has been extended to an employee of a political subdivision of the state, it is generally essential that the person be under some legal duty to perform the services he renders. It follows that the person is within the coverage of the compensation statute as an employee of the school district only if there is a contract between the person and the district which gives rise to the employee-employer relationship. This is apparently the law even where the person performs work which benefits the district. But in the absence of the relationship between the person and the district, the person would not be covered by the compensation statute. 99 C.J.S. 402-411, § § 115, 116.

When the student in the teacher education program enters into the practice teaching course in a school of a participating district, he does not enter into a contract with the district which places him under a legal duty to perform any teaching services. Indeed, his ability to perform any teaching services is determined not by any contract of employment, but rather by the cooperating teacher and the college supervisor in conjunction, based on course requirements and evaluation of the student. The absence of a contract must necessarily indicate that there is no employer-employee relationship between the student and the participating district, regardless of the benefits which the district may receive from the student. Without the existence of that relationship, either express or implied, we must conclude that the student who is enrolled and participates in the practice teaching course of the teacher education program of the college or university wherein he is a student is not covered by the Workmen's Compensation Laws.

OFFICIAL OPINION NO. 73-60

November 1, 1972

TO: Tom D. McEldowney
Commissioner of Finance

FROM: Richard Greener

You ask whether or not the offer for sale and sale of securities by a company issuing the securities in the State of Idaho would be exempt from the application of Chapter 14, Title 30, *Idaho Code*, provided a commission is not charged by the issuer and the order for the securities is sent directly to the issuer.

Section 30-1406, *Idaho Code*, requires any person who transacts securities business in the State of Idaho as a broker dealer or salesman to register as required by the Idaho Securities Act. A company offering its securities in the

State of Idaho in the aforescribed manner is certainly conducting business in the state as is evidenced by consideration of Section 30-1402(10), *Idaho Code*, which defines the sale and offer for sale of securities. This provision makes it clear that a sale includes every contract of sale or contract to sell or dispose of a security; and, likewise, the offer includes every attempt or effort to sell or solicit an offer by a security for value. There is no exception made for situations in which the issuer is selling a particular security and is not exacting a commission. Clearly, a company engaging in the practices in question would be transacting business in the state as a broker dealer or a salesman of securities within the meaning of the relevant provisions.

Consideration must, therefore, be given to Section 30-1435, *Idaho Code*, which sets forth certain transactions which are exempt from the application of the registration requirements found in the Idaho Securities Act. Consideration of this provision indicates quite clearly that there is no exemption which would be afforded this type of transaction. A caveat to this position would be a situation in which offers were directed to not more than ten individuals in this state in accordance with Section 30-1435(8), *Idaho Code*. It should be noted, however, that a situation of this nature is obviously restricted.

Therefore, it is the view of this office that the actions in question give rise to transactions which are subject to the Idaho Securities Act. Consequently, compliance must be had with the registration requirements in order for an issuing company to sell its securities in the State of Idaho.

OFFICIAL OPINION NO. 73-61

November 1, 1972

TO: Dee Tallman
Department of Finance

FROM: Richard Greener

You ask whether or not the contracts currently being offered by Good Life, Inc., constitutes securities within the meaning of Chapter 14, Title 30, *Idaho Code*. I have reviewed the documents involved in this offering and have come to the conclusion that these do not constitute securities within the meaning of the Idaho Securities Act. I must condition this determination, however, upon a satisfactory indication that Good Life, Inc., is a stable sound corporation which is not using the sale of the franchises in question to obtain risk capital. In the event that the corporation is under capitalized, I would be of the view that the sale of these franchises could constitute a security under the risk capital theories.

You also ask whether or not the partnerships being offered by PMF Company constitutes securities. These clearly fall within the definition of a security set forth in the Idaho Securities Act as they are the sale of admitted partnership interests. This problem has been considered in a previous opinion written by this office which indicated that limited partnership shares do constitute securities which must be registered in accordance with the Idaho Securities Act.

OFFICIAL OPINION NO. 73-62

November 2, 1972

TO: Alfred E. Miller
Pesticide Specialist & Registrar
Department of Agriculture

FROM: Michael G. Morfitt

In response to your question of November 2, 1972, in regard to the licensing of pesticide salesmen, it is my conclusion that they indeed fall within the requirements of the Idaho Pesticide Law.

Section 22-3402(X), *Idaho Code*, defines a pesticide dealer to be "any person who sells, offers for sale, or holds for sale any quantity of pesticides". Section 22-3413 prohibits any person from engaging in the sale of pesticides without first obtaining a Pesticide Dealer's License. Therefore, it follows that the salesman, solicitor or sales representative of any chemical company who solicits orders or accepts orders from any person in the State of Idaho must be licensed as a pesticide dealer under this law. It would make no difference if the salesman does not actually deliver or handle the pesticide, or that he does not accept payment for the orders solicited.

In summary then, Idaho law requires any person offering for sale, soliciting for sale, or accepting orders for pesticides to be licensed.

OFFICIAL OPINION NO. 73-63

November 6, 1972

TO: Will S. Defenbach
Chairman, Industrial Commission

FROM: Stewart A. Morris

This is in response to your request for an Attorney General's opinion as to the effect of the appropriation in the amount of \$56,773.00 (as set forth in Idaho Session Laws, Chapter 367, page 1073) to the Industrial Special Indemnity Fund, upon the perpetual appropriation to that fund set forth in Section 72-333, *Idaho Code*.

The problem, of course, is that previously, all monies which came into the Industrial Special Indemnity Fund were perpetually appropriated to the Commission to be used for administrative purposes as stated in Section 72-331, and also to pay special indemnity benefits as set forth in Section 72-332. Notwithstanding this, however, the 1972 session of the Idaho Legislature made a special appropriation to the Industrial Indemnity Fund in the amount of \$56,773.00. You have inquired whether it is the intent of the Legislature to limit the total monies to be expended from that fund to that amount.

Since the major purpose of the appropriation set forth in Chapter 367 of the

1972 Session Laws was for the purpose of administration expenses, we construe the \$56,773.00 appropriation only to apply to and limit the perpetual appropriation set forth in Section 72-333 for administrative purposes. Therefore, as far as the perpetual appropriation for the payment of benefits, pursuant to Section 72-332, it is our opinion that the monies remain perpetually appropriated to the Special Indemnity Fund for the payment of those benefits.

Therefore, we conclude that it was the intent of the appropriation to limit expenditure from the Industrial Special Indemnity Fund for "administrative purposes," pursuant to Section 72-331 to the amount of \$56,773.00. The perpetual appropriation set forth in Section 72-333 for purposes of paying benefits pursuant to Section 72-332 is still in effect and is not limited by that appropriation set forth in Idaho Session Laws, Chapter 367.

OFFICIAL OPINION NO. 73-64

November 7, 1972

TO: Tom D. McEldowney
Commissioner of Finance

FROM: Richard Greener

You pose two questions relevant to the Idaho Securities Act. These will be treated individually in aid of clarity.

You ask whether or not the Chase Manhattan Corporation, a bank holding company, registered under the Federal Bank Holding Company Act of 1956, which created as a subsidiary, Chase Investors Management Corporation New York (Chase Investors) must file as an investment advisor pursuant to Section 30-1402(6), *Idaho Code*, of the Idaho Securities Act.

It is our view that it is within the prerogative of the Securities Administrator to exempt the subsidiary from registration as an investment advisor pursuant to Section 30-1402(6)(g). This must, however, be accomplished by the promulgation of a rule or order. I would suggest that a hearing be had on the subject so that you would have a record to document the regulations to which the subsidiary would be subjected. This would substantiate the criteria that the subsidiary is a person "not within the intent" of the registration requirement for investor advisors in the Idaho Securities Act in accordance with the exception set forth in Section 30-1402(6)(g), *Idaho Code*.

You also ask whether or not there are any laws in the *Idaho Code* which relate solely to franchises. It is our view that the only laws which relate to franchises would be the Idaho Securities Act should the franchise involve a security under that act or the Idaho Consumer Protection Act should the franchise involve a fraud.

OFFICIAL OPINION NO. 73-65

November 8, 1972

TO: Gerald W. Olson
Pocatello City Attorney

FROM: W. Anthony Park

You, as City Attorney for the City of Pocatello, on behalf of the City of Pocatello have requested an opinion on the following questions:

1. Are the incorporated and specially chartered cities of the State of Idaho under House Bills No. 565, 698, and 700 entitled to one-sixth (1/6) of the excise tax monies received by the state treasurer from the motor fuels tax under § 49-1212, Idaho Code, after July 1, 1972?
2. Are the incorporated and specially chartered cities of the State of Idaho entitled to an allocation of unrefunded surplus accumulated in the motor fuel refund fund?

It is our opinion that the incorporated and specially chartered cities of the State of Idaho are entitled to 1/6th of the excise tax monies received by the State Treasurer from the motor fuel tax under § 49-1212, *Idaho Code*, after July 1, 1972.

We understand you are concerned, because House Bill 565, as amended, as amended in the Senate, passed by the Second Regular Session of the Forty-first Idaho Legislature (S.L. 1972 Chapter 281, page 699) did not increase the allocation of excise tax money received by the State Treasurer under § 49-1212, *Idaho Code*, from 1/7th to 1/6th as did House Bills 698, 699, and 700 (S.L. 1962, Chapter 293 through 295, pages 739 through 743).

The passage of the respective bills through the House and Senate can be outlined as follows:

| | Passed House | Passed Senate | House Concurred in S. Amendments | Governor Signed Bill |
|----------|-----------------|------------------|-------------------------------------|-------------------------|
| H.B. 565 | 3/1 | 3/14 | 3/15 | 3/27 |
| H.B. 698 | 3/10 | 3/17 | 3/18 | 3/27 |
| H.B. 699 | 3/10 | 3/17 | 3/18 | 3/27 |
| H.B. 700 | 3/10 | 3/17 | 3/18 | 3/27 |

It would not be reasonable to interpret House Bill 565 as repealing the amendments made by House Bill 698, 699, and 700. House Bill 565 was passed by both the House and Senate before the respective bodies had considered or assented to the changes made in § 49-1210A by House Bill 700, and clearly House Bill 565 was simply intended to incorporate the statute as it existed on the day the House and Senate considered the amendments contained in House Bill 565, and was not intended to repeal the later considered "package" of bills, House Bill 698, House Bill 699, and House Bill 700.

The Supreme Court has repeatedly held that where inconsistent acts passed by the same legislature, the latter act will as a general rule prevail. *Jordan v. Pearce*, 91 Idaho 687, *Rydalch v. Glauner*, 83 Idaho 108.

In *Oregon Short Line R.R. Co. v. Minidoka County*, 28 Idaho 214, (1915) the Idaho Supreme Court was presented with a case involving an irreconcilable conflict between two bills passed by the same session of the legislature and signed by the Governor on the same day. The course of events discussed by the Idaho Supreme Court in the *Oregon Short Line R.R. Co.* case is almost identical with the present problem. In the 1913 legislature, House Bill 74 was introduced and passed by the House, then amended in the Senate. The effect of the Senate amendment was to reduce certain mill levies from a maximum of fifteen mills to a maximum of five mills. After specific consideration in the Senate, this amendment was approved, and the amendment was later concurred in by the House. After this course of events, House Bill 393 was introduced in the House. The bill was long and amended many sections of the school law but did not specifically indicate amendments to the maximum mill levy, and instead incorporated without change the initial mill levy of fifteen mills. The bill was passed and both bills were signed by the Governor on the same day. The court indicated that in view of the length of the bills, and a careful consideration of the history of the enactment of the two bills, the legislature clearly had intended to and did fix the maximum levy at five mills.

The second question has heretofore been answered, by an opinion dated May 19, 1971, and a copy of that opinion is being provided. While the relevant percentages of moneys received by the various funds have changed because the amendments made by the 1972 legislature (see the attached memorandum), the principle has not changed. In essence, the incorporated and specially chartered cities of the State of Idaho do not receive an allocation of unrefunded surplus accumulated in the motor fuel refund fund.

OFFICIAL OPINION NO. 73-66

November 8, 1972

TO: Tom D. McEldowney
Commissioner of Finance

FROM: Richard Greener

You pose an inquiry concerning the bonding requirements for members of the Board of Trustees of an Endowment Care Cemetery. This would arise in the event that the Board of Directors of a cemetery authority should elect to serve as a Board of Trustees as to the trust fund required to be created and maintained for endowment care cemeteries pursuant to Section 27-407, *Idaho Code*. This opinion will consider this problem.

The Endowment Care Cemetery Act, being Chapter 4, Title 27, *Idaho Code*, was amended in 1972, in Chapter 84, 1972 Session Laws. This amendment.

relates to the bond requirements for a Board of Directors which elects to become a Board of Trustees as to the trust fund required by the Endowment Care Cemetery Act. A Board of Directors has this prerogative under the act. The language of this amendment contained in Section 27-408, *Idaho Code*, provides:

“(b) Where the trust is vested in such board of directors as a board of trustees, each of said trustees shall file with the commissioner of finance a surety bond in the amount of five thousand dollars (\$5,000), conditioned upon his full and faithful performance of his trust obligations.” [Emphasis added.]

It is our view that the crucial word in the above amended provision is the word “each”. The inclusion of the word “each” clearly requires that *each* of the trustees must obtain a \$5,000 bond. Therefore, it would not be permissible under the provisions of this act for an entire board of trustees to obtain a single bond in the amount of \$5,000.

OFFICIAL OPINION NO. 73-67

November 9, 1972

TO: Robert Hay
Commissioner of Insurance

FROM: Stewart A. Morris

Robert Graves of your Department has requested an Attorney General's opinion concerning the legality of certain service fees or commissions being paid by Continental Life & Accident Company to various banks incident to its group credit life or disability master policies.

Generally, the bank holding the master group credit life and/or disability policies sells the certificates to its debtors through its officers, who solicit and explain the insurance and witness the signatures of the debtors. A secretary then types up a certificate of insurance and mails it to the debtor. Each month the bank submits a report to Continental Life & Accident on its Form SC 197, which is a statement of the insurance issued, gross premiums received, and net premiums remitted to the Company. For these services the bank retains 40% of the gross premium which is indicated on the SC 197 form as a “service fee or commission”.

Section 41-1015, *Idaho Code*, provides that an insurance company cannot pay any commission or other valuable consideration to any person for services as an agent within this State unless such person then holds a currently valid insurance license. The bank, in the situation presented, is not licensed as an agent in this State. One exception to the license requirement, and therefore presumably to the above restriction on paying commissions or other valuable consideration, is set forth in Section 41-1004(3). That provision essentially provides that a person need not be licensed if he merely exercises ministerial duties and secures and forwards information for the purposes of group insurance

coverage or for enrolling individuals in group insurance or issuing certificates, provided that no commission is paid for such services.

It is apparently the position of Continental Life & Accident Company that the 40% of premiums being retained by the bank is a "Service fee" rather than a commission, and that therefore, since the bank is not being paid a commission for its services, it need not be licensed. For the reasons expressed below, however, we do not agree that in the situation presented the bank would be entitled to the license exemption set forth in Section 41-1004(3).

First, it is questionable that in the situation presented, the bank officers are merely performing ministerial duties in securing and forwarding information for purposes of group insurance coverage. We feel this provision was intended only to cover the situation where an employee of the creditor or employer holding the group master policy merely fills in and has the insured sign the application and subsequently types out a certificate of insurance. If the employee or officer solicits or encourages the person to apply for group coverage, or explains benefits of the coverage to be provided (other than perhaps furnishing a brochure or other sales literature published by the insurer), that person is exercising more than ministerial duties within the exemption contemplated by Section 41-1004(3).

In addition, it is our opinion that the allowance of the sum of 40% of gross premiums collected by the bank is a commission, rather than a mere service fee or charge. The term "commission," generally connotes the payment of compensation on a percentage basis and includes therein a margin of profit for the one receiving the commission. See 7A, Words and Phrases, "Commission," pages 557 through 561, and the supplement thereto. A "service fee or charge," on the other hand, is a charge assessed, not generally on a proportionate or percentage basis, but on a basis calculated to recover the expenses incurred or involved. See 38A, Words and Phrases, "Service Charge," page 568, and the supplement thereto. Since, in the situation at hand, the compensation being allowed to the bank is computed on a percentage basis, and apparently is designed to allow the bank an element of profit, rather than merely a recovery of costs involved, it is our opinion that such is a "commission" as that term is used in Section 41-1004(3).

In view of the above, therefore, it is our opinion that in the example Mr. Graves has cited, the bank would not fall within the exception to the license requirement. Therefore, it appears that both Continental Life & Accident Company and the bank involved, are violating Section 41-1015 by paying and accepting commissions without meeting the license requirements of Section 41-1003.

OFFICIAL OPINION NO. 73-68

November 9, 1972

TO: Marjorie Ruth Moon
Idaho Commission on Women's Rights

FROM: Donald E. Knickrehm

We are pleased to answer your October 16, 1972, inquiry concerning the Idaho Fish and Game Department regulations as they affect the wives of students attending college or university institutions in Idaho.

The Fish and Game pamphlet states that "the status of the wife of a student (whether she is a student herself or not) is the same as that of her husband." On the surface, it seems to say that the wife of a male student who is a non-resident must comply with the non-resident regulations when interested in hunting or fishing in Idaho. The wife of a student who is a resident, as determined by the Fish and Game regulations, is entitled to purchase a resident license for fishing and hunting.

However clear that interpretation is, we do not accept it as a valid one.

The regulation undoubtedly is based upon the common law principle that a wife generally has no power of acquiring a domicile of her own, separate and apart from her husband. *Anderson v. Watt*, 128 U.S. 794. If we were to follow this reasoning, then a woman who has been an Idaho resident all her life — and then married a non-resident student here in Idaho — would be required to meet non-residency requirements for fish and game purposes, until her husband met residency requirements. To accept such an interpretation would be patently unfair.

The law recognizes exceptions to the rule that the domicile of a married woman is that of her husband, on the basis that the purpose of such rule is the promotion of the best interests of the spouses and that when a situation arises in which the interests of the spouses are not identical, the wife should be permitted to choose her own domicile. *Garberson v. Garberson*, 82 F. Supp. 706 (DC Iowa); *Katz v. Katz*, 330 Mass 635, 116 NE2d 273; *Schalk v. Schalk*, 168 Neb. 229, 95 NW2d 545; *Bernardi v. Bernardi*, 42 Tenn. App. 282, 302 SW2d 63; *Hunt v. Hunt*, 72 NY 217, error dismd, 24 L.Ed. 1109.

It is this office's opinion that the Fish and Game regulations as they affect the wives of students contain such an implied exception. Thus, a woman who has been a lifelong resident of Idaho and who marries a non-resident attending college or university here does not lose her residency status for fishing and hunting license purposes. In the same sense, a resident male who marries a non-resident female attending school in Idaho does not have to comply with the non-resident regulations, while the wife would have to.

If both the husband and wife came from out-of-state to attend school here, or if both came from other states and only one attended school, both would have to comply with non-residency requirements before getting fishing and hunting

licenses in the state. On the other hand, if the husband and wife from out-of-state stayed long enough to acquire residency for fish and game purposes, then both could fish and hunt as residents with residency licenses after having applied for same.

Finally, it is obvious that when both the husband and wife are already residents and attending school in Idaho, they do not have to worry about complying with non-resident license laws.

In summary, though the Fish and Game regulations might be interpreted strictly to prevent resident hunting and fishing privileges to those women already Idaho residents and subsequently married to non-residents at schools in the state, this is not an interpretation which this office considers valid. Any woman who can prove her residency should not be denied the privilege of fishing or hunting in Idaho merely because she is married to a non-resident student who has not yet met the requirements of residency for fish and game license purposes.

OFFICIAL OPINION NO. 73-69

No opinion is assigned to this number.

OFFICIAL OPINION NO. 73-70

November 13, 1972

TO: Seward H. French, III
Bonneville County Prosecuting Attorney

FROM: John Croner

This will acknowledge receipt of your letter of October 25, 1972, in which you asked whether a second "wine sale at retail" question could be put to the people of Bonneville County. You related the following facts:

The people of Bonneville County signed petitions earlier this year in order that the Board of County Commissioners order a special election on the question. The Board of County Commissioners found that the earlier petitions were signed by an insufficient number of qualified electors. The Board decided that enough interest had been demonstrated, however, to justify their calling for an election themselves pursuant to the option available to them under Section 23-1304(b), *Idaho Code*. Accordingly, without using the petitions as a base therefor, the election was held and the proposal was defeated. Recently, the same petitions were re-submitted.

In substance, you ask two questions:

1. Whether these same petitions are valid pro tanto the number of signatures upon them.

2. Whether the question may be again put to the electorate after having been once defeated.

Section 23-1304, *Idaho Code*, provides:

"23-1304. COUNTY OPTION – RESOLUTION OF COUNTY COMMISSIONERS – ORDER FOR ELECTION – FORM OF BALLOT – EFFECT OF ELECTION OR RESOLUTION. – There is hereby granted to the board of county commissioners of each of the several counties of this state the right and authority to permit the sale of wine, as defined in this act, within the borders of the several counties of this state, which may be exercised in the following manner:

(a) the board of county commissioners of each county of this state may, by resolution regularly adopted, provide that retail sale of wine, as defined in this act, shall be permitted within the county, and upon a certification of such resolution to the commissioner of law enforcement, a retail wine license shall thereafter be issued for premises within such county so long as such resolution remains in effect; or

(b) the board of county commissioners of each of the several counties of this state may submit the question of permitting the sale of wine at retail within the boundaries of the county to the electors of the county. The board of county commissioners may make an order calling an election to be held within said county in the manner provided by law for holding elections for county officers. All laws of the State of Idaho relating to the holding of elections for county officers shall apply to the holding of the election provided for in this section, except where specifically modified herein. Such election may also be called upon written petition of not less than twenty per cent (20%) of the registered, qualified electors of the county for the last general election. In the event said petition is presented, the governing body of the county shall, within five (5) days after the presentation of said petition, meet and determine the sufficiency thereof by ascertaining whether said petition is signed by the required number of registered, qualified electors of the county affected. In the event the governing body of said county determines that said petition is signed by the required percentage of registered, qualified electors, said governing body shall forthwith make an order calling an election to be held within said county in the manner provided by law for holding elections for county officers. Such election shall be held on a day fixed by the county commissioners not more than thirty (30) days after the call thereof. In addition to the other requirements of law, the notice of election shall notify the electors of the issue to be voted upon at said election. The county recorder must furnish the ballots to be used in such election, which ballots must contain the following words:

'Sale of wine at retail, Yes,'

'Sale of wine at retail, No,'

and the elector in order to vote must mark an "X" opposite one (1) of the questions in the space provided therefor. Upon a canvass of the votes cast,

the county recorder shall certify the result thereof to the commissioner..."

In answer to your first question, we are of the opinion that the re-submitted petitions are valid and the requisite number of signators may be satisfied by supplements to the original petitions. The facts, here, indicate that the petitions were not the legal basis for the boards' action under Section 23-1304(b), *Idaho Code*, in calling the earlier election, and therefore, it seems to us that the signatures are still valid though short of the requisite number. However, it is our belief that the signers of the petitions should be given an opportunity to withdraw their names in view of the length of time which has elapsed since they signed, and in further view of the fact that an election defeating the proposal has been held in the intervening period.

In answer to your second question, we can find nothing in the statutes to indicate the legislature either intended or provided for one election being dispositive of the question. Therefore, under present statutory framework, the question of "wine sales at retail" may be put to the people whenever valid petitions are presented to the Board, and the Board must act upon these within the time limits prescribed in Section 23-1304, *Idaho Code*.

OFFICIAL OPINION NO. 73-71

November 13, 1972

TO: Gladys Muguira
Administrative Secretary, Potato Commission

FROM: Warren Felton

I have your recent letter inquiring as to who is responsible for payment of the Potato Commission tax in the case of a consignment for sale or a consignment for processing and then sale.

The definitions in your act in Section 22-1204 of the term "shipment," that shipment takes place when the potatoes are loaded to be transported for sale or otherwise and the term "dealer" which includes any person engaged in the business of buying, receiving, processing or selling potatoes for profit or remuneration and definition (8) that potatoes are deemed to be delivered into the primary channel of trade when such potatoes are sold or delivered for shipment or delivered for canning and or processing.

Reading these definitions into Section 22-1211 which says that the tax is due when such potatoes are first handled in the primary channels of trade and that the person first introducing potatoes into the primary channels of trade shall be responsible for the tax, and applying the above definitions to this section it is my opinion that the consignee is the person who must pay the tax. I, of course, am not speaking of the fact that the grower is still responsible for his proportionate share of the tax, but the consignee is the person who should be remitting the tax.

OFFICIAL OPINION NO. 73-72

November 13, 1972

TO: Carl C. Moore
Manager, Port of Lewiston

FROM: W. Anthony Park

We are in receipt of your letter of November 2, 1972, concerning Clearwater Economic Development Association and the question therein contained: "May the State Planning and Community Affairs Agency contract with Clearwater Economic Development Association (a non-profit corporation) for regional planning?"

We agree with you that the question can be answered in the affirmative, pursuant to Section 67-1911(6), *Idaho Code*. Of course, the decision to enter into such a contract is a policy matter for the State Planning and Community Affairs Agency to determine.

OFFICIAL OPINION NO. 73-73

November 13, 1972

TO: Laudy G. Tomchak
Board of Trustees
School District No. 251

FROM: James R. Hargis

We wish to respond to your letter of October 20, 1972, received by this office on October 24, 1972, wherein you expressed your opposition to the unexcused absence policy of District No. 251. You have asked for an opinion from this office on the subject.

Whether or not a policy is arbitrary is a factual, not a legal, conclusion, based in part on what the policy is and in part on how it is administered. Strictness alone does not render a policy arbitrary, although it may very well be an element for consideration. We can find no statutory or current case law directly raising the issue of attendance policy and grade cutting, although there is older authority to the effect that a student may be expelled for absence or tardiness without sufficient cause. But we can find nothing which either supports or denies grading sanctions as a penalty for unexcused absences. Although we may have some reservations about the success of defending the policy should it be challenged, we cannot say as a matter of *law* that the policy as adopted is arbitrary and therefore void.

One element which does cause us some concern is the definition of excused absence. As the District No. 251 regulations are presently written, absences due to death or illness are classified as excused absences. In either case neither the student nor his parent has any control over those events. We are of the opinion

that if there are other events over which neither the student nor his parent has any control and which would require the student's absence, then to penalize the student for the absence by either grade cut or suspension might very well be arbitrary and unreasonable.

OFFICIAL OPINION NO. 73-74

November 15, 1972

TO: Lester Brown
Mayor, City of Sandpoint

FROM: W. Anthony Park

I am in receipt of your letter dated the 9th of November, 1972 in which you posed the following question: What is the effective date of a constitutional amendment which is passed by a majority of the electorate at a general election? And, more specifically, what is the effective date of House Joint Resolution 73 as it related to the percentage of votes necessary to pass sewer-water revenue bond issues?

Article XX, Section 1 of the *Idaho Constitution* provides:

“* * * if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution.”

The next question necessarily becomes, “When does ratification take place?” The case of *Halle v. Foote*, 409 P.2d 409 held: “Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, . . .”

Cooley, in his work on *Constitutional Limitations*, 8 Ed., Vol. 1, p. 170, states:

“A constitutional provision does not lose its self-executing quality merely because it provides that the legislature shall by appropriate legislation provide for carrying it into effect; and the mere fact that legislation might supplement and add to or prescribe a penalty for the violation of the self-executing provisions does not render such provision ineffective in the absence of such legislation.”

Based upon the foregoing, it is the opinion of the Office of the Attorney General that the effective date of the constitutional amendment submitted to the electorate in House Joint Resolution 73 is the 7th day of November, 1972. Therefore, only a simple majority of the electorate votes is henceforth necessary to pass revenue bond issues as they relate to sewer and water proposals. The sewer-water revenue bond election of the city of Sandpoint to be held on November 21st will, of course, be subject to the effect of the amendment and you should be guided accordingly.

OFFICIAL OPINION NO. 73-75

November 20, 1972

TO: A. J. Eiguren
Assistant Administrator, Environmental Protection Division
Department of Environmental Protection & Health

FROM: G. Kent Taylor

The office of the Attorney General is in receipt of your letter dated November 3, 1972 in which you posed the following question: "May the Board of Environmental Protection and Health adopt the board regulation which would allow the payment of less than 25% of the estimated reasonable cost of sewer treatment facilities as set forth in Section 39-3604?"

Section 39-3604A. states, in pertinent part:

"The Idaho board of health may make payments of twenty-five per cent (25%) of the estimated reasonable cost of the project where water quality standards have been established for the waters into which the project discharges and where such action will result in a federal grant of not less than fifty per cent (50%) of the estimated reasonable cost of the project."

As you can see, the language set forth in this Section contains the permissive word "may" which means the board has discretion as to the amount of its contribution. Since it is my understanding that under the current federal water act the contribution of the Federal government can be 75% of the total cost, it is obvious that the board will want to exercise the discretion permitted by 39-3604 so as to reduce the 25% state match formerly required.

Accordingly, it is the opinion of the Office of the Attorney General that an amount less than 25% of the estimated reasonable cost can be contributed. Based upon this opinion, I would suggest that if there is a current board regulation requiring a 25% contribution, the same should be amended to read that 25% or less may be contributed by the state as its share of the project cost.

OFFICIAL OPINION NO. 73-76

November 22, 1972

TO: Stephen W. Boller
Blaine County Prosecuting Attorney

FROM: W. Anthony Park

This will acknowledge receipt of your letter of October 27, 1972, in which you asked that this office render an opinion upon the constitutionality of Section 36-404, *Idaho Code*.

In pertinent part, Section 36-404, *Idaho Code*, provides:

"Any person over the age of twelve (12) years who has been a bona fide resident of the state of Idaho for a period of six (6) months last preceding the application for a license, . . . shall be entitled to receive . . . a fish and game license . . ."

You stated your question as follows:

"Are the provisions of section 36-404, Idaho Code, unconstitutional in view of the recent United States Supreme Court decisions relating to residency requirements for voting, welfare, and others?"

You will find enclosed a copy of an opinion dated June 9, 1972, issued by this office relating to the constitutionality of Idaho's durational residency requirement as it pertains to voting.

In that opinion, you will note a discussion of the recent United States Supreme Court decision in *Dunn v. Blumstein*, 92 S. Ct. 995 (1972). The court in *Blumstein* found that there were two *fundamental* rights threatened when Tennessee imposed its one year durational residency requirement on new residents of the state: (1) The right to travel freely among the several states, and (2) the right to vote. The court found that a person desiring to move to Tennessee would necessarily have to make a choice between these two fundamental rights. Inasmuch as the right to vote was "fundamental" the court found that the State of Tennessee must demonstrate a "compelling state interest" in order that the statute withstand the constitutional challenge. Tennessee was unsuccessful in its attempt to convince the court that there was a "compelling state interest" for the imposition of the one year residency requirement, and thus the court ruled that Tennessee's requirement was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as it burdened the right to travel.

The United States Supreme Court ruling in *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) held that any classification of citizens which serves to penalize the exercise of their constitutional right to move from state to state, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional, and a state statute making such a classification is in violation of the equal protection clause of the Fourteenth Amendment.

In *Shapiro*, durational residency statutes were put into question relating to welfare recipients. The court found that a one-year durational residency statute imposed upon new bona fide residents by a state which denied any benefits to new residents for one year impermissibly burdened the fundamental right to travel freely among the states. It is important to note that in both *Blumstein* and *Shapiro* a new bona fide resident coming to a state was absolutely denied a particular right accorded other residents until the durational period was satisfied.

We see a distinction between these fundamental rights, which the court reviewed in *Shapiro* and *Blumstein* and Idaho's six month durational residency law.

Idaho does not attempt to deny anyone a fish and game license based upon a

durational residency. The sole criticism is that bona fide residents who have lived in the state less than six months are treated differently from residents who have lived here for more than six months with respect to the cost of a license.

The net effect of Section 36-404, *Idaho Code*, is to group bona fide residents who have not lived in the state for six months with non-residents.

The question which must first be answered is whether a state may constitutionally discriminate between residents and non-residents in the issuance of, and fee charged for fish and game licenses. We think that such may be done with certain limitations.

The United States Supreme Court has discussed the validity of state fish and game statutes which treat residents and non-residents unequally. The general rule appears to be that a state may constitutionally impose a higher license fee for non-residents than it does for its own residents so long as there is a legitimate state interest advanced, and the higher fee does not have a totally exclusionary effect upon non-resident license applicants.

The court in *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460, stated at page 1472:

"The state is not without power, for example to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the state for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay."

We do not see where Idaho's fish and game license fees charged residents and non-residents is materially different from those which the Supreme Court said were allowable in *Toomer v. Witsell*, supra. Further, we do not see where the higher cost to non-residents necessarily has a totally exclusionary effect upon those desiring to purchase such licenses. (The rational basis for the discrimination is thus met when Idaho sets forth the additional cost burden of enforcement occasioned by non-resident hunters and fishermen.) Further, Idaho taxpayers are thereby assisted by non-residents in financing conservation programs from which both residents and non-residents who hunt and fish in Idaho benefit. We are of the opinion, therefore, that Idaho may permissibly impose a higher fee for non-residents than it does for residents.

The remaining inquiry is whether Idaho can constitutionally classify bona fide residents who have lived in the state for less than six months as non-residents thereby compelling the payment of the higher fee. In short, the question is whether all state imposed durational residency requirements are invalid. We think not.

The court in *Shapiro v. Thompson*, supra, at 1333, in 1969, left the question open by stating:

"We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education to obtain a license to practice a profession, to hunt or fish and

so forth * * *

In *Suffling v. Bondurant*, 339 F. Supp. 257, the United States District Court for the District of New Mexico held that the rule requiring six months residence, a period which may commence as late as the day of the bar examination, provided a reasonable time for examination of character and fitness and did not deny applicants equal protection or unduly penalize their right to interstate travel. This case was affirmed by the United States Supreme Court on November 20, 1972. [No Cite] Thus, it appears that state imposed durational residency requirements are not, per se, unconstitutional.

As discussed above, the *Blumstein* case in 1972 stands for the proposition that state imposed durational residency requirements are invalid as a precondition to voting. The reason, again, is that the right at stake is fundamental and a "compelling state interest" could not be demonstrated to sustain its validity. Hunting and fishing has never been held to be a "fundamental right" of man; in fact, some courts have viewed it as a mere privilege conferred by the state. *State v. Tice*, 69 Wash. 403, 125 P. 168. Since we are of the opinion that the right to hunt and fish is not a fundamental one in the category of voting and/or travel, there is no requirement to show a "compelling state interest" to justify the durational residence of six months.

A state may treat a class of citizens differently without offending equal protection of the laws so long as the classification is not made on an arbitrary or capricious basis and so long as it reflects a policy based on reason. (*Caesar v. Williams*, 371 P.2d 241, 84 Idaho 254.) We do not see where the classification, here, can be said to be arbitrary and capricious, and without any rational basis, and we know of no case which has held these kinds of durational residency requirements invalid.

Therefore, it is my respectful opinion that Section 36-404, *Idaho Code*, is valid and enforceable in this state.

OFFICIAL OPINION NO. 73-77

November 22, 1972

TO: Glenn Nichols
Director, State Planning & Community Affairs

FROM: Donald E. Knickrehm

We are pleased to respond to the two following questions posed by your agency:

- (1) May a county planning and zoning commission hire counsel to advise and assist it, and
- (2) Do Idaho counties have authority to regulate subdivisions under Title 50, Chapter 13, *Idaho Code*, or other statutes of Idaho?

There is no clear answer to the first question. Planning and zoning

commissions, within the limit of their appropriations, are authorized to "employ such employees and technical advisers as are deemed necessary for [their] work." Section 50-113, I.C. Article XVIII, Section 6, of the *Idaho Constitution* provides that the county commissioners "may employ counsel when necessary". And Section 31-813, I.C., provides that the county commissioners may employ counsel to conduct the prosecution or defense of actions to which the county is a party.

These sections all seem to indicate some authority for the planning and zoning commission, at least through the county commissioners, to hire counsel to assist the agency in the execution of its particular duties.

Some cloud hovers over that conclusion for a number of reasons. First, Sections 31-2604 and 31-2607, I.C., respectively provide that it is the duty of the county prosecuting attorney to prosecute and defend all actions in which the county is interested, and that it is his duty to advise the commissioners and other county officers when requested to do so. These provisions raise the issue of unlawful usurpation of the functions of the county prosecuting attorney by the hiring of other legal counsel.

Precisely this issue was involved in the case of *Meller v. Board of Commissioners of Logan County*, 4 Idaho 44 (1894), which invalidated a contract let by the county, hiring general private counsel for the county for a two year contract period. The case is of questionable authority today because the constitutional provision upon which it was based has been significantly altered. Its precise effect today, nonetheless, is unclear.

The case of *Conger v. Commissioners of Latah County*, 5 Idaho 347 (1897) makes it clear that counties generally may not hire private counsel to prosecute criminal actions, but does recognize the authority of a county to employ counsel in matters within their jurisdiction and control "when necessary" (see Article XVIII, section 6, *Idaho Constitution*), and indicates the words "when necessary" mean when the "district attorney" is for some reason unavailable to the commissioners at that moment. This limitation is probably only dicta. On the other hand, the Idaho Supreme Court specifically upheld the hiring of private counsel by the Shoshone County Commissioners ("to perform certain legal services for said county") in *Anderson v. Shoshone County*, 6 Idaho 76 (1898). It does appear in that case, however, that the court would have been willing to give at least some cursory examination to the issue of "necessity" of hiring counsel, had that issue been raised by the litigants. The subsequent case of *Barnard v. Young*, 43 Idaho 382 (1926) indicates further that while a finding of "necessity" by the county commissioners must be made prior to the hiring of private counsel, that finding will not be closely examined by the courts, and is in fact a matter generally within the discretion of the commissioners.

Finally, the case of *Clayton v. Barnes*, 52 Idaho 418 (1932) makes it reasonably clear that private counsel must be hired by the county commissioners, and not the planning and zoning commission.

No clear answers to the question posed spring from this jumble of authority. It may be said with reasonable certainty that the county commissioners, upon

application of the planning and zoning commission, could authorize employment of counsel by the planning and zoning commission for a particular case. The employment of counsel on a retainer basis for a lengthy time period (a year or two) to handle all planning and zoning problems is arguably allowable, but not indisputably so. A resolution of the county commissioners recognizing a necessity therefor, and reciting some facts in support of the finding of necessity, would add significant authority to the employment. The employment of counsel directly by the planning and zoning commission is more questionable. Though not clearly unlawful, the balance of existing authority indicates that private counsel must be hired through the county commissioners themselves.

The second of the questions posed is susceptible to a more succinct, definite answer. The provisions of Title 50, Chapter 13, *Idaho Code*, and particularly Sections 50-1306 and 50-1308, authorize county regulation of subdivisions to the same extent as cities are authorized in Chapter 13 to regulate subdivisions. Items which may be considered in approving or disapproving the plat are indicated in Sections 50-1306 and 50-1308. Finally, Section 50-1306, *Idaho Code*, as recently amended, allows counties as well as cities to adopt their own definition of a subdivision in lieu of the definition set out in that section of the statutes.

OFFICIAL OPINION NO. 73-78

November 22, 1972

TO: Weaver Bickle
Director, Drivers' Service Division
Department of Law Enforcement

FROM: Jay F. Bates

You have requested an opinion on the correct procedure to follow when a driver agrees to and enters upon a Driver Improvement Counselling program and subsequently, for whatever reason, fails to complete the program or to abide by the terms of the agreement.

In substance, the issue is upon recommendation of the counsellor that a revocation or suspension issue summarily without according the driver a new administrative hearing.

I will assume, for purposes of answer, that the agreement which has been signed has not been modified without a driver's consent nor conditions added subsequent to the signing. If there has been an oral modification or if there have been new conditions added, the proper course is always to obtain a new signed agreement. If the contract of the driver is one which requires the imposition of additional restrictions or requirements and the driver refuses to execute a new agreement of course we would have to rely upon the contents of the original agreement to enforce compliance. Where new conditions are added and a driver does not agree, then I think that he is entitled to an administrative hearing to determine whether or not those conditions are reasonable and because of driver's

conduct. Taking the basic assumption that there is simply a clear violation of the executed agreement or, a failure to enter into the program after signing the agreement, a summary suspension or revocation is the correct procedure.

The above conclusion, that summary suspension or revocation is proper, is justified if we would look at this with a proceeding as we would any other court proceeding. For analogy, if there has been a judgment in a civil case based either upon the facts presented, or if there has been a stipulated judgment approved by the Court, then necessarily the issues which led up to that judgment are merged in the judgment and the party against whom it runs, is bound by the terms thereof. It is inconceivable that any person could expect an endless number of administrative hearings because he may become dissatisfied with the terms of an agreement which were fairly reached and which form the basis of allowing him restricted driving privileges on the highways of the state. This type of attack most surely does not obtain in the court structure, nor does it prevail in the administrative procedure structure. In the court structure if a party is dissatisfied with the judgment originally he may appeal. In an administrative proceeding (quasi court), if a party is dissatisfied with the initial decision he may seek judicial review or, through our abortion of an administrative procedure act, take an appeal. Once the factors have been determined, judgment entered and appeal time expired, then, of course, the issues become res judicata. All that is required in the administrative proceeding is that due process of law be accorded of both parties to the administrative proceeding, and once that has been done, no person has room for complaint.

Equating the driver's agreement to enter into the Driver Improvement Counselling Program with a factual determination in court, it is easy to see that the consent to enter into the program is, in fact, an admission of the facts which would justify suspending or revoking his license in the first place. By entering into the agreement the driver, in effect, is obtaining from the State of Idaho leniency, because instead of an unqualified suspension and revocation he is entitled to drive with restricted privileges during the terms of the agreement. There is no fault with this type of procedure. Equally, there is no difference, equating still further, in the agreement to enter into the driver improvement counselling program than a plea of guilty to a basic criminal charge of, say, driving while under the influence. Once the subject appears in court and has entered his plea of guilty, the conviction can be entered. And, frankly, from a plea of guilty, there is nothing to appeal from, assuming that the basic constitutional rights of the subject are protected and he made a knowledgeable plea to the charge.

If you accept the analogies above, then there is no problem in accepting the conclusion that upon a non-compliance with the terms of the agreement suspension or revocation may summarily be issued.

OFFICIAL OPINION NO. 73-79

November 27, 1972

TO: John P. Molitor
Registrar, Public Works Contractors
State License Board

FROM: James G. Reid

In your letter of November 8, 1972, you inquire as to whether or not the Grandview Water and Sewer Association of Grandview, Idaho, is a "public agency".

The Grandview Water and Sewer Association, Inc., was incorporated pursuant to Title 30, Chapter 10, *Idaho Code*, which authorizes the incorporation of non-profit cooperative associations.

The Idaho Supreme Court in construing portions of Title 30, Chapter 10, *Idaho Code*, held in the case of *Sutton v. Hunziker*, 75 Ida. 395, 272 P.2d 1012 (1954), that a non-profit cooperative corporation organized to serve electric current through its members was not a "public service" corporation and, as such, was not required to serve anybody but its members. Using the above reasoning, it would appear that if the purposes to which the Grandview Water and Sewer Association, Inc., was established would be solely for the benefit of the members of the association and not for the "public" at large, then the Grandview Water and Sewer Association could not be construed as being a "public agency".

Article II of the Articles of Incorporation of the Grandview Water and Sewer Association, Inc., set forth the nature of business and purposes of the association and, in part, reads as follows:

"... to associate its members together for their mutual benefit, and to that end to construct, maintain, and operate a *private* water and sewer system for the supplying of water for domestic, livestock and garden purposes, and for the collection, treatment and discharge of sewage for *its* members, and to engage in any activity related thereto ..." [Emphasis added.]

In the Articles of Incorporation, it can readily be seen that the purposes to which the association was created was not to benefit the public or the community at large but was meant solely for the benefit of its own membership; therefore, it is the opinion of this office that the Grandview Water and Sewer Association, Inc., is not a public agency.

OFFICIAL OPINION NO. 73-80

November 29, 1972

TO: Mary Kautz
Washington County Clerk, Auditor & Recorder

FROM: John F. Croner

This letter is in response to your telephone inquiry regarding whether this office had made any final determination regarding the construction to be given Section 31-819, *Idaho Code*. This office has received numerous inquiries regarding whether that section requires a monthly itemization of expenditures to be published in local newspapers.

After having concluded our research we have decided that the language of that section is sufficiently confusing to make us reluctant to reverse the 1959 opinion issued by this office. We, therefore, will abstain from rendering an opinion which reserves the 1959 expression of this office.

We might suggest that the county officials who are displeased with the construction given that statute in 1959 contact a given county attorney and enlist his aid in drafting an amendment which would achieve the desired end. We believe that in this way there will be certainty regarding what the law requires relative to monthly publication. The only other alternative is a lawsuit all the way to the Supreme Court to finally determine the question with statewide import. The latter would not resolve the problem, however, for at least a year.

OFFICIAL OPINION NO. 73-81

November 29, 1972

TO: D. F. Engelking
Superintendent of Public Instruction

FROM: James R. Hargis

We wish to respond to your request for our opinion on the education of the exceptional child in general and the situation in the White Pine School District in particular. As we understand the facts which give rise to your inquiry centers around Lisa Gash, the six-year-old child of Mr. and Mrs. Wayne C. Gash, Route No. 1, Troy, Idaho. Section 33-2002, *Idaho Code*, defines the exceptional child as one whose handicap is so great as to require special education and special services in order to develop the child's fullest capacity. The definition includes the child who has an auditory impairment. You have informed us that Lisa Gash has such an impairment.

Section 33-2001, *Idaho Code*, distributes responsibility for the education of the exceptional child. The school district is responsible for and shall provide for the education of those children who fall within the definition of exceptional

children and who are children of parents or guardians resident in the district or who are residents themselves. The State Board of Education shall determine eligibility criteria for the exceptional children through evaluation done by testing and other sources. The State Board is also to set standards and qualifications for teachers, programs, equipment, and physical layout used in the teaching of the exceptional child. The school district may not ignore or otherwise refuse to provide for the education of any school age child simply because the child is within the definition of the exceptional child or because the district does not have programs, teachers, equipment or other capabilities to meet the needs of that child. In short, the financial or other burdens must be borne by the district and cannot be excused simply because there is a financial or other burden. What is the extent of that financial burden is not discussed here because we do not yet see it as an issue to this opinion.

The real issue is not whether or not the school district is responsible for providing for the education of the exceptional child, but rather the issue is how the district fulfills that responsibility. Section 33-2001, *Idaho Code*, imposes the duty (responsibility) for providing the education of the exceptional child on the school district: "Each public school district is responsible for and shall provide for the education of exceptional pupils resident therein." Does this mandatory language require the school district to establish programs and educate the exceptional child? We think not. A school district may, of course, provide for the education of the exceptional child by establishing such programs to meet the needs of the exceptional child. However, we are of the opinion that a school district has alternatives open to it in order to meet the obligation imposed on it by the Legislature. Section 33-2004, *Idaho Code*, permits the trustees of a school district to contract for the education of exceptional children by another school district or by any private or public rehabilitation center, hospital, or corporation approved by the State Board. School districts may also jointly establish and support special education classes and employ itinerant personnel. Such classes and personnel must meet the same standards and qualifications established by the State Board. If a school district does not establish its own programs for the education of the exceptional child, it must choose one of the alternatives provided by law.

The choice of available alternatives, we assume, is to be made with the best interest of the exceptional child paramount. We do not presume to define or otherwise limit what elements a school district board of trustees should weigh in selecting one of the alternatives for educating the exceptional child, but the wishes of the parents of that child certainly must be considered by the trustees. In other words, the choice of alternatives should be reached by the cooperative efforts of the parents, district, and the state.

In the fact situation presented, we are of the opinion that it is the responsibility of the White Pine District to provide for the education of Lisa Gash. How that obligation is fulfilled should be a cooperative effort by the district, parents, and the state. This office cannot determine which alternative available is the best or least burdensome. But whatever alternative is chosen, it must meet the best interests of the child.

OFFICIAL OPINION NO. 73-82

No opinions assigned to this number.

OFFICIAL OPINION NO. 73-83

December 6, 1972

TO: Dr. James A. Bax
 Administrator
 Department of Environmental Protection & Health

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your letter dated the 20th day of November, 1972, in which you ask questions concerning the duties of the Secretary of the Board of Environmental Protection and Health and also the enforcement powers of the Administrator. The following is submitted in response to those questions.

It should first be noted that the Secretary of the Board is elected by the Board to serve in that capacity and has the same voting rights and responsibilities as do the other members of the Board; however, there are additional responsibilities imposed upon the Secretary which include the attestation of rules and regulations which are adopted by the Board. Section 7.8. of House Bill 610, 1972 Idaho Session Laws, provides:

“... every regulation adopted by the Board shall state the date on which it becomes effective and a copy thereof duly attested by the Secretary of the Board”

Please find attached the attestatory language which should accompany all rules and regulations adopted by the Board.

It is the opinion of the Attorney General's Office that it is not necessary to have an attestation by the Secretary before the rule or regulation is enforceable. However, I would suggest that all rules and regulations adopted by the Board since the effective date of House Bill 610 should be attested to by the Secretary at the next Board meeting.

Secondly, Section 5.3(n) of House Bill 610 provides:

“... the powers and duties of the administrator shall include, but not be limited to the following:

* * *

The enforcement of all laws, rules, regulations, codes and standards relating to environmental protection and health.”

It is the opinion of this office that such general authority gives unto you the power and the responsibility of enforcing all rules and regulations passed and adopted by the Board of Environmental Protection and Health.

Thirdly, the statutes under which we proceeded in the Caldwell Nursing Home case were Section 39-1307, 39-117, 39-119, *Idaho Code*, as transferred to the administrator and the Department of Environmental Protection and Health by Sections 5(1), 5(3)(f), and 5(3)(n), of Chapter 347, 1972 Session Laws.

OFFICIAL OPINION NO. 73-84

December 11, 1972

TO: Rudolf D. Barchas
Junior College District

FROM: John F. Croner

This will acknowledge receipt of your letter of December 6, 1972, in which you asked that this office review the procedure by which a Junior College District election was being conducted.

You related that there were two Junior College District trustee seats to be filled at an election to be held on December 19, 1972. One seat would be for a two year term occasioned by the death of a trustee and the other would be for a full six (6) year term. The clerk of the Board of Trustees arranged for the filing of candidate petitions in a manner such that there would be separate elections, for each seat, and pursuant to such arrangement five (5) candidates filed for the six (6) year seat, and two for a two (2) year seat.

In substance, your inquiry was whether, pursuant to Section 33-2106, *Idaho Code*, the trustees should run at large as opposed to the separate election scheme which was being followed.

Before turning to your specific question, we think it noteworthy to point out that the statute with which the election officials in a Junior College trustee election have to work is vague, incomplete, and definitely needs legislative attention.

In pertinent part, Section 33-2106, *Idaho Code*, provides:

"Notice of election, the conduct thereof, the qualification of electors and the canvass of returns shall be as prescribed for the election of school district trustees, and the board of trustees shall have and perform the duties therein prescribed for the board of trustees of school districts. As a condition of voting, an elector shall execute an oath before a judge or clerk of election to the effect that such elector is a school district elector and a resident of the junior college district.

The person or persons, equal in number to the number of trustees to be elected for regular or unexpired terms, receiving the largest number of votes shall be declared elected."

From a reading of the statute we cannot say that the holding of separate elections is wrong. We can see, where the statute can be read in two different

ways, and in this respect it is clear that the legislature should amend the above-quoted provision. The officials in charge of conducting a Junior College district trustee election are required to employ the provisions applicable to the general conduct of school trustee elections as far as practicable. Because the school district trustee elections are always separated by zones, as opposed to the at-large status of Junior College district elections, many questions are left unanswered, and we appreciate the problems which arise when a Junior College District election is required to be conducted in substantial conformity.

Section 33-402, *Idaho Code*, which relates to the conduct of school elections provides, in part,

“It is intended that no informalities in the conduct of school elections shall invalidate the same if the election shall have been otherwise fairly held.”

We cannot see where the holding of these two elections separately is patently unfair, nor can we see, given the ambiguity of the statute, where the election officials have acted incorrectly in any other procedural manner. Indeed, a more unfair result, both for the voters and the candidates, might be reached if the election procedures were changed at this late date.

Therefore, it is the respectful opinion of this office that the holding of separate elections for each of the two Junior College District trustee seats is according to law and said elections should be valid.

OFFICIAL OPINION NO. 73-85

December 12, 1972

TO: Glenn W. Nichols
Director, State Planning & Community Affairs

FROM: James R. Hargis

We wish to respond to your letter of December 6, 1972, wherein you asked the following question:

“Can the public members of an existing non-profit corporation organized under Title 30, Chapter 10, *Idaho Code*, simultaneously organize under the joint powers statutes set forth in Sections 67-2326 through 67-2333, *Idaho Code*?”

You have also concisely set forth in your letter the history of Ida-Ore and C.E.D.A., which are non-profit corporations, and which have as members, local units of government. Since you have set forth the factual basis for your question, we will refrain from a reiteration of those bases.

To answer your question specifically, we know of no legal impediment which would prevent or otherwise prohibit the public members from organizing and operating under the joint powers statutes where those public members are also members of a non-profit corporation. We do not view these two methods of

performing public planning as mutually exclusive. We make no comment of the advisability or effectiveness of such a procedure. However, we find nothing in the law or the charters of the organizations which precludes membership in a joint powers organization because of existing membership in a non-profit corporation.

OFFICIAL OPINION NO. 73-86

December 15, 1972

TO: Bill Webster
Liquor Dispensary

FROM: James G. Reid

You have asked whether or not it would be permissible to purchase merchandise from a state liquor store and pay for it with a check.

Idaho Code, Section 23-309, deals with this question and states:

"No vendor of any state liquor store or special distributor shall sell any alcoholic liquor except for cash."

A personal check is not considered cash and, as such, it would not be permissible to accept personal checks for the purchase of merchandise at a state liquor store. I may point out that certified checks, cashier's checks, and money orders would be considered cash and, as such, they may be used to purchase merchandise.

OFFICIAL OPINION NO. 73-87

December 15, 1972

TO: Bill Webster
Liquor Dispensary

FROM: James G. Reid

You have asked if it would be permissible for the Superintendent of the State Liquor Dispensary to purchase wine from distributors [who furnish various grocery stores and other retail outlets with wine pursuant to the Table Wine Act of 1971] for resale in a state liquor store.

Idaho Code, Section 23-203, sets forth the powers and duties of the Liquor Dispensary [with wine pursuant to the Table Wine Act of 1971] for resale in a state liquor store.

Idaho Code, Section 23-203, sets forth the powers and duties of the Liquor Dispensary and subsection (b) states:

"Traffic in Liquor. To buy, import, transport, store, sell, and deliver alcoholic liquor."

Idaho Code, Section 23-1305, deals with the authority of the State Liquor Dispensary to sell wine in liquor stores after the adoption of the County Option Kitchen and Table Wine Act and reads as follows:

“... (b) Nothing contained in this act shall prohibit the state liquor dispensary from selling wine pursuant to the Idaho liquor act in any outlet of the state liquor dispensary.”

It becomes evident from the above two statutes that the State Liquor Dispensary has what amounts to an exclusive power to sell liquor in the State of Idaho from whatever source. Because the County Option Kitchen and Table Wine Act provides an exemption from the Idaho State Liquor Dispensary to sell wine notwithstanding the provisions of the Act, it is therefore the opinion of this office that the Idaho Liquor Dispensary may purchase wine from the various distributors in the State of Idaho and resell such wine in state liquor stores.

OFFICIAL OPINION NO. 73-88

December 18, 1972

TO: Robert Hamill
Chairman, Health Facilities Authority

FROM: G. Kent Taylor

You have requested an opinion from this office regarding the following question:

“Is the Idaho Health Authority which was created by Chapter 134 of the 1972 Idaho Session Laws a ‘state agency’ or an ‘independent, autonomous body?’”

It must first be decided whether the Legislature of the State of Idaho has the power to create an autonomous body. In *State v. Dolan*, 13 Idaho 693, 92 P. 995, the Court stated that a constitution is in no manner a grant of power to the Legislature, but is a limitation placed thereon; if no interdiction of a legislative act is found in the Constitution, then it is valid. Upon examination, it is clear that the Constitution of the State of Idaho does not specifically prohibit the creation of an autonomous body by the Legislature. There being no specific limitation, it is the opinion of this office that the Legislature can, in fact, create an autonomous body whose powers would be separate and distinct from that of a “state agency”.

Having decided the Legislature has the power to create an independent, autonomous body, the question remains as to whether the Legislature in passing Chapter 134 of the 1972 Idaho Session Laws did, in fact, create such a body as opposed to a “state agency”. Section 4 of Chapter 135 defines the Idaho Health Authority as a “body politic and corporate.” Section 7 defines the powers of the Idaho Health Authority, which includes the right to sue and be sued, to have a seal, to have perpetual succession as a body politic and corporate, to lease

property, to issue bonds, to make loans, to mortgage, and do all things necessary and convenient to carry out the purposes of the act.

Article VIII, Section 1 of the *Idaho Constitution* provides for a limitation on public indebtedness and in part reads as follows:

“The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singularly or in the aggregate, . . . exceed in the aggregate sum of two million dollars . . .”

If the Idaho Health Authority is, in fact, a “state agency”, Article VIII, Section 1 of the *Idaho Constitution* would, in effect, preclude the agency from performing the exact purpose for which it was created. In defining the purpose of the Idaho Health Authority, the Legislature stated in Section 2 of Chapter 134:

“It is hereby determined and declared for the benefit of the people of the state of Idaho and the improvement of their health, welfare and living conditions, it is essential that people of this state have adequate medical care and health facilities; that it is essential that health institutions within the state be provided with appropriate additional means to assist in the development and maintenance of public health; that it is the purpose of this act to provide a measure of assistance and alternative methods to enable health institutions in the state to refund or refinance outstanding indebtedness incurred for health facilities and to provide additional facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good as more fully provided herein; and it is the intent of the legislature by the passage of this act to create a state authority to lend money to health institutions and to authorize the state authority to acquire, construct, reconstruct, repair, alter, improve, extend, own, lease and dispose of property to the end that the state authority may be able to promote the health and welfare of the people of this state and to vest such state authority with all powers to enable such state authority to accomplish such purpose; it is not intended by this act that the state authority shall itself be authorized to operate any such facility. This act shall be liberally construed to accomplish the intentions expressed herein.”

In order to effectuate the purposes of the Act, the agency would necessarily have to engage in financial agreements and, as such, incur indebtedness. If it is defined as a “state agency”, the *Constitution* of the State of Idaho would preclude any act that would place it in debt. (Article VIII, Sec. 1, *supra*).

In view of the definitions used by the Legislature in creating the Idaho Health Authority as well as the powers which have been conferred upon such an agency, it becomes clear that the Legislature intended to create an autonomous body. To have intended otherwise would place the operative sections of the Act in constitutional jeopardy. The Supreme Court of Idaho has stated that a Court is under a duty to adopt a construction of legislation that will sustain, rather than overturn it, where it is open to both constructions. *Idaho Gold Dredging Co. v. Balderstone*, 58 Idaho 692, 78 P.2d 105; *State v. Peterson*, 61 Idaho 50, 97 P.2d

603.

Based on the fact that the Legislature in creating the Idaho Health Authority clearly used language that would support the conclusion that the agency is autonomous, and further that a different construction would lend itself to constitutional challenges, it is the opinion of this office that the Legislature did, in fact, create an autonomous body in adopting Chapter 134, 1972 Idaho Session Laws.

OFFICIAL OPINION NO. 73-89

December 18, 1972

TO: H. S. Freeman
Mayor, City of Juliaette

FROM: W. Anthony Park

This will acknowledge receipt of your letter of November 22, 1972 in which you asked whether the passage of HJR 73 would have any effect upon the one hundred and ninety-five thousand dollar (\$195,000.00) Juliaetta bond issue for a new sewer and water system which was voted upon on the same day.

The facts before us are: a one hundred and ninety-five thousand dollar (\$195,000.00) bond issue election for a new sewer and water system in Juliaetta was voted upon on November 7, 1972. The canvas of votes showed that there were 116 favoring the proposal and 64 against. It was thereafter determined that the question had failed inasmuch as 2/3 of the electors had not voted affirmatively. On the same day the Idaho electorate voted affirmatively for the passage of HJR 73 which proposed to reduce the number of votes necessary to pass such questions from 2/3 to a simple majority.

The question which we must answer is whether the passage of HJR 73 had the effect of reducing the required margin to a simple majority in view of the fact that both matters were voted on in the same election.

You will find enclosed a copy of a recent opinion from this office which dealt, in part, with the question you pose. This opinion relates closely to that one, and the two should thus be read together.

In the case of *Haile vs. Foote*, 90 Idaho 261, 409 Pac. 2d 409, the Supreme Court of Idaho spoke to a similar question. In that case a candidate ran for the office of County Sheriff which, prior to the election, was an office to which a two year term applied. At that same election there was a constitutional amendment put to the people which expanded the term of office for sheriff to four years. The amendment passed. The question thus presented was whether the newly elected sheriff would serve only a two-year term or the new four-year term approved by the people. The Court held that the term would be four years. The Court reached that result thus: "As concerns the date upon which the amendment became effective there can be no question. Under Article XX, Section 1 of the *Constitution*, upon the ratification of an amendment it becomes

You related the following:

Specifically, the SOS office is making a distinction between non-profit and profit cooperatives. Profit cooperatives are classified as marketing cooperatives and are exempted from annual license fees under Section 30-602, but upon applying for reinstatement under Section 30-608, are required to pay the \$10.00 penalty for each and every year – since they allowed their license to lapse. Non-profit cooperatives are simply classified along with other non-profit organizations under Chapter 11, and are required to pay only \$20.00 in penalties, from Section 30-608, and a \$6.00 reinstatement fee for a total of \$26.00, so as not to exceed \$30.00, from Section 30-608.

Is the practice as outlined above in accordance with the Idaho Code?

In order to understand the Idaho law relating to cooperative associations, it is important to first determine whether such associations can be classified generally as corporations. The courts in cases which discuss the nature of cooperatives, with few exceptions, view them as a kind of corporation, and since a cooperative association organized in corporate form is basically a corporation, the general laws relating to corporations apply also to cooperatives. (*Sagness vs. Farmers Co-op. Creamery Co.*, 67 SD 379, 293 N.W. 365; *Schoenburg vs. Klapperich*, 239 Wis. 144, 300 N.W. 237).

The following provision indicates that cooperatives should generally be treated as corporations under the provisions of Title 30, *Idaho Code*, unless expressly provided otherwise.

30-1002. Application of general corporation law. – Every such cooperative association shall be governed by the laws of this state relating to the organization and conduct of private corporations, except as are inconsistent with the provisions of this Chapter.

Therefore, if the language of any provision of Title 30, *Idaho Code*, does not include mention of “Non-profit Cooperative Associations” then such reference to corporations generally should include within its purview an applicability to “Non-profit Cooperative Associations” relative to fee assessment determinations.

Section 30-601, *Idaho Code*, therefore should be read to require an annual statement to be filed by non-profit cooperative associations.

Section 30-602, *Idaho Code*, therefore should be read to require an annual license to be issued to non-profit cooperative associations, but that these should not be required to pay an annual license tax. This section expressly exempts an annual license tax assessment of those “corporations which are not organized for pecuniary profit. . . .”

Section 30-604, *Idaho Code*, sets forth the means by which a corporation may forfeit its charter and applies to all corporations including corporations not organized for pecuniary profit which would include non-profit cooperative associations. A non-profit cooperative association can be declared forfeited if it fails to file an annual statement pursuant to Section 30-601, *Idaho Code*, though no forfeiture can result by reason of its failure to pay an annual license fee

a part of the *Constitution*."

The next question which must be answered is whether ratification of a constitutional amendment occurs on the day of the election.

The California Supreme Court construed the language of California's Constitution which embodies nearly identical language to the last phrase of Section one of Article 20 of the *Constitution*, of the State of Idaho. The Court in *Johnston vs. Wolf*, 280 Cal. 286, 289, 280 P. 980, stated at page 981:

In our discussion of the problem we have assumed that the constitutional amendment embodying the changes we have mentioned went into effect on November 6, 1928, the date when it was ratified by the people. That it may not be thought we have overlooked this feature of the case, we now assert that to be the law. The closing sentence of section 1 of article 18 of the Constitution, in referring to amendments submitted by the Legislature, says: "If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution." In *Livermore v. Waite*, 102 Cal. 113, 122, 36 P. 424, 427 (25 L.R.A. 312), it is said that it is beyond the power of the Legislature to submit an amendment "that will not, upon its adoption by the people, become an effective part of the Constitution, nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition." And in *Kingsbury v. Nye*, 9 Cal. App. 574, 99 P. 985, the court aptly states: "It is beyond dispute that the amendment went into effect upon its adoption and ratification." A similarly succinct statement is found in *San Francisco v. Pac. Tel. & Teleg. Co.*, 166 Cal. 244-252, 135 P. 971, 975, as follows: "The amendment, which is by its own terms *** self-executing, was adopted at an election held on November 8, 1910, and became a part of the organic law on that date."

Thus it appears to us that on November 7, 1972 a simple majority was all that was necessary in order for a city sewer and water bond issue question to pass. November 7, 1972 was the day when the election officials and canvassers had to determine whether the bond election held on that day had passed, and the law which they were required to follow was the new constitutional amendment which allowed for passage of the measure with the assent of a simple majority of electors.

Therefore, it is the respectful opinion of this office that the one hundred and ninety-five thousand dollar (\$195,000.00) sewer and water bond election question voted upon on November 7, 1972 in Juliaetta was passed and should be put into effect.

OFFICIAL OPINION NO. 73-90

December 18, 1972

TO: Monroe Gollaher
Department of Insurance

FROM: Stewart A. Morris

You have inquired whether or not one corporate broker's bond in the amount of \$10,000.00 would be sufficient to cover all licensed brokers exercising the licensing privileges of the corporate agency under Section 41-1054, *Idaho Code* (effective January 1, 1973). Said Section provides in pertinent part as follows:

"Prior to issuance of license as broker, every person who has otherwise qualified for such license shall file with the commissioner and thereafter maintain in force while so licensed a bond in favor of the state of Idaho executed by an authorized surety insurer."

In our opinion, the intent of the above provision is to require "every" licensed broker, in addition to each licensed corporate broker, to file a bond. There is nothing to indicate that it would be permissible for a number of brokers to combine and share a bond.

For future reference, I note that your letter of inquiry has attached to it a letter dated January 13, 1972, to former Commissioner Blaine from Robert D. Williams, an attorney in Seattle, Washington. Therein, Mr. Williams concluded that only one appointment "and therefore one appointment fee" by an insurer is necessary to continue the license of a firm or corporate entity, regardless of the number of individuals named or registered therein. From this, you have suggested that the situation involving broker's bonds would be analogous. In this regard, I can only say that I disagree with Mr. Williams' conclusions. Sections 41-1030 and 41-1031, indicate that it is the individual licensees, not the agency, who are appointed. Further, Section 41-401 (41)(iii) and (iv) would indicate that an appointment fee for each agent appointed, rather than one fee for the agency regardless of how many individuals are licensed therein, would be due from the appointing insurer.

OFFICIAL OPINION NO. 73-91

December 19, 1972

TO: James A. Defenbach
Legislative Auditor

FROM: John F. Croner

This will acknowledge receipt of your letter of December 18, 1972 in which you requested that this office review a practice of the Office of Secretary of State relating to corporation filings for the purpose of determining whether certain fee assessments were levied and collected pursuant to law.

because such are exempt from payment thereof.

Section 30-608, *Idaho Code*, provides:

30-608. Reinstatement of corporation. — Any corporation which failed to pay the license tax and penalty required by this chapter may pay all the said license taxes and penalties prescribed by section 30-603, and the license taxes and penalties that would have accrued, if such corporation had not forfeited its charter or right to do business, and any such corporation making such payment shall be relieved from the forfeiture prescribed by this chapter, and all persons exercising the powers of any such corporation, making such payment, shall be relieved from the provisions of section 30-610; provided, that any of the corporations, enumerated in section 30-602, which are exempted by that section from the payment of an annual license tax, may be relieved from the forfeiture of their charters upon paying to the secretary of state a penalty of ten dollars (\$10.00) for each year, or part thereof, that their charters have been forfeited; provided, however, in no event shall said penalty exceed the total sum of thirty dollars (\$30.00). The secretary of state shall issue to every corporation so reinstated a certificate showing such reinstatement, and the date thereof, and any such corporation shall file a copy of such certificate of reinstatement with the county recorder of each county in this state in which it shall purchase, locate or hold property in the manner required by law by filing a copy of the articles of incorporation of such corporation; and no such corporation shall maintain or defend any action or proceeding in relation to property in any such county until a copy of such certificate of reinstatement is so filed in such county: provided, the rehabilitation of a corporation under the provisions of this chapter shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture: provided, that in case the name of any corporation which has suffered the forfeiture prescribed by this chapter has been adopted by any other corporation since the date of said forfeiture, or a name which so closely resembles the name of such corporation as will tend to deceive, then said corporation, having suffered said forfeiture, shall be relieved therefrom, pursuant to the terms of this section of this chapter, only upon the adoption by said corporation seeking reinstatement of a new name, and in such case, nothing in this chapter contained shall be construed as permitting such corporation to be revived, or carry on any business, under its former name, and such corporation shall have the right to use its former name or take such new name only upon filing an application therefor with the secretary of state, and upon the issuing of a certificate to such corporation by the secretary of state, setting forth the right of such corporation to take such new name, or use its former name, as the case may be.

From a reading of the above provision, it is apparent to me that non-profit cooperative associations may have their forfeited charters reinstated upon payment of ten (\$10.00) dollars per year for each year or part of a year that the association was delinquent, but that if such were delinquent for more than three

years, then the maximum penalty could not exceed thirty (\$30.00) dollars.

The Office of Secretary of State pursuant to Section 67-910, *Idaho Code*, has been assessing a fee of six (\$6.00) dollars for a "certificate of reinstatement". This charge is not part of the maximum allowable penalty, and should, therefore, not be computed in determining the amount to be charged as a penalty for reinstatement of non-profit cooperative associations. In other words, a non-profit cooperative association could be charged as much as thirty-six (\$36.00) dollars to satisfy its reinstatement requirements.

Section 22-2602, *Idaho Code*, provides in part, "Associations organized hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves . . ."

Section 22-2626, *Idaho Code*, provides:

22-2626. Application of general corporation laws. — The provisions of the general corporation laws of this state, and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this chapter.

Section 22-2627, *Idaho Code*, provides:

22-2627. Annual license fees. — Each association organized hereunder shall pay an annual license fee of ten dollars (\$10.00), but shall be exempt from all franchises or license taxes.

A reading of the above statutes yields the conclusion that a cooperative marketing association is a non-profit cooperative association, which unlike those organized pursuant to Chapter 10 of Title 30, *Idaho Code*, is required to pay an annual license fee (or tax) of ten dollars (\$10.00).

The question which immediately presents itself is whether, upon a forfeiture a cooperative marketing association may avail itself to the thirty dollars (\$30.00) maximum penalty assessment under Section 30-608, *Idaho Code*, (supra) or whether it must stand in the shoes of a corporation which must pay all delinquent annual fees as a precondition to reinstatement.

Although Title 30, *Idaho Code*, does not mention cooperative marketing associations in its fee provisions, forfeiture provisions, and reinstatement provisions, it seems apparent to me that the legislature, when it provided for a fee for cooperative marketing associations, intended that these be made applicable so far as practicable and consistent with Title 30, *Idaho Code* provision. Section 22-2626, *Idaho Code*, (supra) seems to indicate this. Thus I must conclude that notwithstanding the fact that a cooperative marketing association is a non-profit cooperative association, it must nevertheless be treated as an ordinary profit-making corporation for the purpose of determining the amount payable for delinquent fees, penalty, and reinstatement.

Therefore, the current practice of charging ten dollars (\$10.00) per year for each delinquent year subsequent to forfeiture and prior to reinstatement is, at least arguably, not an improper practice. I think it important to note the obvious

at this point, i.e., the fee provisions relative to cooperative marketing associations should be included by legislation in the provisions of Title 30, *Idaho Code*, so that the Corporation Clerk can clearly perform pursuant to law.

In conclusion the Office of Secretary of State is, in my opinion, assessing the proper reinstatement fee, for cooperative marketing associations, but is not charging the maximum allowable for non-profit cooperative associations.

OFFICIAL OPINION NO. 73-92

December 20, 1972

TO: Carl Warner
Deputy State Superintendent
Department of Education

FROM: James R. Hargis

We wish to respond to your inquiry concerning the use of school district funds to build or assist in the building of a county road, where the completion of the road would, among other considerations, assist the transportation program of the district. Apparently the completion of the road would reduce the mileage requirements of the district to transport students of the district.

A school district may provide for the transportation of the students of the district and support that transportation program from the maintenance and operation fund of the district. Purchase of buses may be from bonding proceeds or the plant facilities fund. However, we can find no authority for the expenditure of district funds for road building purposes, even though the construction of the road will undoubtedly benefit the school's transportation program. We would strongly advise against the expenditure of school funds from any source for road construction purposes.

OFFICIAL OPINION NO. 73-93

December 20, 1972

TO: Donald G. Stone, Captain, USAF
Assistant Staff Judge Advocate
Headquarters 366th Combat Support Group (TAC)
Mountain Home Air Force Base

FROM: J. Dennis Williams

It appears from an analysis of Sections 19-2601 and 19-2604, *Idaho Code*, and Idaho case law concerning withheld judgments that such dispositions are not "tantamount to a finding of guilt."

Section 19-2601(3), *Idaho Code*, reads as follows:

"Whenever any person shall have been convicted, or enter a plea of guilty, in any district court of the state of Idaho, of or to any crime against the laws of the state, except those of treason or murder, the court in its discretion may:

"3. Withhold judgment on such terms and for such time as it may prescribe and may place the defendant on probation; . . ."

This section gives the court power to withhold judgment. Section 19-2604(1), *Idaho Code*, states the disposition of a successful probationer and the charge when judgment has been withheld.

"19-2604. DISCHARGE OF DEFENDANT – AMENDMENT OF JUDGMENT. – 1. If sentence has been imposed but suspended, or if sentence has been withheld, upon application of the defendant and upon satisfactory showing that the defendant has at all times complied with the terms and conditions upon which he was placed on probation, the court may if convinced by the showing made that there is no longer cause for continuing the period of probation, and if it be compatible with the public interest, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant; . . . The final dismissal of the case as herein provided shall have the effect of restoring the defendant to his civil rights."

The Idaho case law interpreting these two sections has held that if the accused obtains a withheld judgment and successfully completes probation, the case is dismissed and the guilty plea or conviction is set aside. Thus it is indicated that the withheld judgment is not tantamount to a finding of guilt.

Ex parte Medley, 73 Idaho 474, 253 P.2d 794 (1953) is the first case that dealt expressly on withheld judgments and set the precedents later followed. The defendant was charged with grand larceny and entered a plea of guilty at arraignment. "At that time, upon application of the petitioner, the court, without making any adjudication of guilt, referred the case to the Board of Correction for pre-sentence investigation and report." (73 Idaho 477.) Considering the report, the court entered its order withholding judgment and placed defendant on probation with the Board of Correction. The order went on to say:

"[U]pon expiration of the period of suspension of judgment as fixed, or the earlier termination thereof, and upon written showing by or on behalf of petitioner that he had fully complied with the terms of probation, the action should be dismissed." (73 Idaho at 477.)

Defendant, however, failed to comply with his probation and the court terminated the order withholding judgment and issued a bench warrant for defendant's arrest. The day after arrest the defendant appeared in court with his attorney, "at which time the court openly reviewed and set forth all the proceedings originally taken, commencing with the arraignment." (73 Idaho 477.) Defendant admitted the probation violations, and:

" . . . the court pronounced judgment, adjudging the petitioner guilty of

the crime of grand larceny, and sentenced him to a term of not more than 14 years in the state prison of the State of Idaho." (*Medley, supra*, at 478.)

In the habeas corpus action by defendant, which brought this matter before the Idaho court, he alleged the trial court had originally been without jurisdiction to put him on probation following a plea of guilty without first adjudicating such guilt. The Idaho court disposed of this contention as follows:

"The contention that the court was without jurisdiction to place petitioner on probation following a plea of guilty without first adjudicating such guilt is without merit. The statute, Sec. 19-2601, I.C., as amended, S.L. 1949, Ch. 117, expressly provides that where a person enters the plea of guilty to certain crimes including the one involved herein, the court may, in its discretion, withhold judgment and put the defendant on probation. This procedure was followed by the court. The statute does not require that the court must first adjudicate the guilt of defendant. The obvious and commendable objective of the Act which seeks a proper case to avoid the stigma of a judgment of conviction would be in a major part defeated if the contention of petitioner is accepted. To withhold judgment after a plea of guilty protects the defendant at that time against the stigma of a conviction which may be forever avoided should the defendant conform to its terms and conditions. This creates, and rightfully so, a hope in the heart of the accused that he may ultimately be released under an order of probation without the stigma of a judgment or conviction." (*Ex parte Medley, supra*, at 479.)

The Idaho court has thus determined that under a withheld judgment there is no adjudication of guilt unless the accused violates his probation and is brought again before the court. Thus, the withheld judgment cannot be considered "tantamount to a finding of guilt." For later cases dealing with withheld judgments and following the decision of *Ex parte Medley, supra*, see *Franklin v. State*, 87 Idaho 291, 392 P.2d 332 (1964); *State v. Ballard*, 93 Idaho 355, 461 P.2d 250 (1969), and the cases cited therein.

In reference specifically to drugs and narcotics, the *Idaho Code* states that a first time offender may, upon plea of guilt or conviction, be placed on probation by the court without entering judgment of guilt. Section 37-2738, *Idaho Code*, reads as follows:

"37-2738. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE. — Whenever any person who has not previously been convicted of any offense under this act or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 37-2732(c), Idaho Code, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment

of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualification or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 37-2739, Idaho Code.”

This indicates that the Idaho Legislature has seen fit that a withheld judgment type disposition is not a finding of guilt and not “tantamount to a finding of guilt”.

OFFICIAL OPINION NO. 73-94

December 21, 1972

TO: Richard L. Cade
Director, Liquor Law Enforcement Division
Department of Law Enforcement

FROM: James W. Blaine

In regard to your question as to whether or not punch boards being distributed within the State of Idaho by More Sales Company of Chicago, Illinois is legal, I assume these boards are the regular type punch boards containing holes in which pieces of paper are inserted containing numbers which require the player to pay a certain sum of money to play. The winner, upon punching a pre-determined winning number unknown to him at the time of purchase, receives a clock as a prize. The operator of the board receives a similar gift.

You have asked this office for an opinion whether or not this particular device violates Chapter 38 of Title 18, *Idaho Code*, covering gambling, and Chapter 49 of Title 18, *Idaho Code*, covering lotteries.

The *Constitution* of the State of Idaho prohibits the legislature from enacting any law authorizing a lottery and the laws of Idaho prohibit gambling and operating lotteries. The Supreme Court of the State of Idaho has held on numerous occasions that where there exists consideration, prize and chance, and where chance predominates over skill, such devices either violate the gambling law or the lottery law of the State of Idaho.

In the case of *State vs. Village of Garden City*, 74 Idaho 513, 520, Mr. Justice Keeton said:

“All lotteries are gambling. To constitute a lottery, as distinguished from other methods or forms of gambling, it is generally held there are three essential elements, namely, chance, consideration and prize. When these three elements are present, the scheme is a lottery. 54 C.J.S., Lotteries, Sec. 2(a), p. 845; 34 Am. Jur. 647, Sec. 3.”

Further, the legislature, under the Revenue and Taxation Law, Section

63-2901, *Idaho Code*, has defined a punch board under Subsection (b) as follows:

“(b) A ‘punchboard,’ within the meaning of this act, shall be a board containing a number of holes or receptacles of uniform size in which are placed slips of paper or other substance, in a capsule or otherwise, upon which is written or printed token numbers, figures, insignia, characters, symbols, letters or words, or combinations thereof, which may be punched or drawn from said hole or receptacle by any person upon payment of a consideration, and who shall obtain an award of merchandise or money only upon the chance of drawing the token number, figure, insignia, character, symbol, letter or word, or combination thereof, which has previously been designated to pay a prize.”

It is therefore the opinion of this office that such device as you have described to me which is being imported into the State of Idaho by More Sales Company, violates both the gambling and lottery sections of the statutes, are illegal and may not be operated within the State of Idaho.

OFFICIAL OPINION NO. 73-95

December 26, 1972

TO: Max Boesiger
Department of Public Works

FROM: James G. Reid

In your letter of November 28, 1972, you ask whether the Permanent Building Fund Advisory Council and the Department of Public Works could enter into a lease agreement with the Idaho Housing Agency or a subsidiary thereof to lease a building on state owned property.

As the Idaho Housing Agency is an independent, autonomous body (see Attorney General's opinion dated September 20, 1972), the relationship of an agency of the State of Idaho as lessee to the Idaho Housing Agency as lessor is no different than if the state agency were to lease a building from a private individual. The Idaho Housing Agency is perhaps in a unique position, different from the lessors, in that it may be able to issue tax exempt bonds to finance the construction of the leased building, as opposed to obtaining private financing.

In reviewing the various provisions of the *Idaho Code* dealing with the Department of Public Works, there is no specific prohibition relating to either the ability of the Department of Public Works or the Permanent Building Fund Advisory Council to lease office space. However, Section 67-5733, *Idaho Code*, deals with the leasing arrangements for state office space and reads as follows:

“Leasing of office space for state use. — The division of building services shall negotiate for, approve, and make any and all lease or rental agreements for office space to be used by the various state departments, agencies and institutions in the state of Idaho.”

The above section of the *Idaho Code* clearly establishes the right of any state agency to lease office space so long as the division of Building Services grants its approval. Therefore, it is the opinion of this office that the Permanent Building Fund Advisory Council and Department of Public Works can lease office space from the Idaho Housing Agency subject, of course, to prior approval by the Division of Building Services of any such lease.

OFFICIAL OPINION NO. 73-96

December 26, 1972

TO: Max Boesiger
Department of Public Works

FROM: James G. Reid

In your letter of November 28, you ask whether or not the Legislature of the State of Idaho may create a separate state agency whose single purpose would be to finance the building needs for the State of Idaho.

It is the opinion of this office that such an agency could be created; however, the legislation would have to be drafted to avoid the following pitfalls:

1. Article VIII, Section 1 of the *Idaho Constitution* prohibits the State of Idaho from incurring any indebtedness exceeding the aggregate sum of \$2,000,000 unless such indebtedness can be repaid within a period of one year. This prohibition, of course, also applies to the various state agencies in the State of Idaho. Therefore, the legislation, in order to avoid the constitutional debt limitation, would have to establish such a financing agency as independent and autonomous from the State. In 1972, the legislature of the State of Idaho did, in fact, create two such autonomous bodies – the Idaho Housing Agency, and the Idaho Health Authority;

2. The legislation would also have to be drafted so as to exclude the Legislature of the State of Idaho from any "moral obligation" to repay indebtedness accrued by the agency; this is necessary in order to further avoid any constitutional debt problems.

3. The Legislature, in creating both the Idaho Housing Agency and the Idaho Health Authority, emphatically stated that both agencies were created as a result of an overwhelming public need for such services. There is little question that the Idaho Housing Agency and the Idaho Health Authority were created to provide a "public purpose" which is essential for all legislation of this nature. It would, therefore, be incumbent upon the Legislature of the State of Idaho to officially recognize the public need for state office buildings and, as such, declare it to be a "public purpose" to construct state office buildings. This office, of course, expresses no opinion as to whether a significant public purpose is present here, that being a legislative prerogative.

In regard to the structure of the proposed building agency, I would refer you to *Idaho Code*, Section 67-6201 through 67-6204, establishing and providing for the Idaho Housing Agency. The requirements should be quite similar.

OFFICIAL OPINION NO. 73-97

December 27, 1972

TO: Max Boesiger
Department of Public Works

FROM: James G. Reid

In your letter of November 28, 1972, you ask if Chapter 18, Second Ordinary Session, 1966 Legislature, which authorized the Permanent Building Fund Advisory Council to enter into an agreement with competent parties to provide necessary office space for various state agencies, would still be applicable at this time.

Notwithstanding possible constitutional questions, it is clear that the legislative intent in passing Chapter 18 of the 1966 Session Laws was to authorize the Permanent Building Fund Advisory Council to provide office space in a specific building. Such office space was subsequently acquired utilizing a method other than that provided for in Chapter 18 of the 1966 Session Laws. In providing office space by virtue of alternate means, the reason for the passage of Chapter 18 of the 1966 Session Laws no longer existed.

Further, in 1968, the Legislature enacted Section 67-5733, *Idaho Code*, which authorized the Division of Building Services to negotiate for, approve, and make any lease agreements on behalf of various state agencies for office space. The enactment of 67-5733 clearly indicates that the Legislature only intended that Chapter 18 of the 1966 Session Laws should apply to the specific need contemplated at that time, and should not be used as an authorization for future building purposes.

OFFICIAL OPINION NO. 73-98

December 27, 1972

TO: Robert R. Lee
Director, Water Resource Board

FROM: Nathan W. Higer

You have requested an opinion regarding the priority which would attach to "salvaged" or "conserved" water. In addition, you have asked whether the "salvaged" water could be sold and what steps are necessary to reflect that change in ownership.

We are assuming, at all times, that the water "salvaged" is not returning to the stream by subflow and thereby becoming a part of the natural flow which might have been appropriated. Thus, at no time does the question of interference with a prior right become a problem in this discussion.

Idaho has long had the policy that, in absence of detriment to prior users, the person who salvages water and/or conserves it, is entitled to the use of the water

so salvaged or conserved. *Reno v. Richards*, 32 Idaho 1 (1918); *Hill v. Green*, 47 Idaho 157 (1928).

The question is now raised as to the priority date which would attach to the water so "conserved" or "salvaged". This question was partially answered in *Reno*, supra, where the Court stated that there was no incentive for the accomplishment of a saving of water unless the person who having saved the same should reap the benefit of their efforts, and that the amount so saved should inure to their benefit.

If the water saved does not retain the same priority as it had before the saving, it is doubtful that "the person who having saved the same" would "reap the benefit of their efforts". It is therefore reasonable and logical that the priority date of the water saved would have the same priority as that of the water right from which it was saved. This is supported by the decision of the Supreme Court in *Basinger v. Taylor*, 36 Idaho 591 (1922). The Plaintiff had built a seven mile pipeline and as a result effected a 10% saving of water which would have otherwise been lost in the stream. The water was not reaching any lower diversions and therefore no prior claim to it. The issue was the priority date. The salvagor had an 1888 right and there were 1909 rights that intervened between the salvagor's initial right and the salvage work done in 1912. The Court held regarding the 10% saving:

"To that extent it has materially augmented the amount of water available from the stream for beneficial use and should have a prior right to its use."

Thus, the Court recognized that the salvagor should reap the benefit of his labor and that a priority date equal to that of the right from which the water was saved was necessary to insure that he received those benefits.

It is therefore my opinion that the water saved must have the same priority date as the water right from which it was salvaged. To hold otherwise would eliminate all incentive to make improvements that conserve water, which would be contrary to expressed policy of law.

SALE OF SALVAGED WATER

The question of the sale of the water saved is a much tougher issue. We must start from the premise that one only has a water right to the extent that he has and can beneficially apply water to beneficial use. In other words, is the carrier water reasonably necessary to get water to the fields being beneficially used and therefore part of the primary right? If it is not, it is not subject to sale by the water user. This can, however, be answered in the affirmative. The carrier water may not be used in the actual growing of crops but it is necessary to get the water to the field which is used to grow the crop. It is thus serving a significant beneficial purpose and is a part of the water users "water right". The user has a right to the use of the carrier water.

It has long been the holding in this State that a water right is real property and may be sold or transferred separate and apart from the land on which it is used and may be made appurtenant to other lands so long as such transfer does not injure other appropriators.

Included within the ownership of any property right is the power to sell and/or transfer the whole or any part thereof to another. Therefore, I am convinced that to the extent a "salvage" or "conservation" of water which is being *beneficially* used, can be made, the right to use that water can be sold.

The sale of the water right can be accomplished in any way satisfactory to both parties. The user may reach an agreement with the buyer to have the buyer pay all or part of the cost of lining his ditches and in return receive the right to the use of the water *saved*. Of course, the user could line his ditches himself and then sell the right to the use of salvaged water to a buyer for whatever price agreed upon. After the sale is completed, there are several necessary steps to be taken.

I hasten to emphasize that I am only referring to a "salvage" or "conservation" of water which is or has been beneficially used. This opinion does not apply to water which may be part of a decree or use "right" that has never been or cannot be beneficially used on lands to which it is appurtenant even though such water may have actually been diverted. In other words, there must be an *actual* savings or conservation of water being beneficially used.

WHAT PROCEDURE MUST BE FOLLOWED

If a sale is completed and a definite amount of water has been identified for transfer, the buyer must comply with I.C. §42-222. The pertinent portion states:

"Any person, *entitled* to the use of water whether represented by license . . ., by claims to water rights by reason of diversion and application to a beneficial use . . ., or by decree of the Court, who shall desire to change the point of diversion or place of use of all or *part* of the water, under the right, *shall* first make application to the Department of Water Administration for approval of such change. . ." [Emphasis added.]

Along with the application, it will be necessary to supply the original contract of sale, or assignment of a part of the water right. This is to prove that the person requesting the transfer is entitled to the use of the water.

Even though the contract is signed by the parties, the Department of Water Administration must follow the statutory procedure and be satisfied that no other water right is injured by the transfer and that the change does not constitute an enlargement in use of the original right. (42-222) If the change causes damage to another right by reason of loss of return flow or enlargement of the use, the transfer would have to be denied. Otherwise, it would be approved. It would therefore seem appropriate and advisable, but not required, for anyone contemplating such a venture, to apply for the change prior to any work actually being done.

CONCLUSION

Since the most efficient use of water is favored by the law, any person effecting an actual conservation of water would be entitled to its use. The salvaged water would have a priority equal to the right from which it was salvaged. Since a water right is a valuable property right, this "salvaged" water could be sold and transferred to other lands as set forth in §42-222.

OFFICIAL OPINION NO. 73-99

January 2, 1973

TO: Stephen C. Batt
Payette County Prosecuting Attorney

FROM: G. Kent Taylor

Your December 19, 1972 response concerning prescription drug costs for indigent patients as it affects nursing home residents in Payette County was referred to us by Paul J. Buser.

As you may know by this time, the Payette County Commissioners did send James Allen, Administrator for the Casa Loma Convalescent Center, a check covering all of the pharmaceuticals used by the Social and Rehabilitation Services (SRS) county patients this month. So, for the time being with respect to Payette County, the issue might be considered moot. However, it would be good to discuss the problem a bit more since it may arise again in Payette and is as well a constant concern in the six other counties included in the Office on Aging's Nursing Home Ombudsman Program.

The Director of the Ombudsman Project is formally attached to the Idaho Attorney General. In that dual capacity we rendered the December 7, 1972 opinion to the effect that it is "the duty of commissioners in all counties, including Payette County, to care for the indigent poor and to meet the necessary expenses for that care." Before sending that letter to the Payette County Commissioners, Attorney General Park concurred in the opinion.

The opinion speaks for itself, but I reiterate that it speaks in mandatory terms:

Section 31-3302. County Charges enumerated. — The following are county charges:

...
The necessary expenses incurred in the support of county hospitals, and the indigent sick and the otherwise dependent poor, *whose support is chargeable to the county.* [Emphasis added.]

Again, in Chapter 35, Title 31 — Hospitals for the Indigent Sick — financial and other assistance to hospitals caring for the indigent sick and dependent poor "shall be construed to include nursing homes." 31-3501(2), *Idaho Code*.

Even if the power of the county commissioners to levy an ad valorem tax for the benefit of dependent poor and indigent sick is a discretionary power, the discretion can be exercised only so far because chapter 35 of the same title mandates that the county support the indigent sick and dependent poor. In other words, the better part of discretion is meeting minimum needs, including drug costs.

We do realize that the set county limitations for prescription drug costs do not apply in every instance, but that is not the point of the problem. Though the Department of Social and Rehabilitation Services is providing some assistance

for drug costs, it cannot provide all because of its legislatively mandated budget. In the same vein the statutes are clear that the county is responsible for further assisting the indigent sick and dependent poor when all costs are not met by the state agency. Otherwise, the nursing homes themselves absorb a financial loss and they become the "parens patriae" of the patients.

The Idaho poor laws do not state that the necessary expenses for the care of the indigent sick and dependent poor is chargeable to private businesses.

If the nursing homes must absorb the loss, this could easily result in a poorer standard of care for the entire patient population (including those not on public assistance) since less money would be used by the homes for other necessary services. Also, the already high costs of nursing home care will increase for private patients and residents. This increase, in turn, would no doubt cause some senior citizens who are on fixed incomes to seek additional financial assistance from the state. The problem will then have come full circle. This is what we want to prevent at the outset.

We realize that counties can levy only so much a mill on the tax dollar in order to care for the county charges. Until that maximum is met, however, all counties should continue to supplement SRS funds for the care of indigent poor who require more than the normal amount of care and incur more expenses.

OFFICIAL OPINION NO. 73-100

January 2, 1973

TO: Huey R. Reed
Chief, Health Facilities Construction Section
Department of Environmental Protection & Health

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your letter requesting our opinion as to whether or not recent changes in Title 39, Chapter 1, and Title 39, Chapter 14, of the *Idaho Code*, have substantially affected or reduced the authority of the Department of Environmental Protection and Health to receive federal grants relative to the Hill-Burton Program in Idaho.

The authority under which the Department of Environmental Protection and Health, or as it was previously called, "The Department of Health" before the passage of House Bill 610, administered the Hill-Burton program under the provisions of Title 39, Chapters 1 and 14. Recent changes in those chapters of the Idaho Code do not substantially change the legal authority or the substantive provisions under which the program had been previously administered. The Legislature in its foresight, was very careful to include in House Bill 610 the following language:

"All of the powers and duties of the Department of Public Health, the Department of Health, the Board of Health, and the Interpollution Control Commission, are hereby transferred to the administrator of the Department of Environmental Protection and Health, . . ."

The opinion of the Attorney General in this respect is that all authority heretofore vested in any of the included departments or persons is now vested in the Administrator of the Department of Environmental Protection and Health. Additionally, the Administrator now has broader powers over the administration of the program.

In conclusion, it is the opinion of the Office of the Attorney General of the State of Idaho that in no way has the underlying authority of the Department of Environmental Protection and Health been diluted or usurped as it relates to the administration of the Hill-Burton Program for the State of Idaho.

OFFICIAL OPINION NO. 73-101

January 3, 1973

TO: John P. Molitor
Public Works Contractors
State License Board

FROM: James G. Reid

In your letter of December 11, 1972, you ask whether the Grandview Water and Sewer Association is excluded from the definition of public bodies authorized to award contracts for the construction, reconstruction, or repair of public work within the meaning of Section 54-1901(b), *Idaho Code*.

In our opinion dated November 27, 1972, it was determined that the Grandview Water and Sewer Association was not a "public agency". As such, it would also be the opinion of this office that the Grandview Water and Sewer Association would not be a public body within the meaning of Section 54-1901(b), *Idaho Code*.

OFFICIAL OPINION NO. 73-102

January 4, 1973

TO: W. D. McFarland
Legal Counsel
Coeur d'Alene School District

FROM: James R. Hargis

We wish to acknowledge our recent telephone conversation and receipt of your letter of December 27, 1972.

From reading the question presented at the 1968 election to the patrons of your district, we must conclude that the funds raised by the imposition of the levy could be expended for any one or all of the following:

1. To acquire land;
2. To construct, furnish and equip the following additional elementary

classrooms: Borah, 2 rooms; Bryan, 6 rooms; Harding area, 6 to 12 rooms;

3. To add to, remodel or repair existing buildings after a public hearing;
4. To purchase or replace school buses.

We agree with you that the expenditure of funds from the plant facility levy would be permissible after a public hearing by virtue of the authority granted by the patrons in purpose 3 above, even though such remodeling and additions do not coincide exactly with purpose 2. The changing needs since 1968 would account for the change in plans. The District must, however, conduct a public hearing so that the patrons may be informed of the purpose for which the moneys are to be expended and to receive from the patrons the ideas and information they may have.

OFFICIAL OPINION NO. 73-103

January 4, 1973

TO: Albert H. Vaughn
Superintendent
Meadows Valley School District No. 11

FROM: James R. Hargis

We wish to respond to your request for our opinion on the following question:

“Does a telegram from Western Union, received over the telephone and transcribed word for word by the Clerk of the Board of Trustees and received before the bid closing time, constitute a legal sealed bid?”

You have informed us that the Clerk, after transcribing the telephone message from Western Union verbatim, sealed the transcription in an envelope and presented it, along with all other bids, to the Trustees at bid opening time where it was read and considered with all other sealed bids.

We have closely examined your Notice of Sale and Call for Bids. We are of the opinion that it conforms to the bidding and sale procedural requirements set forth in Section 33-601, *Idaho Code*. Therefore, the question which must be answered is whether or not the bid submitted through Western Union in the manner described sufficiently complies with your own notice. If it does, then the oral bid entered after sealed bids were opened, read, and considered would be the highest binding bid. If the bid did not comply with your own Notice, then the Board of Trustees could not consider it and must make its decision without reference to the bid.

We are of the opinion that the bid submitted through Western Union and transcribed by the Clerk of the District sufficiently complied with the Notice so that the Board could consider that bid.

The Notice required that offers for the purchase of the building and site were to be by sealed bids filed with the Clerk of the District. The Board of Trustees

was to open, read, and consider each bid. The bid transcribed by the Clerk was in fact sealed and submitted along with the others to the Board of Trustees by the Clerk. The only question, then, is what effect did the action of the Clerk have on the entire procedure? There is nothing in the Notice which would indicate that a telegraphic bid would not be considered by the Board had the telegram itself arrived prior to the time set for closing the bids. Had the telegram been sent to a third party who performed the same task as the Clerk and delivered the sealed bid to the Clerk, then in all probability the issues raised by your question would not have been presented. We must consider how Western Union operates. When a telegraphic message is received by a local Western Union office, personnel therein usually call by telephone the addressee and orally communicate the contents of the message. This, in turn, is followed by the telegram itself. Western Union is generally considered the agent of the sender. However, the recipient of the message, in this case the Clerk who transcribed the same, is only the conduit through which the message reached the written state. There is nothing from the facts that you have presented that shows that the sender of the message requested or directed the Clerk to do anything. The Clerk, then, did not act on behalf of the sender or Western Union, but rather was only the mechanism by which the message was reduced to writing and then submitted to the Board.

The procedure in question is unusual and we have been unable to find any case law directly in point on the issues raised. However, as a general conclusion, we are of the opinion that, on the facts presented, the telegraphic bid does sufficiently comply with the Notice and Call for Bids so that the Board of Trustees could consider that bid along with all other written and oral bids submitted.

OFFICIAL OPINION NO. 73-104

January 10, 1973

TO: David R. Christensen
Director of Special Education
School District No. 371 J

FROM: James R. Hargis

We apologize for our late reply to your letter of recent date concerning the education of the gifted child under the provisions of Title 33, Chapter 20, *Idaho Code*, entitled Education of the Handicapped or Others Unable to Attend School.

The responsibility for providing for the education of the exceptional child lies not with the State, but rather with the school district. Section 33-2001, *Idaho Code*. Although the State, through the State Board of Education, has certain duties to perform with regard to the education of the exceptional child, in the first instance special education is an obligation imposed on the district. We would add here that the responsibility imposed on the district does not

necessarily mean that the district must operate the programs for the exceptional child. There are alternatives available to the district to meet the obligation. The district may, of course, establish and operate its own exceptional child programs subject to the criteria established by the State Board of Education.

Section 33-2002, *Idaho Code*, attempts to define, without limitations, the exceptional child. That is a child who has such a physical, mental, or emotional handicap as to require special education or services in order to fully develop to the limits of the handicap. The exceptional child is also one who is so academically talented that he or she needs special educational programs to achieve his or her fullest potential.

Identification of the exceptional child is to be made by Department of Education regulations and standards before any child may be enrolled in a special education class or before public funds can be used for the education of the exceptional child. The identification for determination of eligibility is necessary for the academically talented as well as the child who is physically, mentally, or emotionally handicapped. We do not know what testing or other evaluation methods and standards are used to identify the exceptional child, but we are given to understand that agreement upon the proper identification process is a problem that the education profession itself has been unable to solve.

As for the issue of funding a special education program for the academically talented, once the program has been established for that exceptional child by any one of the methods provided for by law, then the funding would be the same as that provided for the physically, mentally or emotionally handicapped child.

OFFICIAL OPINION NO. 73-105

January 10, 1973

TO: Dr. Vernon Coiner
Director, Idaho Meat Inspection
Department of Agriculture

FROM: Michael G. Morfitt

You recently requested an interpretation as to the extent of the authority of state meat inspectors to condemn adulterated meat found on the premises of custom exempt packing plants.

Section 37-1915, *Idaho Code*, provides the basis for custom packing plants to be exempted from the inspection requirements of the Idaho Meat Inspection Act where they are slaughtering and preparing carcasses exclusively for the grower's own use.

Paragraph C of that section, however, requires that "the slaughter of animals and preparation of articles referred to in paragraphs (a)(2), (a)(3), and (b) of this section shall be conducted in accordance with such sanitary conditions as the

commissioner may by regulations prescribe . . ." Paragraph (d) of that same section provides that "the adulteration and misbranding provisions of this act and the regulations made hereunder, other than the requirement of the inspection legend, shall apply to articles which are not required to be inspected under this section."

It becomes apparent, therefore, that while custom packing plants are ordinarily exempted from the inspection requirements of the Idaho Meat Inspection Act, they specifically are included in so far as the sanitation, adulteration and misbranding provisions are concerned.

In conclusion then, your inspectors are authorized to detain or condemn meat found to be adulterated or misbranded even though the meat is in the possession of a custom exempt plant, under the same provisions and authority as you currently enforce in inspected plants.

OFFICIAL OPINION NO. 73-106

January 10, 1973

TO: R. Keith Higginson
Director, Department of Water Administration

FROM: Nathan W. Higer

Your office has requested our opinion of the applicability to your staff of Chapter 229, 1972 Session Laws, which amends § 54-2401, et seq. In particular, does it apply to your environmental quality specialist and others who deal with environmentally related activities, i.e., stream alterations and waste wells.

It is important to note that the act is primarily amending the prior law to change the name of professional sanitarians to environmental health specialists. These persons were and presumably still are primarily engaged in the field of public health.

The act specifically states as one of its objectives, the establishment of professional status for persons in public and environmental health (Chapter 229, Section 3). In Section 8, the minimum requirement is a baccalaureate degree and one year's experience or a degree in public health. In other words, the primary intent and purpose of the act is directed toward the public health field. To interpret the act as being intended to cover broader areas of environmental quality which do not affect health, does not appear to be justified nor within the statute's intended purpose.

Assuming, *arguendo*, that the act is intended to apply to the type of work controlled by your office, the penalties contained in Section 14 of the act, which prescribes what is lawful, would not be applicable to your Department.

Listed as the first basis of violation is: "Use or assume the title or any other designation or advertise a title or designation indicating he is an environmental health specialist." (Section 14.) If none of the personnel in your office operate under or use the titles prohibited by the act; Sub-section (1) does not apply. In

fact, the designation for your specialist is Environmental Quality Specialist, which, of course, is not a prohibited designation nor one that is controlled by the act.

The second basis of violation is: "Perform the duties of an environmental health specialist." (Section 14.) This portion of the statute appears to be unenforceable, due to vagueness, since there is no definition or listing in the statute of the "duties of an environmental health specialist." It is elementary criminal law, that before a criminal act can be enforced, the public must be able, from reading the act and without going into an interpretation of the statute, to determine what is prohibited. If the activity sought to be controlled is not specifically and clearly prohibited, it cannot be enforced. In this act there is no definition of the duties and therefore no definition of those duties which cannot be performed. Therefore, Sub-section (2) could not be enforced at all.

Thirdly, the act prohibits the use of the initials, name or any other indication that the person is an environmental health specialist. It is my understanding that none of your personnel are so designated and as long as they do not hold themselves out as an environmental health specialist, nor use the name, initials or other indication of an environmental health specialist, they are not violating the act.

In summary, it is the opinion of this office, that the act in question does not apply to any of the duties and functions performed by your office and employees. Even if it did apply, the penalty section does not prohibit any of the work actually done by your personnel. It is therefore inconceivable that you should register your employees when by not so doing, you incur no penalty.

OFFICIAL OPINION NO. 73-107

January 15, 1973

TO: Marion J. Voorhees
Executive Secretary
Idaho Real Estate Commission

FROM: Fred Kennedy

You have advised me that John Joseph Pontier has filed an Application to take the February Salesman's Examination to become licensed in the State of Idaho as a real estate salesman. You have also informed me that Mr. Pontier has disclosed on his Application that he was convicted of the crime of Unlawful Possession of Marijuana and that his judgment of conviction is presently on appeal to the Supreme Court of the State of Idaho. You have requested me to provide you with an opinion as to whether or not, under the provisions of Sections 54-2029 and 54-2040 of the *Idaho Code*, Mr. Pontier would be eligible to become licensed in the State of Idaho as a real estate salesman because of such conviction, and hence, whether or not the Commission should allow Mr. Pontier to take the examination.

I have examined the Court records in Ada County Criminal No. 4603, which I am informed is the case involved in the present situation, and the record indicates the following facts with respect to the criminal charge lodged against Pontier and the subsequent conviction thereof:

1. The crime of illegal possession of a narcotic drug was alleged to have been committed on October 3, 1970.
2. Mr. Pontier was arraigned on this criminal charge in District Court on February 23, 1971, at which time he entered a plea of not guilty.
3. Mr. Pontier was tried before the Court and a Jury on March 3, 1972, and on that date the Jury returned a verdict of guilty.
4. On March 21, 1972, District Judge W. E. Smith adjudged Mr. Pontier guilty of the crime of illegal possession of a narcotic drug and sentenced Pontier to be confined in the Ada County Jail for a term of 6 months, commencing April 18, 1972.
5. The Judgment of Conviction dated March 21, 1972, is now on appeal in the Supreme Court of the State of Idaho.

Under the provisions of Section 54-2040 of the *Idaho Code*, and disregarding, for the time being, the effect of the appeal to the Supreme Court of the State of Idaho, Mr. Pontier would not be eligible to become licensed as a real estate salesman in the State of Idaho if he was adjudged guilty of a felony crime or any crime involving moral turpitude. If the crime Pontier was adjudged guilty of, therefore, was a felony crime under the laws of the State of Idaho, he would not be eligible to become licensed as a real estate salesman under the provisions of Section 54-2040, *Idaho Code*. A review of the Idaho Statutes must then be made to determine whether or not Pontier was adjudged guilty of the commission of a felony crime.

On October 3, 1970, the date of the alleged crime, Idaho State Law provided that it was a felony to be in the possession of a narcotic drug, and as punishment therefor the person adjudged guilty could have been sentenced to be confined for a term in the Idaho State Penitentiary. The Uniform Controlled Substances Act, however, was adopted by the Idaho Legislature early in 1971, was signed by the Governor on March 19, 1971, and became effective on and after May 1, 1971. Section 37-2748(a) of the Uniform Controlled Substances Act, provides as follows:

"Prosecution for any violation of law occurring prior to the effective date of this act is not affected or abated by this Act. If the offense being prosecuted is similar to one set out in Article IV of this Act, then the penalties under Article IV apply if they are less than those under prior law."

Article IV of the Uniform Controlled Substances Act is that portion which covers the penalties for certain acts, and Section 37-2732(c) in Article IV, provides as follows:

"It is unlawful for any person knowingly or intentionally to possess a

controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this Act. Any person who violates this subsection is guilty of a misdemeanor."

On March 3, 1972, the date upon which the guilty verdict was reached, and on March 21, 1972, the date of the Judgment of Conviction, Section 37-2732(c) of the *Idaho Code* was in effect as stated above, and because no specific punishment was provided for therein with respect to the misdemeanor crime, resort must be had to the general criminal laws of the state to determine the maximum punishment therefor. Under the provisions of *Idaho Code*, Section 18-113, the maximum punishment for a misdemeanor was imprisonment in a county jail for a term not exceeding 6 months or by a fine not exceeding \$300.00, or by both.

Pursuant to the provisions of Section 37-2748(a) of the Uniform Controlled Substances Act, then, the maximum punishment which could have been imposed in the Pontier case on March 21, 1972, the date of the adjudication of guilt, was for a term of 6 months in the county jail and/or \$300.00. As stated above, the District Judge who pronounced judgment in the case, in fact, actually sentenced Pontier to a term of 6 months in the Ada County Jail. Since the maximum term of imprisonment which could have been imposed in the case was for the period of 6 months, the general criminal laws of the State of Idaho must be referred to again to determine whether or not the adjudication of guilt in such a crime could constitute a felony. *Idaho Code*, Section 18-111, as the same existed on March 21, 1972, provides as follows:

"A felony is a crime which is punishable with death or by imprisonment in the State Prison. Every other crime is a misdemeanor."

Since the maximum penalty which could have been imposed on Pontier on the date of his adjudication was 6 months in the county jail, the adjudication of guilt falls within the provision of Section 18-111 of the *Idaho Code*, quoted above, and constitutes a misdemeanor crime. Having determined that Pontier was not convicted of a felony, but instead a misdemeanor crime, then, the question of what effect an appeal to the Supreme Court on such Judgment of Conviction would have with respect to his eligibility to become licensed as a real estate salesman, becomes moot, and need not be resolved in this opinion, unless the misdemeanor crime of Unlawful Possession of Marijuana is a crime involving moral turpitude.

The Courts have rather consistently held that a crime involving moral turpitude is one which is an act of baseness, vileness, or depravity in the private and social duties which a person owes to his fellow people or to society in general. A crime involving moral turpitude implies that it is an act which is immoral in itself, without reference to any legal prohibition. I can find no Idaho cases deciding the question of whether or not the simple possession of marijuana constitutes a crime involving moral turpitude, and those jurisdictions in which similar questions have been decided have split, some holding that similar conduct

constitutes a crime involving moral turpitude and others holding that it does not. The Courts have usually stated that the determination of whether or not a crime is one involving moral turpitude depends on the morals and beliefs of the society existing at the time of the crime. In view of what seems to be the changing standard nationwide with respect to the crime of simple possession of marijuana, it is my opinion, that if a court were requested to make such a determination at the present time, the court would find that the simple possession of marijuana, for the owner's own use, while being a violation of the law, would not be a crime involving moral turpitude.

It is therefore my opinion that the conviction of Unlawful Possession of Marijuana, a misdemeanor, on March 21, 1972, does not act as a legal bar to the practice of a real estate salesman in the State of Idaho, and that John Joseph Pontier should be allowed to take the examination for his license, if all other qualifications are met.

OFFICIAL OPINION NO. 73-108

January 15, 1973

TO: William J. Lanting
Speaker, House of Representatives

FROM: Clarence D. Suiter

This will confirm our telephone conversation of this date wherein you requested our interpretation of Section 67-610, *Idaho Code*, relative to the control of employees of the legislature. As I advised on the telephone it is our opinion that the House of Representatives has control over the selection, removal, duties and compensation of employees of the House and the Senate has similar control over employees of the Senate. There are no cases construing the section cited by applying the rules of statutory construction, ordinary practical conclusions, and the benefit of our legal training, generally, we would hold to the above view and say that it is our opinion that the House of Representatives can set and establish the salaries of any and all of the employees of the House of Representatives.

OFFICIAL OPINION NO. 73-109

January 15, 1973

TO: Stanley D. Young
President, Boise Chapter No. 157
Society of Real Estate Appraisers

FROM: W. Anthony Park

We are in receipt of your letter dated November 28, 1972 and would like to apologize for the delay in answering the same.

You inquired in your letter, in essence, whether or not it is proper for financial institutions to voluntarily disclose information which they have acquired in connection with real estate transactions in which they are or have been directly involved, such as the sales price, date of sale, amount of down payment and terms of payment. In view of the fact that real estate brokers and salesmen no doubt receive similar requests to divulge such information concerning real estate transactions they have handled as broker for the seller, this opinion has been expanded somewhat over and above your specific request, to include the propriety and legality of the disclosure of such information by real estate brokers and salesmen.

At the outset, the legality of voluntarily disclosing such information to third persons by banks or similar financial institutions depends upon the facts present in each transaction, that is, what role the financial institution had with respect to the sale of the real property. If the financial institution in a particular case was acting as an escrow holder in a contract sale or in closing the transaction by disbursing funds to the respective parties involved in the sale, then the financial institution would be acting as an agent of either the seller or buyer, or both, and its obligations would be governed by the general law of agency. The *Restatement of Law of Agency*^{2nd}, Section 395, sets forth the agent's duty with respect to confidentiality of information as follows:

"Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge."

The Supreme Court of Idaho has held that a bank has a duty to preserve as confidential, information concerning a depositor's account, in the case of *Peterson vs. Idaho First National Bank*, 83 Idaho 578, 367P.2d 284 (1961). In the Peterson case, the Court approved the rule set forth in *7 Am. Jur., Banks*, Section 196, and quoted the same as follows:

"To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is a different matter, however, when such information is sought from the bank without the consent of the depositor or customer of the bank. Indeed, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure."

In the Peterson case, after approving the foregoing rule, the Court stated the following at page 588, with respect to the voluntary disclosure by a bank of

information relating to its depositor's or customer's account:

"It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositor's accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors . . . It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract."

It is our opinion, therefore, that if the information requested from a financial institution was acquired as a result of its acting as an escrow holder in a transaction involving the sale of property, or if the financial institution acquired such information in confidence from its depositor or customer and such information concerns the account of such depositor or customer, then the financial institution cannot disclose such information to third persons unless previously authorized to do so by the customer or depositor.

If, however, the financial institution in a particular case acted solely as a lender, performed no duties as an escrow holder, and the parties dealing with the financial institution were not depositors in same, then the relationship between the financial institution and the person to whom the money was loaned would be that of a lender-borrower and the strict agency relationship would not exist. In that case, the financial institution would not be prohibited from voluntarily disclosing credit information pertaining to the status of the borrower's loan nor would it be divulging confidential information by releasing information concerning the original amount of the loan. In most such cases, the original amount of the loan would already be a matter of public record in view of the fact that the mortgage or deed of trust securing the loan would have been recorded in the Office of the County Recorder of the County in which the real property was located.

Concerning the propriety of a real estate broker or salesman voluntarily disclosing similar type information to third persons when the information was obtained by the broker or salesman in connection with his employment to sell such property for the owner thereof, the law of agency likewise applies. A real estate broker or salesman is actually a fiduciary and holds a position of trust and confidence with the principal for whom he is dealing. He is required to exercise fidelity and good faith toward the principal in all matters within the scope of his employment. Information acquired by the broker or salesman which was divulged to him by his principal in connection with the sale of property would therefore be confidential information and could not be voluntarily disclosed to third persons without the previous authorization of the principal. The real estate broker or salesman, then, has the same responsibility to his principal as the escrow holder has to his, concerning the voluntary release of confidential information.

OFFICIAL OPINION NO. 73-110

January 16, 1973

**TO: Board of Commissioners
Bonneville County**

FROM: Warren Felton

You have asked this office for an opinion in relation to the possibility of the Board of County Commissioners appointing the wife of one of your members as County Treasurer.

We do not believe that this should be done because of Section 59-701, *Idaho Code*, relating to nepotism.

To begin with under Section 59-906, *Idaho Code*, it is up to you as County Commissioners to appoint the County Treasurer if the elected one retires or resigns during her term of office. This then brings you squarely within the terms of Section 59-701, *Idaho Code*, and this is so whether or not the member who is her husband does or does not vote on the matter.

Section 59-701, *Idaho Code*, reads as follows:

59-701. Nepotism defined. — An executive, legislative, judicial, ministerial, or other officer of this state or of any district, county, city, or other municipal subdivision of the state, including road districts, who appoints or votes for the appointment of any person related to him or to any of his associates in office by affinity or consanguinity within the * second degree, to any clerkship, office, position, employment, or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or who appoints or furnishes employment to any person whose salary, wages, pay, or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the * second degree to any other executive, legislative, judicial, ministerial, or other public officer when such appointment is made on the agreement or promise of such other officer or any other public officer to appoint or furnish employment to any one so related to the officer making or voting for such appointment, is guilty of a misdemeanor involving official misconduct and upon conviction thereof shall be punished by fine of not less than ten dollars (\$10.00) or more than \$1000, and such officer making such appointment shall forfeit his office and be ineligible for appointment to such office for one (1) year thereafter.

OFFICIAL OPINION NO. 73-111

January 17, 1973

TO: Tom D. McEldowney
Commissioner, Department of Finance

FROM: James G. Reid

In your letter of December 27, 1972, you asked whether the bond submitted by Restlawn Memorial Gardens to the Idaho Department of Finance meets the requirements as set forth in *Idaho Code*, Section 27-408(b). It is the opinion of this office that the bond as submitted does not meet the requirements.

As noted in an opinion issued by this office on November 9, 1972, it is a requirement that each of the members of the Board of Trustees of a Cemetery falling under the provisions of the Endowment Care Cemetery Act, must file with the Commissioner of Finance a surety bond in the amount of \$5,000. The bond submitted by the Restlawn Memorial Gardens is for the face amount of \$10,000 and there are three trustees. Therefore, unless the bond were increased to \$15,000, the provisions of the *Idaho Code* would not be complied with.

OFFICIAL OPINION NO. 73-112

January 17, 1973

TO: J. Michael Brassey
Deputy Administrator
Uniform Consumer Credit Code
Department of Finance

FROM: James G. Reid

In your letter of December 20, 1972, you requested an opinion from this office as to whether a properly licensed employee of a supervised lender may sell whole life insurance in the office of the supervised lender.

As you point out in your letter, *Idaho Code*, Section 28-33-512, contains certain prohibitions regarding the sale of goods at locations where supervised loans are made and in part reads as follows:

"A licensee who is authorized to make supervised loans under this Part shall not engage in the business of making sale of goods at any location where supervised loans are made, *except the sale of insurance in connection with the making of loans*." [Emphasis added.]

It becomes apparent from the above-quoted section that in order for a supervised lender or an employee thereof to sell whole life insurance policies in the office of the supervised lender, such policies would have to be considered something other than the sale of goods in order to comply with the U.C.C.C.

In enacting Section 28-33-512, the Legislature must have intended that the

sale of insurance would be classified as the sale of goods under this provision, for if the sale of insurance was not considered goods there would be no reason to provide for exception regarding the sale of insurance in connection with the making of loans.

It is, therefore, the opinion of this office that the prohibitions contained in Section 28-33-512 regarding the sale of goods at the same location where the supervised loans are made would apply to the sale of whole life insurance policies unless such policies were sold in connection with the making of loans, for the policies would be considered goods under Section 28-33-512.

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OFFICIAL OPINION NO. 73-113

January 18, 1973

TO: Harold Snow
State Representative

FROM: Donald E. Knickrehm

We are pleased to respond to your request for an opinion on the constitutionality of legislation making publication or distribution of anonymous campaign literature unlawful.

The Idaho Supreme Court has ruled that a previously enacted statute of this nature was unconstitutional in the case of *State v. Barney*, 92 Idaho 581 (1968). In that case, the Court found the prior statute deficient by reason of its "vagueness". It is our opinion that the proposed revised statute submitted with your request and attached hereto as "Exhibit A" addresses that deficiency, and probably cures it. We have taken the liberty of attaching a slightly revised version of the proposed statute as "Exhibit B". This revised version is drawn slightly more tightly, and avoids application in the situation where a single anonymous letter or comment is authored and mailed (a possible constitutionally protected area). We believe these versions will pass muster with the Idaho Supreme Court, under the "vagueness" test.

However, as the Court noted in its opinion, there remains the issue of whether even a very specific statute which limits anonymous speech can pass constitutional muster when scrutinized in light of the general guarantee of free speech found in the First Amendment to the United States Constitution. We entertain some doubts as to whether such a prohibition could survive such a challenge.

Two cases lead us to these doubts, both of which were noted by the Idaho Supreme Court in the *Barney* case. The first is *Zwickler v. Koota*, 290 F. Supp. 244 (1968). In that case, a very similar New York statute was ruled unconstitutional as a violation of the First Amendment by a special three judge District Court. As the Idaho Court noted in the *Barney* case, *Zwickler* went to the United States Supreme Court. There, it was reversed on other grounds (see 394 U.S. 103 (1968)). The United States Supreme Court *did not* rule on the

constitutional issue. Thus, while we have the opinion of the three judge District Court on the constitutional question you have posed, the United States Supreme Court did not speak directly to it.

The other important case is *Talley v. California*, 362 U.S. 60 (1960). There, a Los Angeles ordinance barring distribution of *any* anonymous handbill was ruled violative of the First Amendment protection of free speech. While in the *Barney* case, the Idaho Court makes a brief effort at distinguishing the *Talley* case from the Idaho situation, the *Talley* case indicates to us that the proposed statute might well be found violative of the First Amendment. This is so because, generally, "political speech" is at the very heart of First Amendment protection. If all anonymous pamphlets cannot be prohibited, it seems unlikely that the favored area of political pamphlets could be so restricted. This is not, however, clearly the case. Certainly, character assassination by anonymous political pamphlet is a serious evil which the legislature reasonably could be concerned with. There do not appear to be any Supreme Court cases directly on this point. Finally, the Idaho Supreme Court left a clear opening for a future legislative attempt at regulation in this area, in its opinion in the *Barney* case.

While one would be foolhardy to deny that the legislation proposed may be on shaky constitutional grounds, we cannot say that it will not withstand constitutional challenge.

OFFICIAL OPINION NO. 73-114

January 18, 1973

TO: Jay R. Friedly
Mountain Home City Attorney

FROM: James G. Reid

In your letter of December 12, 1972, you request an opinion from this office regarding the legality of the competitive bidding procedure followed by the Mountain Home City Council in the advertisement of bids for a new fire house. Specifically, you ask whether the plans and specifications used by the City Council in advertising for bids were sufficiently specific to comply with the competitive bidding statutes of the State of Idaho.

Idaho Code, Section 50-341, outlines the situations in which competitive bidding shall apply to the cities and, in part, reads as follows:

"The following provisions relative to competitive bidding apply to all cities of the state of Idaho, but shall be subject to the provisions of any specific statute pertaining to the letting of any contract, purchase or acquisition of any commodity or thing by soliciting and receiving competitive bids therefor, . . .

* * *

"C. When the expenditure contemplated exceeds two thousand five hundred dollars (\$2,500), the expenditure shall be contracted for and let

to the lowest responsible bidder.”

Section 50-341 specifically states that the provisions of that section shall be subject to provisions of any other specific statute pertaining to the letting of any contract, etc. *Idaho Code*, Section 67-2309, provides certain criteria to be followed by the cities of the State of Idaho in the letting or advertising of bids on contracts or the construction, repair, or improvement of public works, public buildings, or public places and reads as follows:

“Written plans and specifications for work to be made by officials – Availability. – All officers of the state of Idaho, the separate counties, cities, towns, villages or school districts within the state of Idaho, all boards or trustees thereof or other persons required by the statutes of the state of Idaho to advertise for bids on contracts for the construction, repair or improvement of public works, public buildings, public places or other work, shall make written plans and specifications of such work to be performed or materials furnished, and such plans and specifications shall be available for all interested and prospective bidders therefor, providing that such bidders may be required to make a reasonable deposit upon obtaining a copy of such plans and specifications; all plans and specifications for said contracts or materials shall state, among other things pertinent to the work to be performed or materials furnished, the number, size, kind and quality of materials and service required for such contract, and such plans and specifications shall not specify or provide the use of any articles of a specific brand or mark, or any patented apparatus or appliances when other materials are available for such purpose and when such requirements would prevent competitive bidding on the part of the dealers or contractors in other articles or materials of equivalent value, utility or merit.”

Although *Idaho Code*, Section 67-2309, does not set forth all possible criteria to be considered in a bid advertisement, it does at least set forth certain things that must be placed in the minimum requirements for bid specifications. Upon review of the minimum requirements proposal and specifications for the Mountain Home Fire Station, it appears to this office that the specifications contained in that document do not meet the minimum requirements set forth in *Idaho Code*, Section 67-2309; and as such, any award of bid pursuant to those specifications would probably be invalid. (See enclosed attachment.)

Without going into great detail, suffice it to say that the reason political subdivisions within the State of Idaho are required to follow rather strict competitive bidding procedures is to insure that the taxpayer's dollar is spent in an efficient manner while at the same time affording an equal opportunity for all concerned who wish to make a bid on a government financed project. In the specific case of your proposed fire station, a review of the required specifications discloses that it would be literally impossible for any one contractor to determine exactly what the City Council of Mountain Home had in mind concerning the structure of the proposed fire house. For example, nowhere in the specifications is there a mention of the type or kind or quality of material to be used in constructing the building. Without these specifications, it would

appear that the various bidding contractors would be placed in the position of having to outguess one another as to what the city might or might not wish the fire station to look like. As such, it would be possible for the City Council to show favoritism to one of the contractors or at the very least preclude a potential low responsible bidder due to the inadequate information supplied.

This opinion is not meant to discourage the City of Mountain Home or any other city within the State of Idaho from inviting various proposals on types, kinds, and qualities of structures contemplated for city use. In the interest of providing a system for the utilization of current architectural concepts, an invitation on the part of various city councils for proposals on a given project is a worthwhile and admirable policy. However, an invitation to secure another person's ideas and concepts certainly cannot be considered as a bid offering and as such, it would be improper to award a given contractor a bid without first providing all possible bidders with a specific and concise set of specifications in which to base their bid.

OFFICIAL OPINION NO. 73-115

No opinion is assigned to this number.

OFFICIAL OPINION NO. 73-116

January 24, 1973

TO: Patricia L. McDermott
State Representative

FROM: Donald E. Knickrehm

We are pleased to respond to your request for a legal opinion on the following question:

"Does the Idaho legislature have the legal authority to repeal or rescind its 1972 ratification of the proposed Equal Rights Amendment to the United States Constitution?"

We have researched this issue extensively, and have found two cases which deal specifically with this point, both of which involved the proposed "Child Labor Amendment" to the United States Constitution.

The first case is from the United States Supreme Court: *Coleman v. Miller*, 307 U.S. 433, 83 L.Ed. 1885 (1938). In that case, the Kansas legislature had rejected the "Child Labor Amendment" and then, several years later, turned around and by a disputed one vote margin ratified the proposed amendment. The case went to the Supreme Court of Kansas seeking a writ to prohibit certification of ratification to the United States Congress. The writ was there denied and that denial was appealed to the United States Supreme Court.

In a lengthy technical opinion by Mr. Chief Justice Hughes, the United States Supreme Court held that the question was a "political question," and therefore

should not be ruled upon by the United States Supreme Court. The court specifically held that the final determination on the effect of an action of a state legislature in ratifying or rejecting a proposed amendment was to be made by the Congress, and not the court.

The court did, however, in reaching this conclusion, engage in a substantial discussion of the merits of the issue before it. The court first noted the views expressed by prominent writers of that day that once ratification is given a proposed amendment by state legislative action, it cannot be repealed or rescinded. The court then discussed the precedent set by adoption of the Fourteenth Amendment to the United States Constitution. The court noted that in that instance, the states of Ohio and New Jersey first ratified, then passed resolutions withdrawing their ratification of the proposed amendment. Both of these actions by these states occurred prior to a sufficient number of states having ratified the proposed amendment. Subsequently, the Secretary of State certified to Congress that three-fourths of the states had ratified the proposed amendment, if the Congress counted the ratifications of New Jersey and Ohio. The Secretary informed the Congress further of the attempted withdrawal of ratification by these two states. Thereafter, Congress declared the amendment adopted, counting the ratifications of New Jersey and Ohio and disregarding those states' attempt to withdraw their prior ratification.

The other relevant case also involved the proposed "Child Labor Amendment." That case, *Wise, et al. v. Chandler, et al.*, 108 S.W. 2d 1024 (Ky 1937), was decided just prior to the above cited United States Supreme Court case. In the *Wise* case, in an extensive opinion, the Kentucky Supreme Court specifically held that once a state had acted upon a proposed amendment, that state had exhausted its power to further consider the question without resubmission of the proposed amendment by the United States Congress.

The views expressed in the *Coleman v. Miller* and *Wise v. Chandler* cases, supra, both indicate that ratification by a state is a final action which cannot be repealed or revised. We have found no other authority on the constitutional question you have presented. We must therefore conclude that once a state acts through its legislative process to ratify a proposed amendment to the United States Constitution, it has cast its one vote, and exhausted its power to affect the course of the proposed amendment. Subsequent attempts by the same state legislature to retract or appeal its prior ratification would be of no legal effect.

OFFICIAL OPINION NO. 73-117

January 24, 1973

TO: David Duehlmeier
Mental Health Division
Department of Environmental Protection & Health

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your request for an

opinion dated the 16th day of November, 1972, in which you posed the following question: Is a person who is involuntarily committed under the commitment laws of the State of Idaho liable for his expenses pursuant to Section 66-354, *Idaho Code*?

Section 66-354, *Idaho Code*, reads in part as follows:

"Mentally ill persons with assets sufficient to pay expenses — Liability of relatives. — (a) When a mentally ill person has been admitted to a state hospital voluntarily or *involuntarily* (own emphasis), the head of the hospital may cause an inquiry to be made as to the financial circumstances of such mentally ill person and of the relatives of such person legally liable for his or her support, and if it is found that such person or said relatives, legally liable for the support of the patient, are able to pay the expenses for hospitalization proceedings and the charges for the care and treatment of the patient in the hospital, in whole or in part, it shall be the duty of the head of the hospital to collect such expenses and such charges, and if necessary to institute in the name of the state, a civil suit against a person or persons liable therefore."

The answer to the above stated question seems to be definitely answered by the statute itself. There does not appear to be ambiguity as to the intent of the legislature when they included the word "involuntarily" when determining who was to be liable for the hospital expenses; thus, there does not appear to be a distinction between persons who are committed under the criminal code and Title 66, Chapter 3.

Therefore, it is the opinion of the Office of the Attorney General that the statute speaks directly to the question and that persons involuntarily committed under the criminal laws of the State of Idaho are legally responsible for the payment of their expenses.

OFFICIAL OPINION NO. 73-118

January 26, 1973

TO: C. E. Barnett
Board of Pharmacy

FROM: Wayne Meuleman

This is in response for your request for an opinion concerning the legal authority of "nurse practitioners" prescribing drugs and controlled substances. I again apologize for the delay in responding; however, the nature of the problem warranted extended deliberation.

Idaho Code, Section 54-1413(e) states:

"Practice of nursing: The practice of professional nursing means the performance for compensation of any act in the observation, care and counsel of the ill, injured, or infirm, or in the maintenance of health or prevention of illness of others, or in the supervision and teaching of other

personnel, or the administration of medications and treatments as prescribed by a licensed physician or dentist; requiring substantial specialized judgment and skill based on knowledge and application of the principles of biological, physical and social science. The foregoing *shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as may be authorized by rules and regulations jointly promulgated by the Idaho state board of medicine and the Idaho board of nursing which shall be implemented by the Idaho board of nursing.*"

Pursuant to the above-underlined provisions, the Idaho Board of Medicine and the Idaho Board of Nursing enacted Minimum Standards, Rules, and Regulations effective June, 1972. Such Rules provide that the additional authority granted a certified "nurse practitioner" shall be in writing as prescribed by an area committee, subject to the approval of the Board of Medicine and Board of Nursing. It is my view that said Rules properly conform to the provisions of Section 54-1413(e), *Idaho Code*.

In respect to the legality of pharmacists filling prescriptions written by nurse practitioners, I refer you to Section 37-2701(t), *Idaho Code*, which provides:

"(t) 'Practitioner' means:

- (1) a physician, dentist, veterinarian, scientific investigator, or *other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of his professional practice or research in this state;*
- (2) a pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state." (emphasis added)

This provision would encompass nurse practitioners within the Controlled Substances Act definition of "practitioner." Additionally, *Idaho Code*, Section 37-2722 states:

"Prescriptions. — (a) *Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in Schedule II may be dispensed without the written prescription of a practitioner on an official blank furnished by the board.*

(b) In emergency situations, as defined by the rule of the board, Schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the pharmacy. Prescriptions shall be retained in conformity with the requirements of section 37-2720, *Idaho Code*. No prescription for a Schedule II substance may be refilled.

(c) Except when dispensed directly by a practitioner, other than a pharmacy to an ultimate user, a controlled substance included in Schedule III or IV, which is a prescription drug as determined under this act or regulation of the bureau or the board, shall not be dispensed without a written or oral prescription of a practitioner. The prescription shall not be

filled or refilled more than six (6) months after the date thereof or be refilled more than five (5) times, unless renewed by the practitioner.

(d) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose."

Reading the above statutes together, I conclude that a pharmacist may legally fill prescriptions written by nurse practitioners with one qualification. That qualification is that the *written* authorization as required by the Minimum Standards, Rules and Regulations limits and restricts the scope of which a nurse practitioner may legally prescribe drugs and/or controlled substances. In this respect I suggest that a procedure be established whereby pharmacists and the Board of Pharmacy is informed as to the scope of authority within which a particular nurse practitioner may act.

OFFICIAL OPINION NO. 73-119

January 26, 1973

TO: Edward W. Rice
State Representative

FROM: Clarence D. Suiter

This is in response to your letter of January 18, 1973 regarding House Bill 665, Second Session of the 41st Legislature. You inquired by your letter as to whether beneficiaries under that legislation continue to be so after the POW's and MIA's return. That law in pertinent part provides:

"Children of any Idaho citizen . . . who has been determined . . . to be a prisoner of war or missing in action in southeast Asia . . . shall be admitted to attend a public institution of higher education or public vocational-technical school within the State of Idaho without the necessity of paying tuition and fees therefor . . ."

In the entire legislation there is no clear expression of intent as to when, if ever, those benefits shall cease to be available to the persons qualified as above indicated. Although it was probably the intent of the legislature to provide qualified recipients during the period of their parent's incarceration as prisoners of war or while missing in action, there was no enunciation of that intent in the bill. Without any qualifying language or other expression of contrary intent it must be concluded that students continue to be eligible notwithstanding their parent's or parents' repatriation or other return to the living, as it were. There is some evidence that can be gleaned from the statute that might strengthen our conclusion and that is that institutions of higher education are admonished to include in future budgets the cost incurred and the cost anticipated from compliance with the statute.

It is our conclusion then, that there is no cut-off date for persons qualified

under House Bill 665 nor will repatriation or other return of prisoners or those missing in action in southeast Asia serve to discontinue benefits under the act. The practical effect of the legislation is that if your father or mother was ever a prisoner in southeast Asia, or missing in action in that zone you are eligible to take advantage of the benefits provided in House Bill 665.

OFFICIAL OPINION NO. 73-120

January 29, 1973

TO: Glenn A. Phillips
Magistrates Division
Seventh Judicial District

FROM: Peter Heiser

The 1969 Session Laws section to which you refer in your letter of January 9, 1973, has been codified in Section 1-2208(3)(a), *Idaho Code*, and now provides that Magistrates may handle all misdemeanor actions regardless of jail term or fine amount.

You ask if a Magistrate may hear an involuntary manslaughter case brought under Section 18-4006(2)(c), *Idaho Code*. The companion punishment section, Section 18-4007(2), *Idaho Code*, provides that the punishment for involuntary manslaughter in a situation which *does not* relate to the operation of a motor vehicle could involve a jail sentence of up to ten (10) years in the state prison. Referring to Section 18-111, *Idaho Code*, it is clear that the aforementioned penalty falls in the classification of a felony and, thus, a Magistrate could not hear such a manslaughter action.

However, if the manslaughter action was one which arose out of the operation of a motor vehicle, Section 18-4007(2)(b), *Idaho Code*, would apply for purposes of punishment. Said section provides that a violation of Section 18-4006(2)(c), *Idaho Code*, relating to the operation of a motor vehicle could involve imprisonment in the county jail for not more than one (1) year. Referring again to Section 18-111, *Idaho Code*, it is clear that the aforementioned penalty would be classified as a misdemeanor and, thus, the manslaughter action would be heard by a Magistrate.

OFFICIAL OPINION NO. 73-121

January 30, 1973

TO: Thomas G. Drechsel
ASBSC President
Boise State College

FROM: James R. Hargis

The Attorney General has directed me to answer that portion of your letter

of recent date which deals with the issue of possession and consumption of alcoholic beverages (including beer, wine, and alcoholic liquors) in campus buildings owned or possessed by the college or board of trustees thereof. Retail sale of such beverages is another separate and distinct issue which will be dealt with separately.

We can find no statutory prohibition against the possession or consumption of alcoholic beverages in any publically owned building in general or in college buildings in particular. However, every state college or university and both junior colleges have administrative regulations prohibiting possession and consumption. These rules and regulations are expressed in the catalogue of each institution. The State Board of Education acting as Trustees and Regents has approved the catalogues and the contents therein as part of the Board's duties as the governing board. Any change therein must also be approved by the administration of the institution and finally by the Board.

With respect to the legality of retail sales of liquor or beer on college campuses in Idaho, again there appears to be no specific statutory prohibition. However, the licensing provisions of the Department of Law Enforcement and the Rules and Regulations relating to such licenses must be complied with as well as any institution regulation dealing with this subject.

I trust that this information will be of assistance to you. Detailed procedural information concerning licensing must be obtained from the Department of Law Enforcement.

OFFICIAL OPINION NO. 73-122

January 31, 1973

TO: Wayne Loveless
State Representative

FROM: J. Dennis Williams

You have requested an opinion of this office regarding the effect proposed House Bill No. 93 will have on Section 18-4626, *Idaho Code*, relating to wilful concealment of goods, wares and merchandise, since House Bill 93 would allow detention under certain conditions of a person on or in the immediate vicinity of the premises of a mercantile establishment, and Section 18-4626 applies only to concealment of goods on a merchant's premises.

In this regard, proposed House Bill No. 93 reads as follows:

"In any action, civil or criminal, brought by reason of any person's having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his

authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the *person so detained was committing or attempting to commit larceny or wilful concealment on such premises of such merchandise*. As used in this section, 'reasonable grounds' shall include, but not be limited to, justifiable belief that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to ownership of the merchandise." (emphasis added)

Section 18-4626, *Idaho Code*, reads:

"WILFUL CONCEALMENT OF GOODS, WARES OR MERCHANDISE.
— Whoever, without authority, wilfully conceals the goods, wares or merchandise of any store or merchant, while still upon the premises of such store or merchant, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$300 or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment. Goods, wares or merchandise found concealed upon the person shall be prima facie evidence of a wilful concealment."

A reading of House Bill 93 reveals that it applies to cases involving possible larceny as well as possible wilful concealment. Since a larceny may be committed when a person leaves an establishment with unpurchased merchandise, this act would allow a merchant who had reasonable grounds to believe a larceny was being committed to detain the suspect.

In view of the application of the act to both the crimes of larceny and wilful concealment, it is the opinion of this office that House Bill No. 93 does not extend the provisions of Section 18-4626, *Idaho Code*, to situations involving concealment of goods, wares or merchandise outside the actual store premises of a merchant.

OFFICIAL OPINION NO. 73-123

February 2, 1973

TO: T. F. Terrell
Executive Director
Public Employee Retirement System

FROM: W. Anthony Park

An opinion has been requested on the following question:

"Can a unit of government affiliated with the Public Employees Retirement System of Idaho enter into a salary reduction agreement with its employees for the purpose of providing a tax sheltered plan offered by an

insurance company in compliance with provisions of the Internal Revenue Service Code?"

In conjunction with this question you stated in your letter you understood that the Internal Revenue Service had imposed the following requirements on salary reduction agreements in order that the funds subject to such agreements would not be considered to be income taxable currently:

"1. A bona fide salary reduction agreement is entered into between the employer and employee.

2. The funds generated by the agreement are held in a trust capacity by the employer until payable to the employee in accordance with terms and conditions set forth in the agreement.

3. At no time are such funds considered as salary subject to any form of withholding by the employer for income tax, social security, retirement or other purposes."

This response is not intended to express an opinion as to what requirements the I.R.S. does in fact place on such plans. Our research indicates that the current I.R.S. requirements imposed on salary reduction agreements so as to give tax deferral benefits to a taxpayer are very much in flux as this type of program is "unqualified" under any specific Internal Revenue Code section.

We feel that the above enumerated requirements may not in fact state current I.R.S. policy in this area. However, in reaching your question as to a possible conflict between the enumerated I.R.S. requirements and the requirements placed on employees subject to the Public Employees Retirement System, we shall assume your statement of the I.R.S. requirements to be correct.

An employer under the Public Employees Retirement System is required to pay to the retirement board its and its employees contributions as computed based on the salaries paid by it during the month previous, see § 59-1332, *Idaho Code*. The question raised is whether or not this mandate of the law conflicts with the requirements of the I.R.S. set out above.

Salary is defined by the Public Employees Retirement System as follows:

"§ 59-1302(31), *Idaho Code*: 'Salary' means the total salary or wages payable by all employers to an active member for personal services currently performed, together with all remuneration for personal services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with the rules prescribed by the board."

A salary reduction agreement results in the right to receipt of cash at a date later than it would normally occur absent such agreement. Such payments cannot be considered "wages payable . . . for personal services currently performed . . ." and therefore if such funds are included within the definition of salary provided by § 59-1302(31), *Idaho Code*, they must be by virtue of that

portion of the same statute which provides that salary includes "all remuneration for personal services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash."

As provided in § 59-1301, *Idaho Code*, the Public Employees Retirement System was established for the following public purpose:

"(2) The purpose of such system is to provide an orderly means whereby public employees in the State of Idaho who become superannuated or otherwise incapacitated as a result of age or disability, may be retired from active service without prejudice and without inflicting a hardship upon the employees retired, and to enable such employees to accumulate pension credits to provide for old age, disability, death and termination of employment, thus effecting economy and efficiency in the administration of the state, county and local government . . ."

Consistent with an effectuation of this purpose is a broad reading of those definitional sections found in the Act which further such purposes. The phrase "remuneration in any medium other than cash" is nowhere defined in the Public Employees Retirement System Act. The intent of the legislature in defining salary obviously was to extend as far as possible the measure of "salary" so as to provide an adequate amount of employee and employer contributions to support the System itself and provide benefits to its employee contributors.

In our opinion the right to receipt of cash in the future under a "salary reduction agreement" was intended to be considered "remuneration in any medium other than cash" and thus included within the term "salary" as defined in § 59-1302(31), *Idaho Code*. This right, once valued in cash by the Retirement Board, as salary must be available for employee and employer contributions to the Public Employees Retirement System as provided in § 59-1303, 59-1304, 59-1305, 59-1330 and 59-1332, *Idaho Code*. To allow circumvention of the intended effect of these statutes by means of a "salary reduction agreement" which would remove deferred income from "salary" as defined could clearly endanger the financial viability of the Public Employees Retirement System. Therefore, the law must in our opinion be read to have been intended to include a cash valuation of the right to receive future cash payments under a salary reduction agreement as "salary" for purposes of the Public Employees Retirement System.

Having determined that a current cash valuation of the right to receive future cash payments as a result of a salary reduction agreement is properly includable in the determination of "salary" as defined by § 59-1302(31), *Idaho Code*, we must now turn to the question you have posed. Assuming, as above stated, the propriety of your statement of I.R.S. requirements, there appears to be a direct conflict between the requirement #3 above of the I.R.S. and the Public Employees Retirement System Act in that § 59-1301 et seq, *Idaho Code*, requires a current cash valuation of deferred income to be subject to employee and employer contribution requirements for retirement whereas requirement #3 of the I.R.S. does not allow such funds to be *considered* salary for retirement purposes.

At least three possibilities for avoiding this seeming conflict occur to us. First, the definition of "salary" for Internal Revenue purposes as referred to in requirement #3 above may be substantially different from that found in § 59-1302(31), *Idaho Code*. Secondly, our research in the area indicates that I.R.S. requirement #3 above may incorrectly state current Internal Revenue Service requirements imposed on salary reduction agreements. Thirdly, the funds referred to may not be "considered as salary" in that all which is included in the definition of "salary" is the valuation of the *right* to future payment of "such funds" not the funds subject to the salary reduction agreement themselves.

An opinion by this office as to what requirements the Internal Revenue Service should make before a salary reduction agreement would provide income tax deferral benefits would not be recognized by the I.R.S.

The definition of "salary" provided by § 59-1302(31) *Idaho Code*, requires inclusion of a valuation of cash payments deferred as a result of a salary reduction agreement.

It is our opinion that contributions based on money paid under a salary reduction agreement must be paid to the retirement board. Subject to this requirement, we see no basic inconsistency between such plans and retirement system requirements.

OFFICIAL OPINION NO. 73-124

February 5, 1973

TO: Peter G. Leriget
Latah County Prosecuting Attorney

FROM: W. Anthony Park

In response to your request for an opinion as to whether there can be lateral movement within a budget after the tentative budget has been compiled, it appears that there can be such changes made.

Sections 31-1602, 31-1603 and 31-1604, *Idaho Code*, deal with expected and tentative budgets and require that expenses and revenues be broken down into two classifications, salaries and wages and other expenses. It appears that the breakdown requirement is for the purpose of showing where funds have been used in the past and where funds could be expected to be used in the future.

On the second Monday in February the county commissioners shall hold a hearing on the tentative budget where officers and employees of the various county departments may be called upon and examined concerning expenditures made by him. Section 31-1605, *Idaho Code*. This section goes on to state:

Upon the conclusion of such hearing, the county commissioners shall fix and determine the amount of the budget for each office, department, service, agency or institution of the county, separately, which in no event shall be greater than the amount of the tentative budget, and by resolution

adopt the budget as so finally determined and enter said resolution on the official minutes of the board.

Thus, the final budget for each office, department, service, agency or institution is determined separately and cannot be greater than the tentative budget, but the budget for salaries or other expenses of each department, etc., is not necessarily determined as a final budget item. Thus, it may be seen that after a tentative budget is compiled for each department, service, agency, etc., there can be no increase of the budget over the tentative amount. However, there is nothing in the Code that states there cannot be a reshuffling of monies from one item to another within the department budget. If it were seen that salaries and wages had not received sufficient funding in the tentative budget, money could be taken from other expenses and transferred to salaries for the final budget.

From the above it can be seen that there may be lateral movement within the tentative budget so long as the final budget is not greater than the tentative one.

With regard to our discussion concerning your functions and duties as the Prosecuting Attorney for Latah County, you are the sole attorney for the county and its officers. Art. 5, § 18, *Idaho Constitution*, provides:

A prosecuting attorney shall be elected for each organized county in the state, by qualified electors of such county, and shall hold office for the term of two years, and shall perform such duties as may be prescribed by law; . . .

Section 31-2604, *Idaho Code*, prescribes the duties of the prosecuting attorney, and in particular part 3 reads as follows:

3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

It should be noted the county has no other attorney. If county officials disregard the advice of their county prosecutor they do so at their own risk.

OFFICIAL OPINION NO. 73-125

February 6, 1973

TO: Paul Kratzke
Director, Computer Center
Idaho State University

FROM: James G. Reid

In your letter of February 1, 1973, you request an opinion from this office as to whether or not the computer center at Idaho State University may enter into a lease agreement for the purpose of leasing a computer for a period of time exceeding one year.

Art. VIII, Sec. 3 of the *Idaho Constitution* provides for a limitation on county and municipal indebtedness and, in part, reads as follows:

"No county, city, town, township, board of education, or school district, or other subdivision of the state, shall in any indebtedness, or liability, in any manner, for any purpose exceeding in that year, the income and revenue provided for in such year . . ."

The preceding provision of the *Idaho Constitution* would seemingly prohibit Idaho State University from entering into long term leasing agreements. However, in the case of *Williams v. Emmett*, 51 Idaho 500, 6 P.2d 475, the Supreme Court of the State of Idaho held that the lease of equipment requiring payments in future years for services needed in those years create a present indebtedness within the meaning of Art. VIII, Sec. 3 of the *Idaho Constitution* and not a future indebtedness.

It would, therefore, be the opinion of this office that the lease of equipment by Idaho State University (which would include computers) would not constitute a future indebtedness; and, as such, there would be no constitutional prohibition against a lease for such equipment extending longer than a period of one year.

OFFICIAL OPINION NO. 73-126

February 6, 1973

TO: John A. Flanagan
Director, Chemical & Feed Division
Department of Agriculture

FROM: Clarence D. Suiter

You have asked the following questions:

"Are licensed warehouses required to also license as trackbuyers if they buy and sell to farmers, grain and other commodities which fall under the Trackbuyer Law?

EXAMPLES: 1. A warehouse buys 20 tons of barley from Farmer A and stores the barley in his warehouse; two months later he sells 20 tons of barley to Farmer B.

2. The warehouse buys 20 tons of barley from Farmer A and trucks and sells the grain to Farmer B."

Our suggestions as to how you should construe and enforce these laws, that is, the warehouseman's law and Trackbuyer's Law, relates to the bonds required by these laws. You will notice that under Section 22-1402, *Idaho Code*, the Trackbuyer's Law does not apply to or include any person who has a license to operate a public warehouse who "is receiving farm products for shipment . . . to such warehouses within this state" and Section 22-1419 says that in administration of the Trackbuyer's Act the Commissioner of Agriculture is directed to coordinate the Trackbuyer's Act and the Bonded Warehouse Law.

Now then, the warehouseman's bond will cover your first case if the

warehouse is *in Idaho* because the products are being shipped into the warehouse. However, if the products do not go to the warehouse the warehouseman's bond will probably not cover the product since the warehouse owner is not, strictly speaking, acting as a warehouseman and the transaction does not concern or enter his warehouse. Therefore, unless he has a trackbuyer's bond in this case, there will be no protection for the seller or buyer if there is some loss or the warehouse owner does not pay the seller.

Therefore, I would suggest that as to example No. 1 from your letter if the warehouse is in Idaho, no trackbuyer's license should be required but if the warehouse is outside Idaho a trackbuyer's license should be required.

As to example No. 2, the warehouse bond could be rewritten to cover such dealings outside a warehouse, or regulations could be passed providing that such dealings are part of a warehouseman's obligations under his bond, or else a trackbuyer's license should be required by your office.

OFFICIAL OPINION NO. 73-127

February 6, 1973

TO: Marion J. Voorhees
Executive Secretary
Idaho Real Estate Commission

FROM: Fred Kennedy

You have requested me to provide the Idaho Real Estate Commission with a legal opinion as to whether or not a non-resident broker who has been granted a license to conduct his real estate business in Idaho by reciprocity may be granted a license to establish a primary office for the conducting of his business in this state, without becoming a resident of the State of Idaho and actively managing such office, and without complying with the branch office requirements of Section 54-2033A of the Idaho Code.

Section 54-2034 of the *Idaho Code* provides, in part, as follows:

" . . . If the applicant . . . is a nonresident and licensed in the state of his domicile, the examination as provided in this act shall not be required except that any person who was not domiciled in the State of Idaho at the time of receiving a license from his state of domicile must take the examination as provided in Section 54-2027, Idaho Code, if at any time such a licensee becomes domiciled in the State of Idaho."

Section 54-2033 of the *Idaho Code*, which governs the issuance of licenses to non-residents, provides as follows:

"A non-resident to whom a license is issued upon compliance with all the other requirements of law and provisions of this act shall not be required to maintain a definite place of business within this state, provided, that such non-resident shall maintain an active public place of business within the state of his domicile and provided further that the privilege of

submitting evidence of good standing by the state of the domicile of a non-resident applicant in lieu of the recommendations and statements otherwise required shall only apply to licensed real estate brokers and real estate salesmen of those states under the laws of which similar recognition and privileges are extended to licensed real estate brokers and real estate salesmen of this state."

Section 54-2033A of the *Idaho Code* authorizes and governs the establishment and operation of branch offices in this state, and provides as follows:

"No branch office will be operated by a resident or non-resident broker unless the business performed in that office (such as advertising, listing, closing, depositing of funds, writing of checks and the issuance of receipts) be issued in the name of the broker or under the direct supervision of the broker. A branch office operated by a resident broker shall have a licensed broker, associate broker or salesman with two (2) years active experience as a licensed real estate salesman, regularly occupying it and in charge of it. A branch office operated by a non-resident broker shall have a licensed broker who is domiciled in the State of Idaho regularly occupying it and in charge of it. Resident and non-resident brokers operating branch offices in the State of Idaho are required to license such offices with the Idaho Real Estate Commission and the broker, associate broker or salesman in charge of the office shall be designated at the time of licensing."

By the adoption of Section 54-2033A of the *Idaho Code*, the legislature has established the conditions under which real estate offices may be operated in this state *when the licensed broker is not present in and actively managing such office*. In order for a broker who is domiciled in and a resident of Idaho to establish and operate such an office, the statute cited requires him to comply with the branch office requirements contained therein. It must be presumed that the Idaho Legislature contemplated the same type of compliance on the part of a non-resident broker in the establishment and operation of such an office. To interpret Section 54-2033A in any different way would make it redundant and of no force or effect.

It is therefore my opinion that, when the above quoted Sections of the *Idaho Code* are read together and construed in such a manner as to give effect and meaning to each in light of clear legislative intent, the following procedure governs with respect to the conducting of real estate business in this state by non-resident brokers:

1. Under the provisions of *Idaho Code* Section 54-2033, if a broker is domiciled in another state and receives an Idaho license by reciprocity, he may practice real estate in Idaho without establishing or maintaining a definite place of business in this state, so long as he maintains an active public place of business within the state of his domicile and provided he has made the necessary filings required by Section 54-2031 of the *Idaho Code*.
2. If, however, the non-resident broker decides to establish an office in the State of Idaho for the conducting of his real estate business, he may do

so only by complying with one of the two following methods:

A. The nonresident broker can either move to Idaho, establish his residency in this state, take the broker's examination required by Idaho Code Section 54-2034, and become licensed by Idaho to establish a primary real estate office in this state under his management and control, or

B. The broker can remain a nonresident of Idaho and establish a branch office in the State of Idaho, based on his Idaho license granted by reciprocity, at which time he would have to comply with the provisions of Section 54-2033A of the *Idaho Code*, which would require, in part, that a licensed broker, domiciled in the State of Idaho, regularly occupy such branch office and be in charge of same.

In view of the foregoing, it is my opinion that the application to establish a primary real estate office in Idaho submitted by Charles L. Anderson, a non-resident broker licensed to conduct his real estate business in Idaho and domiciled in the State of Wyoming, should be denied by the Commission, until such time as Anderson complies with either sub-paragraph 2A or 2B of this opinion, as set forth above. Further, that the applications submitted by residents of Idaho for the issuance of real estate salesmen's licenses under Anderson's broker's license should be denied for the same reasons as outlined above. It is my understanding that one of the persons who has applied for a salesman's license under Anderson's broker's license, Doyle I. Dickerson, actually resides in Wyoming and holds a valid Wyoming license under Mr. Anderson's Wyoming broker's license. Assuming this is the case and that all requirements are met under the reciprocity provisions of Idaho Code Sections 54-2033 and 54-2034, and the necessary filing is made pursuant to Section 54-2031, the Commission could properly grant Doyle I. Dickerson an Idaho real estate salesman's license by reciprocity, but such license would not enable Dickerson to operate an office in Idaho. Rather, it would merely enable him to conduct business in this state so long as he remains domiciled in Wyoming and continues to operate out of Anderson's Wyoming office.

OFFICIAL OPINION NO. 73-128

February 8, 1973

TO: John Evans
State Senator

FROM: W. Anthony Park

On February 5, 1973, you requested an opinion from this office on the following two questions relating to appointment of members of the Idaho Water Resource Board:

(1) What are the statutory qualifications necessary for appointment to the Board?

(2) Does Mr. Franklin Jones of Boise possess the necessary qualifications for appointment to the Board?

Question No. 1

In 1964, the Idaho voters ratified a constitutional amendment — Article 15, Section 7 — creating a Water Resource Agency to be “composed as the Legislature may now or hereafter prescribe . . .”. Pursuant to this constitutional authorization, the Legislature enacted Section 42-1732, *Idaho Code*, providing for the composition of the Board and qualifications for appointment of Board members. The pertinent language of this section provides:

The eight (8) appointed members shall be *qualified electors* of the state, no more than four (4) of whom shall be members of the same political party. Appointment of board members shall be made solely upon consideration of their *knowledge, interest and active participation* in the field of *reclamation, water use or conservation* and no member shall be appointed a member of the board unless he *shall be well informed upon, interested in, and engaged actively* in the field of *reclamation, water use or conservation of water.* (emphasis added)

In addition to providing that all board members must be qualified electors of this state, the above quoted language establishes (1) criteria to be considered in appointing board members and (2) mandatory qualifications required of all appointees to the board.

As the statute reads, appointment is to be based solely upon consideration of a person’s knowledge, interest, and active participation in any of the areas of reclamation, water use or conservation. Qualifications for appointment are that the prospective board member must be well informed upon, interested in, and actively engaged in any one of the areas of reclamation, water use, or conservation of water.

Question No. 2

In view of the answer to Question No. 1, it is clear that Mr. Jones must be well informed upon, interested in, and engaged actively in any one of the areas of reclamation, water use or conservation of water in order to qualify for appointment.

To assist in making this determination, we have examined a resume of Mr. Jones’ background and experience, which is attached as Exhibit “A.” In addition, Mr. Jones has informed us that he has an interest in his family’s farm near Rupert and also irrigates a portion of his property in Boise with shares he owns in the Boise Canal Company. He has also been a member of the Citizens Advisory Council to the Water Resource Board.

It is evident from this material that Mr. Jones has an extensive background in the area of conservation of water and use of water. Among his significant accomplishments in this area are:

(1) President of the Ada County Fish and Game League in 1952 and 1972.

(2) President of the Idaho Wildlife Federation¹ in 1969 and 1970, and delegate to the National Wildlife Federation on three occasions.

(3) Member of the Landholder Sportsmen Committee.

(4) Presently in second term as President of the Pacific Northwest Conservation Council, which has as one of its primary functions the review and exchange of information related to certain fish runs and uses of the Columbia, Snake, Clearwater, and other major rivers in Idaho and the Northwest.

In view of this experience and these current activities, it is the opinion of this office that Mr. Jones is well informed upon, interested in, and engaged actively in the field of water use and conservation of water and is therefore qualified for appointment to the Idaho Water Resource Board.

¹ The conservation policy of the Idaho Wildlife Federation is to "create and encourage an awareness among the people of this state and nation of the need for use and proper management of those resources of the earth upon which the life and welfare of men depend: this includes the soils, *the water*, the forests, the minerals, the plant life and wildlife." (Emphasis added)

OFFICIAL OPINION NO. 73-129

February 9, 1973

TO: Ellis L. Mathes
State Highway Engineer
Department of Highways

FROM: W. Anthony Park

You have requested, through the State Treasurer, an opinion on the proper distribution of use fees collected under § 49-127, *Idaho Code*, "Schedule B." Specifically, you have requested our opinion whether such revenues, hereafter referred to as "Schedule B revenues," should be shared between cities and other highway users under the formula provided by *Idaho Code*, § 49-1231A.

Information you have provided us indicates that use fees collected under "Schedule B" have at no time been shared with the cities pursuant to § 49-1231A since the enactment of such section by the 1971 legislature. It is our opinion that the distribution of "Schedule B" moneys now being made is proper.

It seems clear that § 49-1231A applies only to "special fuels." Moneys collected under "Schedule B" under § 49-127 are not special fuel revenues because § 49-1230(e), *Idaho Code*, very clearly excludes fuels taxed under "Schedule B" from the special fuels tax.

We feel this result, while dictated by law, is extremely unfortunate. Materials reviewed from both the 1971 and 1972 legislatures indicate some legislators during both sessions informally understood "Schedule B" and "Special Fuel" revenues to be identical and interchangeable. We think it fair to state that

available information indicates some legislators believed they were providing the cities with 1/7th (1/6th in 1972) of all revenues derived from taxes on highway fuels. This mistake was undoubtedly reinforced by the failure to carefully discriminate between special fuels taxes and Schedule B revenues. During the year 1971 the discrepancy was covered up because the cities did receive a small portion of Schedule B moneys through the state highway fund. (§40-405, *Idaho Code*).

Between the period July 1, 1971, and March 31, 1972, approximately \$1,914,587.55 was collected as Schedule B revenues and placed directly in the State Highway Fund. The Department of Law Enforcement has indicated that during the same period approximately \$4,000 was collected under the special fuels tax, which of course, was shared with the cities under §49-1231A.

While we have grave doubts as to whether the language employed by the 1971 legislature was fully understood, we are unable to say that the mistake was so patent that the actual language employed may be disregarded. It is not entirely illogical to suggest, for example, that the legislature felt cities should benefit from the gasoline taxes used in ordinary automobiles and should not benefit from fuels used in trucks and other heavy vehicles and consequently intentionally omitted the cities from any additional share of Schedule B moneys in enacting § 49-1231A.

OFFICIAL OPINION NO. 73-130

February 12, 1973

TO: Gary Ingram
State Representative

FROM: Donald E. Knickrehm

We are pleased to respond to your request for an opinion on potential constitutional defects in the proposed "Mass Gathering Advertising Act of 1973," attached hereto.

Preliminarily, we would like to indicate that we are very happy to have been able to work with you in eliminating some of the more obvious difficulties from a similar act introduced earlier in the Legislature. We have no doubts that the attached proposed legislation is a better bill, from a constitutional viewpoint. Nevertheless, the following points of both constitutional and of lesser stature relative to this legislation should be considered:

(1) The standard set out in Section 7(2) of the proposed act, by which the Attorney General judges whether the gathering is deserving of an exemption certificate, is to our mind much too vague. Courts have consistently struck down regulatory ordinances and statutes which attempt to regulate First Amendment rights (speech, assembly) under a vague standard and a permit system. Thus the authority to deny a permit for a parade or other gathering, lodged in a police

authority on the basis of unfettered discretion, has consistently been held to be unconstitutional. We believe that to be a problem here. Section 7(2) provides no real standards to the Attorney General, and yet hinged upon the determination made under the vague criteria set out there, the Attorney General is to determine whether to impose substantial additional burdens on the sponsors of an assembly. The question of a "substantial likelihood that a gathering . . . will pose a physical danger to some or all of its participants or non-participants, for which adequate preparations have not been made, will not be made, or cannot be made . . ." is, we believe, simply too vague. Even if the Attorney General believed this vague criteria was susceptible a fair and objective application to groups seeking exemption or compliance certificates, it seems obvious that there would be no basis for a court of law to review the Attorney General's decision. On the other hand, once the determination is made that this vague danger is presented by the assembly, the persons wishing to hold the assembly may not do so until they satisfy the Attorney General by publishing warnings and otherwise correcting their advertisement.

(2) The provision of Part 6 (a) of Section 4, and of Section 5 of the proposed legislation raise the issue of undue burden upon the right of assembly and speech. Section 4(6)(a) provides that a schedule of advertisements must be filed with the Attorney General some sixty days before the assembly. Providing that kind of before-the-fact information with any reliable accuracy is probably impossible, even for the most well-planned assembly. And yet, this information is required to be filed before an exemption or compliance certificate may be issued. Under Section 5 once the material is published, it must be filed that same day in the Attorney General's office. This promptness of filing is itself a serious difficulty, but in addition there is the concern that having to file a copy of all advertisements (according to the definition, to include individual verbal invitations to attend the assembly) with the government may present an unconstitutional chilling effect upon the right of free speech and assembly. So far as we are able to determine, no federal or state law regulating advertising requires a filing of each advertisement at or before its date of publication. There is an aura of big brother watching in the concept of having to provide the government with a copy of everything you say about your exercise of your right of assembly. In short, as to this point, we think the requirements of these two sections may unduly burden the right to assembly.

(3) Section 3(12) of the proposed act provides that the Attorney General is the state officer designated to enforce the provisions of the act. While our objection to this provision is not of a specific constitutional nature, the concept involved is, we believe, of constitutional stature. Generally, the basic exercise of police authority is properly lodged with local officials, rather than a state official. Thus, the great majority of our criminal laws are enforced by the county prosecuting attorney. We believe that exceptions to this basic division of authority should only be made for strong reasons. In the case of the exercise of police power by the special narcotics division of the Attorney General's office, the problem was of obvious severity, and obviously statewide in nature, and many local prosecutors did not have the staff or the expertise to deal with some

of the more sophisticated drug pushers. Even in this instance, however, most of the actual prosecutions are done by the local prosecutors. We do not believe that the danger presented by large assemblies of people is of sufficient immediacy and state-wide concern to warrant another exception to the lodging of the general enforcement authority with the local police authorities. In short, we believe that if some provision in the nature of this act is desirable, the basic responsibility for enforcement of the provisions should be with the prosecuting attorneys. They are closer to the problem, and are certainly able to deal with these difficulties.

(4) Section 3(3)(f) attempts to define exempt gatherings in terms of the length of time that the assembly continues. The provision is that the assemblage is exempt if it does not continue for twenty-two or more consecutive hours, and if it "is not reconvened in substantially the same place without an elapsed time of at least twenty-four hours." The difficulty with this provision, again, is not of a constitutional nature, but is nonetheless serious. As we read this provision, any gathering which meets on a given day for a few hours, and then reconvenes within twenty-four hours for a few more hours, even though totaling far less than twenty-two hours, would *not be exempt*. We don't think this was the intent of the act, and in fact understand that this particular language is an attempt to avoid the phenomena of a large gathering continuing for twenty-one hours, breaking up for an hour or two, and reconvening for another twenty-one hours or more. Unfortunately, this attempt to negate the noted potential avoidance seems to have so broadened the coverage of the act as to include any type of gathering which meets, breaks up and then reconvenes less than twenty-four hours later. An effort at curing this drafting difficulty is recommended.

(5) The final major difficulty that we see in the act is the potential for a general "equal protection" attack. The law is clear that one may not separate out a particular class of persons, as opposed to a kind of activity, and attach additional burdens to those persons' exercise of given constitutional rights. To do so is to deny the equal protection of the law. Thus, one may not require only Negroes to deposit a bond before holding a parade. Nor, as the California Supreme Court recently held, may a city single out only persons with long hair and beards and prohibit them from assembling in a park. *If* this act is so limited that as a practical matter it only applies to so called rock festival gatherings held by young people, and then subjects these types of assemblages to additional burdens, it is our view that the act may be subject to an equal protection attack.

There are several other items in the proposed act which, although less serious than the above problems, deserve your attention. First the definition of "sponsor" is very broad, in that it includes anyone who sells tickets to a covered assembly. This becomes significant when it is realized that Section 12 of the proposed act requires each (and every) sponsor to file a written notice of any material change in the planned assemblage. Further, Section 14 subjects every "sponsor" to strict liability for any injuries to any person at the gathering if the gathering continues after revocation of a compliance certificate. This means that an innocent sponsor (i.e., ticket seller) who sold tickets while a valid compliance certificate was outstanding, might later become subject to these severe liabilities

because the compliance certificate was revoked and the assemblage continued unabated. In addition, when one reads the definition of sponsor in conjunction with the provisions of Section 3(11), it becomes possible that a newspaper carrying advertisements might subject itself to certain liabilities because of the broad definition of sponsor. We think this definition should be significantly narrowed.

Next, as previously indicated, we think there is some difficulty involved in defining advertisement so broadly that it includes a single verbal invitation. We believe the definition of advertisement should also be narrowed.

The provisions of Section 10 also present some difficulty, in that they provide for the determination of misleading or false advertising to be made by the Attorney General himself, rather than a court. While determinations of misleading or false advertising are made under the Consumer Protection Act by the Attorney General's office, the Attorney General must go to court for any relief. Here, the Attorney General after making this judgment himself has the element of relief at hand. He simply refuses to issue a compliance certificate until the material which he judges to be false or misrepresentative is deleted. Thus, the assemblage cannot be held until the Attorney General, rather than a court of law, is satisfied as to the fairness and correctness of the advertisement. This is an exception to the usual policy of requiring an executive officer to go to a court of law for this sort of relief. This is a subtle intrusion upon the separation of executive and judicial powers. It should be sufficient, if the Attorney General believes the advertising is false or misrepresentative, to provide that he may go to court and seek an injunction of further advertising, or even an injunction of the assemblage if in fact the court adjudges the advertising to be false.

In addition, Section 10 faces a very practical difficulty. That is, the Attorney General under the scheme developed in this act would normally issue a compliance certificate before advertising appears. If advertising appears at a later date that the Attorney General judges to be false, he must revoke the compliance certificate and seek correction of the "false statement." If, as with many events, the advertising of the event takes place only in the week or two preceding the event, then in effect this provision may prohibit advertising, or prohibit the event, even though until the date of the Attorney General's exercise of judgment relative to the advertising, the sponsors were proceeding with a compliance certificate.

In conclusion, we do not mean to indicate that any one of these discussed difficulties is sufficient in and of itself to fatally flaw this proposed legislation. Rather, it is the cumulative effect that is most damaging. Nor is that to say, if the Legislature deems necessary some regulation of large gatherings of citizens in addition to that already on the books, that a more definitive act cannot be drafted. Indeed, an act defining large assemblages that are to be covered, requiring the general informational filing set out in this proposed act to be filed with the prosecuting attorney in a county in which the assemblage is to be held, requiring some notification of the publication of mass media advertising, allowing a prosecuting attorney to take out "warning" type advertising, and

authorizing a prosecuting attorney to pursue false advertising under the Consumer Protection Act, would present few if any of the above discussed difficulties. This office would be happy to cooperate with you in drafting such legislation.

OFFICIAL OPINION NO. 73-131

February 12, 1973

TO: Leo A. Butler
State Representative

FROM: Donald E. Knickrehm

I must apologize for the delay in responding to your request that we determine why the attempt by the citizens of the Deary area to form a Recreation District pursuant to Chapter 43 of Title 31, *Idaho Code*, was thwarted, and what we might do to eliminate the obstacle to their formation of such a district.

As I indicated to you in my correspondence of January 12, I had asked the District Court in Moscow (Judge Felton) to forward to us a copy of the opinion in the case which halted formation of the Recreation District. After some delay, that opinion was sent to us. I studied it, and was quite frankly surprised at the result. I then contacted the local prosecuting attorney to see if the case was being appealed. It appeared appropriate for appeal. The local prosecutor informed me that he also favored appeal, but is newly elected, and did not take office in time to file the appeal. We now are, of course, barred by statutory time limitations from appealing.

There appears to be two avenues by which we might pursue the matter. One is to get another such case before the same District Judge, and make sure it gets appealed. The other is to draft legislation to cure the "defect" Judge Felton's opinion focused upon.

I have found it extremely difficult to understand the basis for the constitutional deficiency found by the District Court. The Court cited the fact that no hearing was required before incorporation of the Recreation District. Yet the law explicitly provides for the most reversed of hearings — an election in which every elector in the proposed district may voice his opinion.

The only way I can see to satisfy the District Court is to provide that before calling the election, the County Commissioners must call a hearing, publish sufficient notice thereof, and then on the basis of the hearing, themselves decide if the proposed district is a good idea. If they so decide, I suppose then the whole thing is to be submitted to the voters of the proposed district. Quite frankly, I cannot believe that "due process of law" requires any such procedure.

OFFICIAL OPINION NO. 73-132

February 12, 1973

TO: John T. Peavey
State Senator

FROM: Donald E. Knickrehm

We are pleased to respond to your request with an opinion on the question of whether the provision found in Section 3(3) of Senate Bill No. 1133 is a revenue measure, and therefore whether it must originate in the House.

The referenced section of the proposed bill provides

A distributor shall not refuse to accept from a dealer any empty beverage containers in satisfactory usable condition, of the kind, size and brand sold to the distributor, or refuse to pay the dealer refund value for beverage container as established by Section 2 of this act, plus one cent (1¢) per container.

Article III, Section 14 of the *Idaho Constitution* provides

Bills may originate in either house but may be amended or rejected in the other, except that bills for raising revenue shall originate in the House of Representatives.

The issue presented is whether Section 3(3) of the proposed act provides for the raising of revenue as addressed in the quoted constitutional provision.

We do not believe that it does, and therefore the quoted constitutional provision is no bar to the initiation of the proposed legislation in the Senate. There is little authority on this subject. *Black's Law Dictionary* provides that a revenue law is any law which provides for the assessment and collection of a tax to defray the expenses of the government. The proposed legislation does not provide for the levying of any tax, nor indeed the collection of any monies by the state to defray its expenses. The single Idaho case found on this precise issue is the case of *State v. Workman's Compensation Exchange*, 59 Idaho 256 (1938). In that case, a state statute providing for the payment of one thousand dollars into the State Treasury where an employee covered by Workman's Compensation was killed in the course of his employment, and there were no private claimants for the benefit. The State Supreme Court held that even though the state did receive the money, the payment was not in the nature of a tax or revenue measure, and thereby applied a very restrictive reading to the issue of what constituted revenue measures.

The subject provision is not intended, insofar as we are able to determine, to support any direct state activity. The provision would appear to be more in the nature of a mandatory minimum price law, regulatory of the dealings between distributors of beverages and retailers of beverages. We therefore conclude that the subject provision is not a revenue measure within the meaning of a constitutional limitation, and may be initiated in the Senate.

OFFICIAL OPINION NO. 73-133

February 13, 1973

TO: Richard L. Barrett
State Personnel Director

FROM: James R. Hargis

We wish to respond to your recent request for our opinion on the Commission's rule regarding sick leave and workmen's compensation award where the injured employee is a state employee.

Section 67-5338, *Idaho Code*, authorizes the Personnel Commission to establish rules and regulations relating to leave for state employees, including accumulation and use of sick leave. On the basis of that authority, we are of the opinion that the Commission may establish a rule or regulation whereby the number of sick leave hours accumulated to the credit of an employee may be used at a rate which, taken with any award under the Workmen's Compensation Act, will reduce the speed with which accumulated sick leave hours are expended. The result will be an extension of the length of time it will take an employee to exhaust his accumulated sick time. The beneficial effect will be a longer period of time that the employer will continue to receive his full salary. As an example, let us say, an employee who received a compensable injury has 50 hours of sick leave credited to his account. The compensation award is 60% of his salary. The remaining 40% of the salary could be spread over the time required to exhaust the accrued sick leave at the rate that the amount of sick leave required to bring the salary up to 100% bears to that 100%. In the example used, 40% of the hours accrued would be used until the full number of accumulated hours has been exhausted.

We are aware of the opinion of the Office of the Attorney General dated September 23, 1958, to the Industrial Accident Board,

Re: Sick Leave and Vacation Time
State Employees
Workmen's Compensation Benefits for Loss of Time.

The conclusion of that opinion with regard to sick leave states:

" . . . we are of the opinion that a state employee must first utilize his or her sick leave time (and this is compensated for by payment of full wages,) before becoming entitled as a matter of right to workmen's compensation benefits on the job."

Our present opinion directly conflicts with the quoted 1958 conclusion. To the extent of that conflict, we hereby reverse that earlier opinion. The reversal is based on the legislative changes since that time: The Personnel Commission has been created and invested with rule-making authority over sick leave policies and practices. The authority to regulate sick leave is clearly a matter for the Commission. We can find no authority to the effect that the Commission cannot adopt the rule, nor can we determine that the authority is vested in any other agency.

The administration of the present rule is, as you pointed out, difficult due primarily to the time between the injury and award. The award, when made, is retroactive to the week immediately succeeding the injury. The employee generally must protect his income by taking sick leave until the award is made. Yet once the award is made with its retroactive provision, the employee may have used all of his sick leave. He will also receive a windfall. In any event, the purpose of the rule will be ineffective as to its aims. How to resolve the dilemma and still give the rule efficacy is, of course, an administrative policy judgment. By way of guidelines, we could only suggest that the rule must be uniform in its application and still offer some protection to the employee. We do not believe the problem, however, is insurmountable. It might very well be possible to resolve the matter with the Industrial Commission so that where a state employee is the victim of a compensable injury, the award once made would not be retroactive. The employee would be placed on sick leave until the award is made. Any remaining sick leave from that time could then be integrated with the award. This is offered only as a possible solution.

OFFICIAL OPINION NO. 73-134

February 13, 1973

TO: Steven W. Bly
Director, State Parks & Recreational Department

FROM: Donald E. Knickrehm

We are pleased to respond to the following inquiry: Does a school district have the authority to condemn lands for recreation purposes?

We believe that there is ample authority in Idaho for school districts to condemn lands for such purposes. Section 7-701 of the *Idaho Code* provides that eminent domain may be exercised in behalf of the acquisition of grounds for use of any school district. Section 33-601, *Idaho Code*, provides that a school district may enter into a contract with any city or village within the boundaries of the school district for the construction, development and maintenance of playgrounds and other recreational facilities upon property owned either by the school district or the city or village. Reading these two provisions together, we believe that if the Board of Trustees of a school district determines that it is in the interest of the school district to acquire property for use by the school district as a recreation facility, the general condemnation authority of the school district may be exercised in that path.

OFFICIAL OPINION NO. 73-135

February 13, 1973

TO: Cecil D. Andrus
Governor

FROM: W. Anthony Park

In accordance with a request you received from the Boise Branch of the National Association for the Advancement of Colored People you have requested our opinion on the following questions:

1. Is it proper for the state to discourage or prohibit participation by its employees in associations practicing racial discrimination?
2. Is state financial assistance, in the form provided by § 63-105C, Idaho Code, prohibited for associations practicing discriminatory racial membership policies?

The Fourteenth Amendment to the *United States Constitution* provides:

§ 1. [Citizenship — Due process of law — Equal protection] — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The language is clear; however, the Courts for one hundred years have struggled to apply it to actual problems and events. One principle has remained constant; the Fourteenth Amendment does not infringe upon or abridge the right of private individuals to associate freely with persons of their own choosing. The Fourteenth Amendment does not require, nor does the United States Constitution permit, an unwarranted invasion of such individual rights by limiting the voluntary association of any state's citizens with persons of their own choosing. As private individuals, citizens are entitled to select their associates on the grounds of race, religion, or any other principle they choose. Included are state employees when they act as private individuals and not as officers or agents of the state.

What the Fourteenth Amendment permits for private individuals, it prohibits for the state itself. The Fourteenth Amendment was enacted as a part of the program designed to finally terminate a reprehensible and destructive state institution of racial discrimination and slavery. The concept the Fourteenth Amendment adopted was that while the rights of private individuals to segregate themselves from other races and to discriminate because of racial differences was to continue unchanged, such activities could not be institutionalized or made state policies.

In simple terms, the question presented is whether the state is participating in

discriminatory racial policies when it extends the state tax exemption provided by § 63-105C, *Idaho Code* to fraternal organizations practicing social discriminatory policies.

In our opinion the state may not provide such assistance. While conceivably every tax exemption may not be prohibited, the substantiality of the property tax exemption provided, the limitation of the exemption to certain groups clearly categorized as furthering desirable state policies, and the direct transferring of the burden of the exemption to other local taxpayers, all indicate to us that the financial subsidy provided by § 63-105C, *Idaho Code*, is prohibited.

It has been argued that equal protection is provided by § 63-105C to all citizens because its benefits are afforded to any racially segregated association, whether the association be white, black or Indian. This is not sufficient to satisfy the requirements the Fourteenth Amendment imposes upon a state. Under § 63-105 no black, Indian or white citizen is free to choose whether or not to give financial assistance to an association which excludes him solely because of his race. Instead, he is required by state law to subsidize the financial assistance the state gives to an association which excludes him solely because of his race. A citizen has not only a right to join such associations as he may choose, but also a right not to be required under compulsion of law to directly or indirectly subsidize associations discriminating against him solely because of his race.

Our opinion is also required by court ruling. In 1972 a three Judge Federal Court in Oregon, in the case of *Falkenstein vs. Department of Revenue*, United States District Court for the State of Oregon, Civil #71816, November 20, 1972, _____ Fed. Supp. _____, ruled on the exact question presented, and held the Oregon exemption statute unconstitutional. The same ruling was also reached in *Pitts vs. Department of Revenue for the State of Wisconsin*, 333 Fed. Supp. 662, 1971. In two recent cases the United States Supreme Court has ruled on issues touching those discussed in this opinion. *Moose Lodge #107 v. Irvis*, 407 U.S. 163, 1972; *Waltz v. Tax Commissioner*, 397 U.S. 664, 1970. In both cases the Court was presented with different issues than those discussed in this opinion, but the ruling in both indicate that the Court still adheres to the long standing doctrine barring state sponsored racial discrimination.

In preparing this opinion we have not investigated the racial policies of any fraternal association and do not feel it proper to comment on the racial policies of any specific association. Neither do we wish to criticize or condemn the fraternal or benevolent activities of the Elks Lodge or any other fraternal association. We simply state that the state may not provide direct financial aid in the form provided by § 63-105C, *Idaho Code*, if such association excludes citizens from membership solely on racial grounds.

OFFICIAL OPINION NO. 73-136

February 15, 1973

**TO: James H. Fitzpatrick
Sheriff, Kootenai County**

FROM: Jay F. Bates

It is the opinion of this office that although you may seize beer and liquor under your writ of execution, you are unable to dispose of it by sale. I might also advise that Regulation 10-1 of the Rules and Regulations of the Department of Law Enforcement, prescribes the procedure for transferring liquor licenses and this can only be done upon written application to the Commissioner of the Department of Law Enforcement. This entails the necessary investigation into the background of the transferee and all other investigations which are attendant with the issue of a license in the first instance. Secondly, I doubt that a licensee can be deprived of his license right in this manner.

There are factors involved in the seizure and sale of licenses which must be accorded recognition both under the law and the regulations. One of these is that the state has a right to maintain a priority list in areas where, by reason of population, all of the licenses that are permissible by law have been issued. I am simply saying to you that since all these questions involve a determination by the Commissioner of Law Enforcement, the seizure and sale of the license by an execution sale may not transfer anything at all to the purchaser. I doubt that the sheriff's office ought to be involved in selling a stock of liquor and beer where the statutes specifically require that prior to such sale a license be held by the disposing party.

I think that you are going to have to rely upon the advice of your Prosecuting Attorney for guidelines in execution sales. However, since you have asked for an opinion of this office, you may seize the beer, liquor and licenses, but you may not sell the liquor nor transfer the license by sale.

OFFICIAL OPINION NO. 73-137

February 15, 1973

**TO: Tim Eriksen
Bannock County Clerk**

FROM: Warren Felton

We have your recent letter wherein you ask that this office give you an opinion on the validity of the contracts between Bannock County and the Automatic Voting Machine Co. of Jamestown, New York. We have also examined the opinion of your Prosecuting Attorney, Garth S. Pincock, as to the validity of these agreements.

The first agreement between the county and the Voting Machine Corporation

was entered into on the 25th day of November, 1969. Under it the company furnished to the county a hundred voting machines at a price of seventeen hundred and ninety-six dollars (\$1,796.00) per machine. Payment was to be made by a rental purchase plan. The county could elect on or before February 1st of the first nine years of the ten-year contract to return any or all of said machines without further obligation if the county had paid for the use of the machines for the previous year. The county also had the option to accelerate the contract and pay all or any part of what remained due. The county agreed to accept the machines and be responsible for their safety and care. And the company agreed to take certain actions in aiding the county in the use of the machines. This, of course, was before the opinion in the *City of Pocatello vs. Peterson*, which was rendered by the State Supreme Court on August 7, 1970 (*Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644). Then, on the 22nd day of February, 1971, a new contract was entered into which states that it supersedes the prior contract, and under which the company agrees to sell to the county the same voting machines for the same price named for each machine, payment to be made in ten annual installments. Under the second contract, the county (1) has the option of accelerating the contract and paying it in full or any part of it; (2) agrees to purchase from the company the above described machines and pay for the same; (3) there is no escape clause, nor is the contract set up as a lease. It is instead a sale and purchase agreement on the installment plan over a ten year period. The case of *City of Pocatello vs. Peterson, supra*, held that where the City of Pocatello had maintained airport facilities for some twenty years and the facilities had become inadequate and old, the city as lessee could pay for new facilities to be constructed by a private firm over a period of years, that this was an "ordinary and necessary" expense and thus was exempt from Article 8, Section 3 of the *Idaho Constitution*, prohibiting governmental indebtedness for a period longer than one year.

It is apparent that the second contract was entered into by the county in reaction to *Pocatello v. Peterson, supra*.

We have examined Mr. Pincock's letter in which he concludes that the second voting machine contract is a valid contract and that the courts would hold that the purchase and expenditure of funds for the voting machines is an "ordinary and necessary" expense falling within the exception to Article 8, Section 3 of the *Idaho Constitution*. It is with regret that we must disagree with Mr. Pincock. Ordinarily, we dislike advising a county that a contract that it has entered into in good faith is void, thus allowing the county to escape such a contract. However, it is our feeling that if the court were to extend the holding in *Pocatello v. Peterson* to the contract with which we are dealing here, the net effect would be to emasculate Article 8, Section 3. In our opinion the contract in this instance goes a good deal further than the case of *Pocatello v. Peterson*. In that case the contractor built the structure and leased it back to the state while in the voting machine contract there is no pretense of any sort of lease purchase arrangement; it is a simple sale and purchase on an installment plan.

Let us suppose Bannock County failed to make one of the installment payments if the contract were presumed valid. In such a case, it would clearly be

within the province of a court to accelerate the contract and require that the county pay the entire amount to the voting machine company.

As Justice McFadden notices in his dissent to the case of *Pocatello v. Peterson*, there are actually two problems involved in such contracts. The first problem is whether or not the contract creates an "indebtedness or a liability." The second problem is whether the expenses incurred under the contract are "ordinary or necessary." Most of the cases that have dealt with lease purchase contracts have held that periodic rentals do not create an indebtedness; however, as pointed out by Justice McFadden in his dissent, the *Idaho Constitution* is worded differently than the constitutions of almost all of the other states. It includes both the words indebtedness and liability whereas most of the constitutions only include words such as debts or indebtedness and one or two of them only contain the word liability. In previous cases in Idaho such as *Williams vs. City of Emmett* 51 I 500 6 P 2d 500, *Boise Development Co. vs. Boise City* 26 I 347, 143 P 531, *Dexter Horton T. & S. Bank vs. Clearwater Co.* 235 F 743 and *Feil vs. Coeur d'Alene* 23 I 32, 129 P 643, 43 LRANS 1095, it has been held that lease arrangements create a liability or indebtedness under this section.

As stated by the majority in *Pocatello vs. Peterson* "ordinary" means regular, usual, normal, common, often recurring; not characterized by peculiar or unusual circumstances. "Necessary" means indispensable. Now it is a fact that over thirty counties in Idaho do not use voting machines. We do not believe that voting machines are "indispensable" to county government; further, we feel that this expense cannot be classified as "ordinary." It is rather in the nature of a one time capital improvement. A case quite similar to this situation was the *Dexter Horton T. & S. Bank vs. Clearwater Co.* case, supra. In that case, which occurred about twenty years after the turn of the century, a new law had been passed requiring the counties to appraise the timber lands in the state in an attempt to equalize the valuation thereof and provide for uniform taxes. Clearwater County hired a timber cruiser to do this and claimed that since the law required the appraisal of these lands the use of the timber cruiser was "ordinary and necessary" and exempted this expenditure from Article 8, Section 3 of the *Idaho Constitution*. In discussing that matter Judge Dietrich said in part . . .

"The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a pay-as-you-go system of finance. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay. Such policy entails a measure of crudity and inefficiency in local government, but doubtless the men who drafted the Constitution, having in mind disastrous examples of optimism and extravagance on the part of public officials, thought best to sacrifice a measure of efficiency for a degree of safety . . . And likewise, under the Constitution, county officers must use the means they have for making fair and equitable assessments until they are able to pay for something more efficient, or obtain the consent of those in whose interests they are supposed to act . . . Enough has been said to make it clear that the

Legislature has not imposed upon the counties the absolute duty of cruising their timber lands, or of incurring indebtedness for that purpose. The county officers are required only to determine the full cash value of property, including timber lands, as nearly as may be practicable with the means they have. They are not obligated, nor have they the right, to overstep the constitutional limitation for the purpose merely of possibly increasing the efficiency of their service. And the county commissioners have no authority to substitute for the statutory mode of valuing property a method of their own . . .”

What Judge Dietrich said then, we feel applies fully as much to the second voting machine contract. We believe that *Feil vs. Coeur d'Alene*, supra, *Dunbar vs. Board of Commissioners* 5 I 407, 49P 409, *Washington Water Power vs. Coeur d'Alene* 9 FS 236, *Dexter Horton T. & S. Bank vs. Clearwater County*, supra, *Boise Development Company vs. Boise City*, supra, *Allen vs. Doumecq* 33I 249, 192 P 662, *Bannock County vs. Bunting & Co.* 4I 156, *Williams vs. Emmett*, supra, *General Hospital, Inc. vs. Grangeville* 69 I 6, 201 P 2d 750, *O'Bryant vs. Idaho Falls* 78 I 313, 303 P 2d 672 and *Swenson vs. Buildings, Inc.* 93 I 466, 463 P 2d 932, all support this position.

The Idaho voting machine law (Sections 34-2401 et seq., *Idaho Code*, does not require that the counties obtain voting machines. It only authorizes that the counties obtain them. Section 34-2407, *Idaho Code*, gives the counties a great deal of leeway in the methods by which they can purchase voting machines. It reads as follows:

34-2407. Purchase of machines – Manner of payment. – (1) The governing body may, on the adoption and purchase of voting machines or vote tally systems, provide for their payment in the method it determines to be for the best interest of the county, city, district or other political subdivision. The governing body may make contracts for the purchase of the machines or vote tally systems with the provisions with regard to price, manner of purchase and time of payment that the governing body determines are proper.

(2) For the purpose of paying for voting machines or vote tally systems, the governing body may:

(a) Issue bonds, warrants, notes or other negotiable obligations. The bonds, warrants, certificates, notes or other obligations shall be a charge upon the county, city, district or other political subdivisions.

(b) Pay for the voting machines or vote tally system in cash out of the general fund.

(c) Provide for the payment for the voting machines or vote tally systems by other means.

(3) In estimating the amount of taxes for the general fund, if any, the amount required for payment for voting machines or vote tally systems shall be added, extending over the time required to pay for the machines or vote tally systems.

However, this section cannot change Article 8, Section 3 of the *Idaho Constitution*. The *Constitution* certainly controls in any event; however, we don't think that that section could authorize a straightforward ten-year installment purchase contract for a county.

Section 34-2405, *Idaho Code*, provides for the discretionary rental or purchase or procurement of voting machines and the section goes on to say that once the county has such machines, "thereafter the voting machine or vote tally system shall be used for voting and for receiving, registering and counting the votes at all primary and general elections held . . ." We do not interpret this as being a requirement that the county must continue thereafter to have voting machines, but only, that it use voting machines as long as it has them. And thus we do not see this provision as imposing a specific duty on the county to always thereafter use voting machines. See *Dexter Horton T. & S. Bank vs. Clearwater County*, supra.

In view of the above, it is our conclusion that while the voting machine contract of November 25, 1969, was almost certainly valid, the subsequent contract of February 22, 1971, is almost certainly invalid.

OFFICIAL OPINION NO. 73-138

February 15, 1973

TO: Mayor & City Council
City of Payette

FROM: Jay F. Bates

In answer to your request for an opinion as to whether or not you can legally deny an applicant a liquor permit in the City of Payette, assuming that the population requirements were met for the additional permit, on the basis of expressed desire for a location other than that proposed and by a different applicant, the answer is you may not.

The regulations adopted by the Department of Law Enforcement, State of Idaho, clearly prohibit this type of action. Regulation 11-L, provides:

"1. License available. No priority list shall be maintained in those cities or villages wherein there is available for issuance a license to sell alcoholic liquor at retail."

You would, in effect, be maintaining a priority list if you attempted to reserve the additional license for a particular area and deny issuance to the present applicant on that fact alone. Other things being equal, if the prior applicant qualifies, I think that the city would subject itself to a lawsuit if it failed to grant the permit.

OFFICIAL OPINION NO. 73-139

February 15, 1973

TO: Robert H. DesAulniers
Assistant to the Administrator
Department of Environmental Protection & Health

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your request for an opinion dated the 13th of February, 1973, in which you posed the following question:

"Do the proposed changes to Section 39-414, Idaho Code contained in House Bill 51 reduce the control of the Administrator or lessen his supervisory authority so as to have inadequate control of Federal Funds coming to the state for local expenditures?"

On November 23, 1971, this office wrote an opinion answering this question under the then existing law; the conclusion at that time was that the state did retain sufficient control and have adequate supervisory powers over the public health districts to insure the appropriate expenditures of the federal monies. After comparing the proposed amendments, under House Bill 51, to Section 39-414(2), *Idaho Code*, I find that there is not a substantial difference between those proposed amendments and the now existing law.

It is my understanding that there is some question about the meaning of the word "delegate" as contained in the proposed amendment. Upon researching the definition of this word and the general meaning given to it by the courts, I find that the following definition is generally accepted:

"The entrusting of power to another to act for the good of the one who authorizes him." *Mouledoux v. Maestri*, 2 S.2d 11.

The court in that case went further and stated that the delegation of a power does not constitute "surrender" or "abandonment" of the "power" and that the delegating authority retains the control to withdraw such delegation in its discretion.

For purposes of this opinion, the foregoing definition of the word "delegate" shall be used for it is the general definition applied when speaking to a delegation of authority.

In conclusion, it is the opinion of this office that there is no reduction in control or of the supervisory powers as they relate to federal monies coming into the State of Idaho to be used for local purposes.

OFFICIAL OPINION NO. 73-140

February 20, 1973

TO: Franklin D. Ormsten
Chief Attorney, Branch #4
Securities & Exchange Commission

FROM: Wayne Meuleman

This is in response to your letter of January 9, 1973, requesting this office to determine whether whisky warehouse receipts constitute a sale of a "security" within the meaning of the Idaho Securities Act. The question you have presented has not yet been considered by Idaho courts; however, two of the cases decided pursuant to the Idaho Securities Act shed light upon the judicial attitudes the Idaho courts have taken in respect to the Idaho Securities Act.

As concerns the scotch whisky receipts described in your correspondence, it is my opinion that such documents do constitute a "security" within the meaning of the Idaho act. In support of this opinion I am enclosing a copy of a Memorandum Opinion issued on the Preliminary Injunction in *State of Idaho v. Dare To Be Great*. This decision indicates a very progressive and liberal interpretation of the Idaho Securities Act so as to encompass any document which has the characteristics of a security regardless of the form of such document. Also enclosed is a copy of a Memorandum Decision and Order issued on the Preliminary Injunction in *State of Idaho v. International Silver Mint Corp.* wherein the court ruled that silver deposit receipts issued by the defendant company constitute a security within the meaning of the Idaho Securities Act, and therefore must register with the Idaho Department of Finance as a security. It should be noted that the silver deposit receipt under consideration in *State of Idaho v. International Silver Mint Corp.* were not true warehouse receipts in that commodity which the silver receipt represented was not segregated nor specifically designated from the bulk of the defendant company's silver inventory. In this respect the scotch whisky warehouse receipts described in your letter would likewise be something other than a true warehouse receipt under the present judicial interpretations in this state. The fact that the sale of the whisky warehouse receipts is to inexperienced individuals who are not expected to take personal possession of specifically designated scotch which the receipt represents, indicates that the warehouse receipts are more in the nature of a "security" than a true warehouse receipt.

OFFICIAL OPINION NO. 73-141

February 20, 1973

TO: Dean Summers
State Senator
Chairman, State Affairs Committee

FROM: W. Anthony Park

You have inquired as to the constitutionality of a bill which would require an electorate vote upon proposed amendments to the *U.S. Constitution* prior to any action taken by the Legislature to ratify such amendments. The proposed bill provides:

"That the legislature of the state of Idaho shall not ratify any amendment to the United States Constitution unless the proposed amendment shall first have been submitted to the electorate at the general election next preceding the session of the legislature when the amendment is to be considered. The results of such submission of the question to the electorate shall be advisory in nature only, and shall not prevent the legislature from acting in any manner on the proposed amendment . . ."

The legal question, therefore, is as follows: Whether a state may enact a statute which imposes a condition or additional requirement not mentioned in the *U.S. Constitution* relative to the legislature's ratifying an amendment to the U.S. Constitution.

Article V of the *Constitution* of the United States provides:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress*; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate." (Emphasis supplied)

It is clear that Article V of the *Constitution* of the United States (*supra*) does not provide for an advisory question being put to the people as a precondition to a state legislature's consideration whether or not it will ratify a proposed amendment to the Constitution of the United States.

The precise question here, to my knowledge, has never been reviewed by the Supreme Court. It is noteworthy, however, to analyze similar attempts by states to condition the orderly passage of amendments to the *Constitution* of the United States.

In *Hawke v. Smith*, 253, U.S. 221, 231 (1920), the court said that *the term "legislatures" as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several states. It does not comprehend the popular referendum which has subsequently become a part of the legislative process in many of the states, nor may a state validly condition ratification of a proposed constitutional amendment on its approval by such a referendum. In the words of the court: "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."* (*Leser v. Garnett*, 258 U.S. 130, 137 (1922)) (Emphasis supplied)

Though these cases do not absolutely dispose of the question before us, certainly a strong argument develops from them and flows as follows:

The U.S. Supreme Court has ruled that the function of both Congress and state legislatures in proposing and ratifying amendments to the *Constitution* of the United States is a federal one derived from the *Constitution*. Further, the court has held that a "referendum approval" prior to a state legislature's ratification of proposed amendments is contrary to the procedure set forth in Article V because such a procedure places conditions and burdens upon the orderly ratification by a legislature. The bill in question, in our opinion, places a condition or burden upon the orderly ratification of a proposed constitutional amendment by the Idaho Legislature, because it prohibits the Legislature from acting upon an amendment until it has *first been put to the people at a general election*. The legislature could never, under this bill, ratify an amendment to the *Constitution* of the United States during a session in a general election year. This condition or burden probably would be held to contravene the procedure set forth in Article V of the *Constitution* of the United States if the U.S. Supreme Court continues to follow the rationale expressed in *Hawke v. Smith, supra*.

We do not want the Committee to believe that we are expressing this opinion with absolute certainty that the high court will rule as we have stated. Rather, we are saying that, based on the legal precedent available to us, the best likelihood is that would be the result.

OFFICIAL OPINION NO. 73-142

February 22, 1973

TO: John V. Evans
 Senator — District 33

FROM: W. Anthony Park

The limited question to which this opinion addresses itself can be stated as:

"Is a manager of a duly constituted port authority, a municipal corpora-

tion, an 'appointive office' proscribed in *Idaho Code*, 40-113, to members of the Idaho Board of Highway Directors?"

The reasons set forth in this opinion require the question to be answered in the negative.

The Governor, pursuant to *Idaho Code*, Section 40-113, is responsible for appointing members to the Idaho Board of Highway Directors. In exercising this authority the Governor has duly appointed Carl C. Moore, Lewiston, Idaho. Mr. Moore is presently employed by the Port Authority of Lewiston, Lewiston, Idaho, as manager.

The only restriction upon the Governor's appointments to the Idaho Board of Highway Directors are contained in *Idaho Code*, Section 40-113, which requires as follows:

"The Idaho board of highway directors shall be composed of three (3) members to be appointed by the governor. Not more than two (2) members thereof shall at any time belong to the same political party. Members shall be successful public spirited men of good character, well informed and interested in the construction and maintenance of public highways and highway systems, and their selection and appointment shall be made solely with regard to the best interest of the various functions of the board. Each member at the time of his appointment shall have been a citizen, resident and taxpayer of the state of Idaho and of the district from which he is appointed for at least five years, and during his tenure of office no member shall hold or occupy any elective or other appointive office, federal, state, county or municipal, or any office in any political party."

For purposes of this opinion it can be stipulated that Mr. Moore would be otherwise qualified unless he holds an "appointive" municipal office.

A port authority duly constituted under Idaho law is a municipal corporation. *Idaho Code* Section 70-1008; *State v. Port of Seattle*, 399 P.2d 623 (Wash. 1965). As such, the manager of a port authority is a public rather than a private engagement.

Whether this position of port manager is merely a "public employee" or is a "public official" depends upon the nature and operative duties of that office. *Advisory Opinion to the Senate of the State of Rhode Island and Providence Plantations*, 277 A.2d 750 (R.I. 1971); *Johnston v. Melton*, 73 P.2d 1334 (Wash. 1937); *Gary v. Board of Trustees of Employees' Retirement System*, 165 A.2d 475 (Md. 1960). In *Bredice v. City of Norwalk*, 206 A.2d 433 (Conn. 1964), the Court stated:

"The accepted characteristics which differentiate a public office from a mere employment are: 1. an authority conferred by law, 2. a fixed tenure of office, and 3. the power to exercise some portion of the sovereign functions of the government."

And in *State v. Jacobson*, 370 P.2d 483 (Mont. 1962), the court in discussing the distinction between a public employee and public office stated:

“***we hold that five elements are *indispensable* in any position of public employment, *in order to make it a public office of a civil nature*: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) *it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public*; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority.’ ”

The distinctions are exhaustively annotated in 53 A.L.R. 595, 93 A.L.R. 333, and 140 A.L.R. 1076 which supplements the earlier annotations. In 140 A.L.R. 1076 there are listed as specific grounds of distinction which will be applied to the position involved in this appointment. It must be first noted that not all those in public employment are public officials or hold public office. *Hudson v. Annear*, 75 P.2d 587 (Colo. 1938). The first factor analyzed in determining whether a person is a mere employee or holds an office is to determine how his position was created. It is generally considered essential that the position be created by constitution or law or that the power to create the position be delegated to an inferior body. *State v. Jacobson, supra*. It is clear from a reading of Chapter 14, Title 70, of the *Idaho Code*, that the Legislature has not created the position of port manager, nor has it delegated to the port commission the creation of the position of port manager. The authority to employ individuals to assist the port authority to carry out its functions is contained in *Idaho Code*, Section 70-1408. This section does not create the position of port manager but merely gives the port authority permission to retain such legal or other professional persons as it deems necessary. There is no legislative requirement for a port commission to employ a port manager. The only requirement is that if the port commission does employ a port manager, he shall execute and file a fidelity bond. *Idaho Code*, Section 70-1409. Under such circumstances the position is not one created by law and does not rise to the dignity of an “office.” *State v. Dark*, 196 So. 47 (La. 1940); *Wipfler v. Klebes*, 298 N.Y.S. 333 (1937).

The next factor considered is the extent of the powers and duties exercised by an individual. It is generally considered an indispensable element of a public office that the person holding such office will exercise some portion of the sovereign power for the benefit of the public. *Bernstein v. Krom*, 260 A.2d 269 (N.J. 1969); *Mosby v. Board of Com'rs of Vanderburgh County*, 186 N.E.2d 18 (Ind. 1962). This is the most important characteristic of a public office and without it the person is characterized as a mere employee. In this case the port manager has not been legislatively delegated any of the sovereign powers to be

exercised for the public benefit. His duties and functions are fixed by the port commission in the exercise of their discretion. An analogous situation is found in *Martin v. Smith*, 1 N.W.2d 163 (Wis. 1941), wherein the court held that a university president did not exercise any part of the sovereign power but instead such power was exercised by the university's board of regents. The president merely had the power to manage and direct the university under the authority and control of the board of regents. Similarly, Mr. Moore as port manager manages and directs the operation of the port authority under the direct supervision and control of the port commission. It is the port commission that is exercising the sovereign powers for the benefit of the public. For this same proposition see also: *Gary v. Board of Trustees of Employees' Retirement System, supra*; *Hudson v. Annear, supra*.

The next factor to be considered is the continuing and permanent nature of the position. *State v. Jacobson, supra*. If the position has no permanency in the sense that it is created by law rather than at the discretion of the appointing authority then such person occupying that position will be considered an employee. *State v. Fernandez*, 58 P.2d 1197 (1936). The position of port manager is not one created by law but is one created solely at the discretion of the port commissioners and may be abolished as easily as it has been created.

In addition, to constitute one a public official his duties must be prescribed by constitution or law. *State v. Jacobson, supra*; *Griggs v. Harding County South Dakota*, 3 N.W.2d 485 (1942).

Another indispensable element required of a public official is that he perform his duties independently and without control of a superior body or agency, other than the law. *Gary v. Board of Trustees of Employees' Retirement System, supra*; *State v. Jacobson, supra*; *Hudson v. Annear, supra*; and *State v. Clark*, 196 N.E. 234 (1935), states that a superintendent of the county poor asylum and county farm, as the general manager thereof, was held to be an employee and not an officer of the county for the reason that his duties were always subject to the control of the board of county commissioners. The position of port manager is obviously similar in nature.

Another factor considered is the requirement of an official fidelity bond. Although the port manager is required by law to execute and file a fidelity bond, under the numerous cases cited in the annotations found in 140 A.L.R. 1076 at 1091 this factor is not an absolute criterion by which to distinguish between a public official and an employee. And, it is particularly not persuasive in this case since the position of port manager is not required by law but is discretionary with the port commission.

Two final factors which add support to the fact that the port manager is not a public official but merely an employee is the fact that no oath of office is required and the statute itself designates the people employed by the port authority as "employees." There are numerous cases cited in the annotation at 140 A.L.R. 1076 at page 1092 for the proposition that the requirement of an oath of office is a strong indication that the individual is a public official rather than an employee when other circumstances identifying a public official are

present. Although the nomenclature of the statute in designating a person as an employee is not controlling, it is to be considered together with the other factors. *Mosby v. Vanderburgh, supra*.

When all these factors are considered together they conclusively and irrefutably require the port manager to be classified as an "employee" rather than a "public official" of a municipality.

A final consideration should be noted. There is a strong public policy in favor of eligibility for public office. *State v. Dubuque*, 413 P.2d 972 (Wash. 1966). And in *Oliver v. City of Shreveport*, 199 So2d 1 (La. 1964), the court said in quoting from 67 CJS Officers, § 11, at page 126:

"There is a strong presumption in favor of eligibility of one who has been elected or appointed to public office, and any doubt as to the eligibility of any person to hold an office must be resolved against the doubt."

And in *McCarthy v. State of Arizona*, 101 P.2d 449 (Ariz. 1940) the court stated that legislative qualifications for public office are to be strictly construed and will not be expanded to cases not clearly within their scope. Here it would have been easy for the legislature, had it been its desire, to exclude governmental employees as well as elected and appointed officials from being members of highway boards. See, e.g., *Washington Code*, 47.01.030, and the *Montana Code*, 32-2403.

In conclusion, and for the reasons discussed, it is the opinion of this office that Carl C. Moore, Port Manager of the Port of Lewiston, is eligible for appointment to the Idaho Board of Highway Directors.

OFFICIAL OPINION NO. 73-143

February 26, 1973

TO: Dr. Vern Coiner
Department of Agriculture

FROM: Michael G. Morfitt

You requested an interpretation of the legality of certain custom meat packing plants processing wild game salami for sale in intrastate commerce. The Idaho Meat Inspection Act, Chapter 19, Title 37, *Idaho Code*, outlines the procedures which must be followed before any meat or meat products may be placed in intrastate commerce for human consumption. Section 37-1901, *Idaho Code*, defines "meat food product" to mean "any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats . . ." or equines. The term "capable of use as human food" is defined to mean "any carcass, or part or product of a carcass, of any animal, . . ."

Although the act specifically enumerates certain domestic animals which are covered by the inspection requirement, it also implies that any meat product capable of use as human food comes under the purview of the act. This

implication is further strengthened by Section 37-1915, *Idaho Code*, entitled "exceptions to inspection requirement." This section specifically excludes any game animals from the inspection requirements of the law only when the meat or meat food products are being prepared for the owner of such carcasses, and "exclusively for use by him and members of his household and/or his nonpaying guests and employees." A second exclusion in the same section is offered to the custom preparation of meat or meat food products derived from game animals "at the request of the owner thereof for such custom preparation and transportation in commerce of such custom prepared articles exclusively for use in the household of such owner by him and members of his household and/or his nonpaying guests and employees." Once again the apparent intent is that all other circumstances except those specifically excluded shall fall under the purview of the act.

Therefore, it is the opinion of this office that commercial preparation of wild game salami for intrastate commerce must meet the same inspection requirements and other requirements imposed by the act for sale of meat food products. Preparation of the wild game salami would be excluded only if such preparation is made for, and at the request of the owner of the wild game carcass.

OFFICIAL OPINION NO. 73-144

March 2, 1973

TO: Steve Antone
Representative, District #21

FROM: James R. Hargis

We wish to respond to your question of whether or not Section 67-2328, *Idaho Code*, entitled Joint Exercise of Powers, permits local school districts to jointly purchase insurance to cover the risk of loss to property or for injuries of the individual districts. Members of the staff of this office have discussed and researched the matter in some depth. The Department of Insurance has also been requested to enter its expression on the subject.

We are of the opinion that although there is merit in legislation specifically authorizing districts to purchase insurance jointly, the Joint Exercise of Powers Act is apparently broad enough to authorize joint cooperation for that purpose. Since each school district is authorized by law to issue property loss and injury liability, Section 67-2328 would appear to authorize the joint and cooperative purchase as well.

OFFICIAL OPINION NO. 73-145

March 5, 1973

TO: John F. Croner
Assistant Secretary of State

FROM: Clarence D. Suiter

In response to your letter of February 26, 1973, regarding Section 67-910, and the interpretation this office puts on said section, we offer the following:

Section 67-910, *Idaho Code*, sets forth with particularity the schedule of fees to be charged by the Secretary of State for certain services performed by him. That statute was enacted initially in 1901, amended in 1907, and amended again in 1955. Although this fee statute, notwithstanding its 1955 amendment, is vague in some sections and outdated in others, nevertheless the statute is for the most part so unequivocally clear in its language and intent as to have very little, if any, room for interpretation, with the exception of one area. That area last referred to is the section of the statute pertaining to the payment of fees in advance. The provision that all fees must be paid in advance was not included in the original 1901 statute but appeared initially through the 1907 amendment. In that 1907 enactment, the advance payment of fees section did not appear in the title of the act and, therefore, under the Idaho court decisions interpreting similar statutory enactments, that particular amendment is probably void and of no effect. In Idaho's *Constitution*, Article III, Section 16, it is provided:

"§ 16. Unity of subject and title. — 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."

In construing that provision of the *Idaho Constitution*, the Supreme Court of the state in *Hammond v. Bingham*, 83 Idaho 314, said:

"The object or purpose of Idaho Constitution Art. 3, § 16, is to prevent the combining of incongruous matters and objects totally distinct and having no connection nor relation with each other; to guard against 'logrolling' legislation; and to prevent the perpetration of fraud upon the members of the Legislature or the citizens of the state in the enactment of laws."

The foregoing case authority, combined with our constitutional authority leads this office to conclude that the payment in advance provision of *Idaho Code*, Section 67-910, is void and unenforceable.

In your letter of February 26, you also ask for some indication as to the interpretation to be given the subsection of the law relating to, "... a copy of any law, resolution, record or other document or paper on file in his office, \$.20 per folio.", when said document or paper is a photocopy. The original statute in 1901 obviously did not contemplate photocopies but just as obviously did

contemplate copies, of one sort or another; therefore, it is the opinion of this office that there is no practical or legal difference between a hand drafted copy and a photocopy insofar as the charge per folio, or page, is concerned.

You ask also who the proper persons to be charged under the various provisions of the act. It is our opinion that the person that receives a copy has to make payment therefor, with exception of state officers or members of the Legislature when the search to be accomplished pertains to the duties of their offices nor must they be charged any fee for certified copies of laws or resolutions passed by the Legislature relative to their official duties. The various sections of 67-910 relating to the charges to be made and the persons to be charged should be followed literally in our opinion and in any ambiguous or extraordinary situation recourse can be had to this office for the particular decision.

The one remaining area that may conceivably cause difficulty is the reference throughout the statute to the word "folio." That word by legal and practical definition is conceded to mean "page." The most usual definition historically has been, "a leaf, especially of a manuscript or book." Our conclusion that a "folio" is synonymous with a "page" is based upon that time honored definition.

It seems here appropriate to make unsolicited observations in regard to the application and enforcement of the statute here in question. All practicing attorneys, and citizens generally, have been accustomed to and in the habit of exemplary service of the Secretary of State's Office in regard to record searches and assistance generally in transforming some obscure section of a public record into the practical every day working papers of those who depend upon such things for their livelihood. As you point out in your letter, state employed auditors will no longer allow the considerate assistance of the employees of the Secretary of State's Office to be given to citizens without charge. I believe the most cogent inquiry is whether persons desiring information have any alternative but to pay the \$3.00 per inquiry, or \$.20 per page, or whatever. I should like to call attention to *Idaho Code*, Section 59-1009, which states:

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

So even though the Secretary of State must charge \$3.00 per inquiry or record search (or more depending upon need) nevertheless, citizens of this state may go freely into the Secretary of State's Office and themselves search the records without any charge being made therefor, as it seems clear to this office that the charges outlined in Section 67-910 are for services rendered by the Secretary of State or his employees. Minimal regulations can be made by the Secretary of State to provide for the security and safety of the records and files in his office, but it appears to us that the public cannot be entirely excluded from those files and records.

OFFICIAL OPINION NO. 73-146

March 6, 1973

TO: Bartlett R. Brown
 Commissioner, Department of Labor

FROM: Wayne Meuleman

I have reviewed the Idaho Supreme Court decision in *Local Union 283, International Brotherhood of Electrical Workers v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967), wherein the Court considered whether the duties of the Idaho Commissioner of Labor under Section 44-107, *Idaho Code*, extends to public employment. I will attempt to briefly summarize the Court's decision in said case.

It was the unanimous decision of the Court that the statutory duty of the Commissioner to conduct elections and certify a collective bargaining representative pursuant to Section 44-107, *Idaho Code*, does not extend to public employment. The Court stated that even though public employment was not specifically exempt from the act by Section 44-108, "(t)he use of general language in a statute is insufficient to indicate a legislative intent that the government should fall within the statutory coverage."

The Court concluded by stating:

"We are not persuaded that the ambiguous language employed in the certification statute, I.C. § 44-107, and in the related penal sections, I.C. § 44-107A and 44-107B, demonstrates a legislative intent to inaugurate a mandatory system of collective bargaining in governmental employment. We hold that the duties of the Commissioner of Labor, pursuant to I.C. § 44-107, do not extend to questions of representation in public employment, of employees, in a collective bargaining unit."

In light of the above-cited language, I conclude that any involvement of the Commissioner of Labor under Section 44-107, *Idaho Code*, in the public employment area, except where specifically designated by statute, is authorized only where the governmental employer consents to such involvement. Therefore, where any objection to participation by the Department of Labor is voiced by the governmental employer the Department of Labor is without authority to participate. The Supreme Court opinion discussed herein limits the Department of Labor to permissive participation where public employment is involved.

OFFICIAL OPINION NO. 73-147

March 7, 1973

TO: Ewing H. Little
 Chairman, State Tax Commission

FROM: W. Anthony Park

You have requested an Attorney General's opinion on the following question:

“Do the confidentiality sections of the Idaho State Income Tax and Sales Tax Acts apply to auditors and other personnel of the Multi-state Tax Commission to the same extent as to Idaho’s own auditors?”

It is our opinion that auditors who are employed by the Multi-state Tax Commission for the purpose of conducting audits as agents of the Idaho State Tax Commission are subject to the confidentiality provisions of the Idaho State Income Tax and Sales Tax Acts to the same extent as an auditor directly employed by the State Tax Commission. Additionally, the applicable penalty provisions found for disclosing confidential tax information would apply to the same extent to Multi-state Tax Commission auditors as they would to auditors directly employed by the State Tax Commission.

This opinion is based on the clear language of the statutes involved. *Idaho Code* § 63-3076 provides in applicable part as follows:

“63-3076. Penalty for divulging information. – (a) No commissioner, deputy, or any clerk, agent or employee, or any centralized state computer facility employee shall divulge or make known to any person in any manner any information whatsoever obtained directly or indirectly by him in the discharge of his duties . . .” (Emphasis added)

This provision indicates that the confidentiality section and the penalty provided therein is to be applied to any direct employee of the State Tax Commission or any “agent” of the State Tax Commission. Employees of the Multi-state Tax Commission are appointed agents of the State Tax Commission and therefore clearly subject to this provision. This section is made applicable to the Idaho Sales Tax Act by virtue of *Idaho Code* § 63-3634.

Additionally, there is specific statutory authority found in the Idaho Legislature’s enactment of the “Multi-state Tax Compact,” Section 63-3071, et seq., *Idaho Code*, wherein in Article VIII, Section 6 further protection is afforded the taxpayer who is subjected to audit by auditors retained by the Multi-state Tax Commission as follows:

“6. Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes of party states, their subdivisions or the United States . . .”

The sanctions provided for in *Idaho Code* § 63-3076(b) apply equally to employees of the State Tax Commission or “agents” of the State Tax Commission. Therefore, it is our opinion that the penalty provisions including possible felony conviction, discharge and incapacitation to hold public office in this state for a period of two years found in *Idaho Code* § 63-3076(b) apply to Multi-state Tax Commission auditors who are agents for audit purposes of the State Tax Commission.

OFFICIAL OPINION NO. 73-148

March 7, 1973

TO: Ewing H. Little
Chairman, State Tax Commission

FROM: W. Anthony Park

You have requested an Attorney General's opinion on the following questions:

1. Does the State Tax Commission have the authority to enter into an agency relationship with the Multistate Tax Commission for the performance of audits on its behalf?
2. Are there specific qualifications which must be met by auditors directly employed by the State Tax Commission to which Multistate Tax Commission auditors are not subject?

In answer to your first question, it is our opinion that the State Tax Commission has the authority under applicable Idaho law to enter into an agency relationship with the Multistate Tax Commission for the purpose of performing audits on its behalf.

The Idaho Legislature in 1967 adopted the "Multistate Tax Compact" in order to facilitate the following purposes:

"The purposes of this compact are to:

- (1) Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
- (2) Promote uniformity or compatibility in significant components of tax systems.
- (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
- (4) Avoid duplicative taxation." § 63-3701, *Idaho Code*.

A central concern, which was obviously addressed by the Legislature, was that the Multistate Tax Commission should have the power to perform multistate audits on behalf of the member states. Article VIII of the "Multistate Tax Compact" provides specifically for the requesting by a member state of the performance of an audit on its behalf by the Multistate Tax Commission.

The specific authority for the employment of personnel by the State Tax Commission is found in a series of statutes and it is by a reading together of these statutes that the power of the State Tax Commission to employ agents can be discerned. The State Tax Commission is given general authority to "employ such other persons as may be necessary to the performance of its duties." The question to be addressed is whether or not the auditors who are hired by the Multistate Tax Commission are "persons" in the "employ" of the State Tax Commission.

Section 63-506(c), *Idaho Code*, states that the State Tax Commission "may delegate to any of its employees the duty of assisting in . . . audit . . . of any tax." The language of this subsection is clearly permissive so as to not limit the State Tax Commission's power to "employ" persons to only those who are "employees" in a strict sense of the word.

Elsewhere in the Idaho Income Tax Act and the Idaho Sales Tax Act we find statutory indications that Section 63-506(c) should be read broadly to include agents for audit purposes as "employees." § 63-3624(b) in the Sales Tax Act provides that the State Tax Commission "shall employ qualified *auditors* for examination of taxpayers' records and books. The Tax Collector shall also employ such accountants, investigators, regional supervisors, assistant, clerks and other personnel as are necessary for the efficient administration of this act, and may delegate authority to his *representatives* to conduct hearings or perform any other duties imposed by this act." The power to "employ" auditors and delegate authority to "representatives" appears broader than the power to form employer-employee relationships.

The applicable confidentiality sections, § 63-3076(a), *Idaho Code*, (this section is applied to sales tax audits by virtue of § 63-3634) anticipate the ability of the State Tax Commission to enter into agency relationships as well as employer-employee relationships. Therein is found the following language: (a) No commissioner, deputy, or any clerk, *agent* or employee . . . shall divulge . . ." Agents are clearly covered by the penalties for divulging confidential tax information which they possess as a result of an exercise of their duties.

There is no case law in the state on the question of how far the State Tax Commission's power to "employ persons" runs. Given the apparent acknowledgement of the power to employ "agents" and "representatives" found in the above cited sections coupled with this State's adoption of Article VIII of the "Multistate Tax Compact," the reasonable interpretation of the State Tax Commission's power to "employ persons" would seem to include the right to hire "agents" for audit purposes.

In answer to your second question, it is our opinion that the specific requirements placed on "employees" by virtue of state employees being covered by the Personnel System, Section 67-5301, et seq. are not applicable to auditors employed by the Multistate Tax Commission for the performance of multistate audits on behalf of the State Tax Commission. *Idaho Code* § 67-5303 provides as follows:

"67-5303. APPLICATION TO STATE EMPLOYEES. — All departments of the state of Idaho and all employees of such departments, except those employees specifically exempt, shall be subject to this act and to the system of personnel administration which it prescribes. Exempt employees shall be: . . . (m) persons retained under independent contract for special or temporary projects."

Auditors hired by the Multistate Tax Commission for the performance of specific audits on behalf of the State Tax Commission would appear clearly to be exempted from the requirements of the Personnel System by virtue of subsection (m).

Our research has not resulted in our finding any other specific statutory qualifications imposed upon auditors either in the direct employ of the State Tax Commission or in the "employ" of the State Tax Commission by virtue of an agency relationship. Therefore, there appear to be no other specific differences between the standards which must be met by state auditors and auditors employed by the Multistate Tax Commission on behalf of the State Tax Commission.

OFFICIAL OPINION NO. 73-149

March 9, 1973

TO: D. F. Engelking
State Superintendent of Public Instruction

FROM: James R. Hargis

We wish to respond to your letter of recent date concerning accumulation of sick leave and the transfer thereof by teachers.

Section 33-1216, *Idaho Code*, provides that a teacher shall be entitled to 8 days of sick leave in each school year with full pay. There is nothing in the section of the *Code* which indicates how the 8 days are to be acquired. Therefore, in the absence of any accumulation formula, we must conclude that the teacher has 8 days of sick leave when that teacher enters upon the first day of contractual duties.

Section 33-1218 provides that a local board of trustees may establish a policy of accumulating sick leave in excess of the minimum 8 days provided for in Section 33-1216. You have asked the question of the transferability of accumulated sick leave, as provided for in Section 33-1217. *Idaho Code* provides that the accumulated sick leave credited to a teacher shall be transferred. Therefore, if a teacher transfers to another district with 40 days sick leave to that teacher's credit all 40 days must be transferred regardless of the schedule of accumulation. The only limitation is the total number of days which can be accumulated, which is 90 days. A teacher cannot transfer more than that limit.

The district to which a teacher transfers must accept the total number of accumulated sick leave. The district does not have the authority to establish a policy which will limit the numbers of sick leave days it will accept. The total is transferable, regardless of the number of days which the prior district awarded in excess of the 8 day per year minimum.

OFFICIAL OPINION NO. 73-150

March 12, 1973

**TO: Carole G. Youren
Member, Board of Trustees
Garden Valley School District #71**

FROM: James R. Hargis

We wish to respond, with our apologies for the lateness of the response, to your letter of December 29, 1973, wherein you requested our opinion on your district policy of excused-unexcused absences. You have outlined a factual situation in your district where a family's religious beliefs are such that the children thereof have been adversely affected by the policy.

We would first point out that the State makes no distinction between an excused and unexcused absence. The State is interested only in whether or not the student is physically present in school. Distribution of State funds is based on the attendance, not the reasons for the absence of a student. Therefore, absences do, as you pointed out, have an adverse effect on the financial structure of the district. However, the State does have a vital non-financial interest in school attendance. The compulsory attendance statutes, of course, require attendance. The State Board of Education has established a regulation which requires a student to attend not less than 85% of the time school is in session in order to complete successfully that particular grade or class. But again, the State is not concerned with why the student is not attending. Illness of the student, a universally recognized and required legitimate absence, has the same financial and educational effect on both the school and the absent student as the willful truancy of the student.

We point out the above analysis to demonstrate that the policy of excused and unexcused absence is a matter of board or trustee determination. The policy must be based on those absences which the school trustees feel they can abide, even though those absences may have an adverse effect on the financial structure of the school and the educational progress of the absent student. Further, the policy on absences must be rational; that is, the basis for the policy must be reasonable and fair, both in the establishment of the policy and the administration of it. The board's policy and the absence of any student of necessity require parental participation.

We must admit to serious legal reservations concerning your district's policy. Particularly, we question two points; (1) The relationship between Paragraphs B & D; and (2) The consistency with which Paragraph D is or can be administered. Paragraph B permits an excused absence where the student is needed to assist in any family related business. We assume that a family's agricultural business might very well require the student to be absent from school to help put the crops in or harvest them. The compelling need for the student to help is apparent. We would ask whether the need for the student to attend to some other family operation, such as a religious convention, might not be as equally compelling to the family. The test is not whether the board of trustees believes

the need to be compelling, but rather whether the board finds that the *family* considers the need to be compelling. The parents who feel the absence is based on a compelling need in all probability are going to cause their students to be absent anyway. We would suggest that the board consider a policy of excused absence which broadens Paragraph B to include other absences that are as compelling to the family as the need for the student to be absent to assist the family related business. The legal issue raised by this paragraph is not the policy of permitting the absence for the reason stated therein, but rather the narrowness of the policy itself. Such narrowness can and probably does result in inconsistencies. If the board of trustees is going to excuse absences on the basis of compelling need, which Paragraph B apparently attempts to do, then the trustees should not exclude or pick and choose only those factual situations which they feel are compelling needs of the board, but rather the compelling needs of the family which is the basis for the policy. Therefore, the trustees should recognize that there are other needs just as compelling as the family related business.

The second question we have concerns Paragraph D. We would suggest that before the trustees can delegate the administration of any of its policies to the administrative officers of the district, the policies must be clear and concise so that everyone knows what the policy states and intends to accomplish. We must admit that we find Paragraph D to be so vague that the administration of the policy could lead to inconsistency and potential abuse. Further, the administrative officers of the district must know what the intent of the policy is so as to administer effectively and fairly the policy. We suggest that the administrative guidelines are not present in the policy statement. The trustees have left the determination of the educational nature of functions and activities to the Principal without affording him any criteria on which to make that determination. The policy is vague and could be found to be an improper delegation of board authority to the administrative officer.

We do not wish to be understood as invading the policy making authority of a board of trustees. But board policy must comply with certain legal standards of necessity, reasonableness, answerability, consistency, and review. We are of the opinion that the policies you have asked us to review do not in all instances comply with those required standards.

OFFICIAL OPINION NO. 73-151

March 15, 1973

TO: Gordon Randall
Executive Director, Potato Commission

FROM: Michael G. Morfitt

You requested an opinion as to whether or not a grower could cast all three of his nominating ballots for one nominee.

Unless otherwise specifically provided for by law, an individual entitled to

case a ballot to nominate another may cast only one ballot. Where an individual is entitled to vote to nominate three, as provided in Section 22-1202, *Idaho Code*, that individual may cast a maximum of three ballots for three different individuals, but may not cast three ballots for one individual. In other words, he may vote for one, two or three different individuals, but may not cast more than one vote per nominee. Section 22-1202, does not provide for any other means of casting ballots. It further states that "all nominations must give equal consideration to all who are eligible for appointment as defined in this act."

OFFICIAL OPINION NO. 73-152

March 16, 1973

TO: Dan R. Pilkington
State Purchasing Agent

FROM: James G. Reid

In your letter of February 12, 1973, you requested an opinion from this office as to whether or not color separation work is considered part of the printing process set forth in Section 60-101, *Idaho Code*, so as to require all color separation work to be done within the State of Idaho.

Specifically, Section 60-101, *Idaho Code*, provides, in part:

"All printing, binding, engraving and stationery work executed for or on behalf of the state, and for which the state contracts, or becomes in any way responsible, shall be executed within the state of Idaho, . . ."

Printing has been characterized as the act of reproducing a design on a surface by any process, *Technograph Printed Surfaces Ltd. v. Bendix Aviation Corp.* 218 F.Supp 1 (Md.D.C.). In *Forbes Lithograph Mfg. Co. v. Worthington*, 25 F. 29 (Mass.), print was further defined as the impression of letters, figures, and characters by types and ink of various forms and colors on paper of various kinds while on some such yielding surface.

In order to print in color (other than single color), the task of color separation must first be performed in order to convert the image into a carrier for color printing. As such the color printing and color separation process is an essential ingredient of any printing which is done in color. It would therefore be the opinion of this office that color separation work is such an integral part of the color printing process so as to be included within the definition of printing in Section 60-101, *Idaho Code*.

This is not to say that all color separation work must invariably be done within the State of Idaho. *Idaho Code*, Section 60-103 provides exceptions to the requirement that all printing work must be done within the State of Idaho. Those exceptions are: (1) when the charges for printing within the State of Idaho would be excessive in relation to the charge usually made to private individuals for the same kind and quality of work, or (2) if the execution of the printing work would require the use of a technique or process that cannot be

performed through the use of physical production facilities located within the State of Idaho, or (3) where the printing job in question has been submitted for bid and no bid or proposal is made by any person, firm, or corporation proposing to execute such work within the State of Idaho.

OFFICIAL OPINION NO. 73-153

March 16, 1973

TO: Rex D. Colton
Chief, Division of Resources
Bureau of Land Management

FROM: Michael G. Morfitt

Pursuant to your letter of March 5th, 1973, and my telephone conversation with Mr. Jensen, I am enclosing copies of Idaho laws dealing with estrays.

As I understand your question, you want to know if a person claiming ownership of a horse or burro located on public land can recover the same in accordance with Idaho law. If so, recovery is also possible under the provisions of Public Law 92-195.

Idaho law indeed allows recovery of estrays, "... if such person appears to be the owner of such animal or animals ..." (Section 25-2308, *Idaho Code*). Section 25-2301, *Idaho Code*, allows any person to take up estrays "... running at large in this state without sufficient food or shelter at any time between the first day of November and the first day of March, ... and any animal or animals that break or jump, more than once, into any field or other enclosure surrounded by a lawful fence ..." Such person is required to immediately notify the nearest constable or sheriff.

A duty is imposed upon the constable or sheriff to give notice to the owner, if known, or if unknown, to advertise the animal for sale with a description of "... marks, brands, age ... sex and color ..." (Section 25-2302). A further duty is imposed to at once notify the State Brand Inspector, describing the animal when the owner is unknown. (Section 25-2303).

If the brand or marks are recorded, notice is sent to the owner. If unrecorded, the State Brand Inspector so notifies the constable or sheriff, who then proceeds to advertise and publish notice of sale as outlined in Chapter 23, Title 25, *Idaho Code*. If there is no brand on the animal, the State Brand Inspector is charged with the duty of keeping the notice on file for 40 days and promptly answering any inquiries. (Section 25-2304).

Section 25-2308, *Idaho Code*, then reads in its entirety as follows:

25-2308. CLAIMING OF ANIMALS. – If any person appears before the constable or sheriff and claims said animal or animals before such sale, then, if such person *appears* to be the owner of such animal or animals, such constable or sheriff shall deliver such animals to the owner on his paying all costs of caring for, sending and preparing notices, and advertising the same as herein provided. (Emphasis added)

Section 25-2314, *Idaho Code*, provides as follows:

25-2314. UNBRANDED ANIMALS ON PUBLIC RANGE – DISPOSITION OF ESTRAYS. – All animals over the age of twelve (12) months ranging upon what is known as the public range, and bearing no marks or brands may be taken up by the finder thereof and where so taken up such animals shall be delivered to the constable of the nearest precinct who shall dispose of said animal in the same manner as is now provided by law for the disposition of stray animals, and the proceeds of all sales in pursuance of this section shall be turned over to the County Treasurer to be placed in the public school fund of the county.

In summary then, anyone may take up estrays where found in Idaho, but they must turn the animal over to the nearest constable or sheriff. One claiming ownership of the animal may recover possession if he “appears to be the owner” to the satisfaction of the constable or sheriff. Unfortunately, the Legislature in 1927 did not see fit to clarify the criteria for the establishment of ownership, but clearly the burden rests upon the person claiming such ownership. I might add that recorded brands are prima facie evidence of ownership by statute.

I have also enclosed for your information, copies of miscellaneous sections of law dealing with taking up stallions running at large, detaining livestock found in possession of one without evidence of ownership, and the penalty for driving livestock from range.

OFFICIAL OPINION NO. 73-154

March 22, 1973

TO: Clifford Allen
Human Rights Commission

FROM: Paul J. Buser

We are pleased to respond to your three February 10, 1973 inquiries.

Your first question reads:

Whether or not the Idaho State Human Rights Commission may act upon a charge of discrimination filed against the Bureau of Indian Affairs on the state level?

We have to answer in the negative to this question. The Bureau of Indian Affairs has its own complaint structure. The complainant should first file a petition for appeal and review of his or her case of alleged discrimination with the Bureau of Indian Affairs appellate board. If the complainant does not receive satisfaction through this administrative remedy then the Civil Service Commission is the appropriate agency to contact.

By Executive Order No. 11478 promulgated on August 8, 1969 the President recognized the possibilities of discrimination in employment hiring practices by federal agencies. In that executive order the Civil Service Commission was

authorized to review complaints of the nature which you mention. Thus, all federal administrative remedies of the Bureau of Indian Affairs and Civil Service Commission should first be approached and used accordingly before even considering bringing the Idaho Human Rights Commission into the picture.

It is difficult to positively say at this time that the Civil Service Commission would contest a Human Rights Commission attempt to bring the Bureau of Indian Affairs under the jurisdiction of the Idaho commission, but we suspect that the federal remedies would preempt the field of review and prevent the Idaho commission from acting in this case.

I am writing the General Counsel of the Civil Service Commission to get a formal opinion as to whether that federal commission would assert preemption and contest the Human Rights Commission's attempt to undertake such a case. In the meantime you should recognize that this is not only a legal problem of jurisdiction, but a political problem as well. If you want to pursue the matter of bringing a federal agency under the Human Rights Commission's jurisdiction, please be sure to contact Fred Grant or this office before you do anything or say anything to that agency. You will be treading awfully thin ice if you do otherwise and may create problems clouding the original issue.

Your second question reads:

Could you tell me if there are any Indian cases pending before the Idaho State Supreme Court?

Presently, there is one Indian case before the Idaho State Supreme Court. It is *Mahoney v. State* and was argued October 12, 1972. An opinion should be issued in due time. In *Mahoney*, the plaintiff is a member of the Coeur d'Alene Indian Tribe. He was operating several cigarette stores on Indian trust land located in Benewah County. An agent of the Idaho State Tax Commission seized and took away seven hundred eighty-four cartons of the plaintiff's cigarettes. The plaintiff is alleging that the State Tax Commission has no jurisdiction over commerce on Indian trust land and had no right to go thereon and seize the cigarettes. This case should be of real significance to you because it discusses much more than just the sales tax issue which you alluded to in your letter.

There are at least three cases before the United States Supreme Court concerning Indians and their rights with regard to fishing, commerce, and tax issues. They should be decided sometime this spring. You may want to talk to Robert Strom, Counsel for the Nez Perce Tribe, who should be up on these cases.

Your third question reads:

Could you explain "public assistance" in the third paragraph of Resolution N.P. 65-126?

I should point out that this interpretation is entirely dependent upon the existing *Idaho Code* definitions. Just how "public assistance" is applied in cases affecting the tribe depends upon individual circumstances.

The Idaho Public Assistance Law says that "public assistance" shall include

general assistance, old-age assistance, aid to the blind, aid to dependent children, aid to the permanently and totally disabled, and medical assistance. *Idaho Code*, 56-201. The definitions for each of the individual classifications are as follows:

1. *General assistance* shall mean direct assistance in cash, direct assistance in kind, and supplementary assistance;
2. *Old-age assistance* shall mean money payments to or medical care in behalf of needy aged people;
3. *Aid to the blind* shall mean money payments to or medical care in behalf of blind people who are needy;
4. *Aid to dependent children* shall mean money payments with respect to or medical care in behalf of needy dependent children;
5. *Aid to the permanently and totally disabled* shall mean money payments to or medical care in behalf of needy individuals eighteen years of age or older who are permanently and totally disabled;
6. *Medical assistance* shall mean payments for part or all of the cost of such care and services enumerated in Section 1905(a)(1) through (15) of the Federal Social Security Act as amended.

All of these definitions are taken from the Idaho Public Assistance Law and can be further developed and understood by reading over that entire law. *Idaho Code*, 56-201 *et seq.* I will refrain from going into further detail on what "public assistance" is until specific questions and cases necessitate specific interpretations.

Cliff, we are glad to respond to your questions. Yet, it is difficult to give more authoritative opinions when the questions are not accompanied by factual situations. We are sure you recognize that we cannot commit this office until a case is presented and thoroughly investigated. If you have questions about the United States Supreme Court cases and about the Public Assistance Law, Robert Strom surely would be able to give you quicker answers if you have time to meet with him personally.

OFFICIAL OPINION NO. 73-155

March 23, 1973

TO: Robert Bushnell
 Legal Division
 Department of Environmental & Community Services

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your question for an opinion in which you asked the following question: "Is the Department of Environmental and Community Services the single state agency which administers the categorical programs under Titles I, IV, X, XIV and XIX of the Social

Security Act?"

Section 1 of House Bill No. 187 provides as follows:

SECTION 1. It is the intent of the first regular session of the forty-second Idaho legislature to encourage and improve the delivery of health and social services to the people of Idaho. In order to maximize service to the citizens of this state and to promote economy in operation, a revision of the existing administrative structure is necessary. Therefore, the Idaho legislature proposes the orderly consolidation of the existing department of environmental protection and health, the department of social and rehabilitation services, and the state youth training center, into a *single state agency*. (Own emphasis)

It is this office's conclusion that the Department of Environmental and Community Services is a single state agency within the meaning of paragraph 205.100(2) of the "Federal Register."

Section 4(1) of House Bill No. 187 of the first regular session of the forty-second legislature provides:

SECTION 4. (1) All of the powers, duties, and functions of the commissioner and the department of social and rehabilitation services, the administrator of the department of environmental protection and health, and the executive and administrative powers, duties and functions of the state board of education, in its present status as the governing body of the youth training center, are hereby transferred to the administrator of the department of environmental and community services. The administrator shall have all such powers and duties as may have been or could have been exercised by his predecessors in law, and shall be the successor in law to all contractual obligations entered into by his predecessors in law.

It should be pointed out that the Department of Social and Rehabilitative Services as it existed before the merger was a single state agency which was denominated to satisfy the requirements of aforesaid in the "Federal Register" and for that reason it is the opinion of the Attorney General's Office that the Department of Environmental and Community Services has sufficient authority to administer the plan on a statewide basis.

Also in Section 4(3) of House Bill 187 it is provided that all the rules and regulations as heretofore adopted were issued by the Department of Environmental Protection and Health, the Board of Environmental Protection and Health, and the Department and/or the Commissioner of Social and Rehabilitative Services, and the Board of Education, shall remain in full force and effect until superseded or modified by other rules and regulations. It is the opinion of this office that this is sufficient authority for the Department of Environmental and Community Services to promulgate new rules and regulations and to administer existing rules and regulations and that the same are binding upon the political subdivisions of this state.

In conclusion, it is the opinion of the Office of the Attorney General that the Department of Environmental and Community Services is a single state agency

to administer the programs under Titles I, IV, X, XIV and XIX of the Social Security Act; that this department has the authority to supervise and administer this plan; and further, that it has the power to promulgate rules and regulations and to enforce now existing rules and regulations to effectuate the purposes of the plan.

OFFICIAL OPINION NO. 73-156

March 26, 1973

TO: Hurley Berthelson
Supervisor, Civil Division
Ada County Sheriff's Office

FROM: Clarence D. Suiter

In your letter of February 23, 1973, you request an expression of our opinion on the extent of a Sheriff's deputies' obligation in regard to temporary restraining orders issued in divorce cases.

At the outset, it might be well to observe that our opinion in this matter is nothing more than just that, our opinion. The restraining orders are peculiarly the prerogative of the judicial system to be issued and enforced solely by our courts. Because of the courts' exclusive domain in restraining orders, our opinion could be modified at any time depending upon the particular court involved. Notwithstanding the trepidation with which we approach the problem of offering definitive guidelines, we will suggest the following thoughts and principles which may be of some benefit to you.

To begin with, the duties of the Sheriff are outlined in *Idaho Code*, Section 31-2202, a fact of which I am certain you are aware. That section is important here as a predicate because of subsection 3 thereof in particular which provides "Present and suppress all affrays, breaches of the peace, riots and insurrections which may come to his knowledge." It is that section, in my estimation, which furnishes the bases for the evaluation of an officer's responsibility in the matter of restraining orders. As an adjunct to the above cited section, it is appropriate here to point out the language in *Cornell v. Harris*, 60 Idaho 87, where it is stated:

"In addition to powers expressly conferred by law, an officer has by implication such powers as are necessary for due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom."

In the usual situation which you envision in your letter, there is invariably a highly emotional, tension-filled atmosphere in which husbands and wives can and often do act irrationally to the point of committing some breach of the peace or other act which a deputy sheriff is sworn to prevent or quell. That, Mr. Berthelson, in our opinion is the extent of the jurisdiction, authority, or responsibility of a deputy sheriff or other police officers in the situation described in your letter. This conclusion presumes that the Sheriff's primary

mission in going to the residence of the husband or wife is to serve the restraining order upon the individual to whom it is directed. Absolutely no authority exists for an officer to enforce the provisions of a restraining order, either in a negative or a positive sense, except as outlined above where the enforcement is merely incidental to preserving the peace or quelling a disturbance. No authority whatever exists for a police officer to supervise or assist in the transfer of property or children pursuant to a restraining order.

As noted at the beginning of this letter, restraining orders are issued by a court and to be enforced by a court by whatever sanctions the court wishes to impose. It just isn't the same as a warrant that is to be executed by a police officer; a restraining order is merely to be served by a police officer and if the individual to whom it is directed does not abide thereby, the only remedy against the person is through the authority and power of the court. If a police officer undertakes to enforce the directions contained in a restraining order, in my opinion he would be civilly liable to any injured individual.

OFFICIAL OPINION NO. 73-157

March 26, 1973

TO: Lloyd J. Eason
Assistant Superintendent
Boise Public Schools

FROM: James R. Hargis

We wish to respond to your letter to Dr. Truby of the State Department of Education, wherein you ask whether or not the maximum accumulation of 90 days of sick leave per certificated employee of the district, as provided for in Section 33-1217, *Idaho Code*, limits the district to granting no more than 90 days of accumulated sick leave.

Where the Legislature establishes minimum or inside limits for benefits with which a local board of trustees must comply, in the absence of any other limitations, the local board may exceed those minimum limits. For example, Section 33-1216, *Idaho Code*, presently provides that each certificated employee shall be entitled to a minimum of 8 days sick leave each year with full pay. The local board may not provide less than 8 days per year, but it is free to award more than 8 days per year. Conversely, where the Legislature imposes maximum limits, then a local board may not grant benefits beyond those limits.

The authority of a local district to contract with professional personnel is extremely broad, but that authority is not without limitation. There are certain required contractual elements, including sick leave. The district must grant at least the minimum, but it is likewise limited to the maximum amount it can grant. Therefore, we are of the opinion that sick leave accumulation in excess of the statutory 90 days is neither allowable nor negotiable.

OFFICIAL OPINION NO. 73-158

March 27, 1973

TO: Alfred E. Miller
Pesticide Specialist & Registrar
Department of Agriculture

FROM: Michael G. Morfitt

I have reviewed the enclosed brochure concerning "electro-magnetic plant activator," as you requested.

It is my opinion, based upon the explanation and claims expressed in the brochure, that "activator" is a "plant regulator" within the meaning of that term as defined in Idaho's Pesticide Law.

Section 22-3402(g), *Idaho Code*, defines "plant regulator" to mean "... any substance or mixture of substances, intended through physiological action, for accelerating or retarding the rate of growth of maturation, or for otherwise altering the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants and soil amendments."

The brochure claims that the product "... stimulates health growth ..." and promises that you will "get healthier, faster-growing trees and shrubs ... greater yields of bigger, tastier vegetables ..." etc. Yet it also purports to be a "mixture of naturally-occurring ores ... not chemically altered."

Finally, the brochure states that "plant activator is *not* a fertilizer or a soil amendment. In fact, best results are achieved when plant activator is used in conjunction with recommended fertilizers and trace minerals."

In summary then, I believe that this product falls within the definition of "plant regulator" and should be registered as provided by Idaho's Pesticide Law.

OFFICIAL OPINION NO. 73-159

March 27, 1973

TO: B. R. Brown
Commissioner of Labor

FROM: Wayne Meuleman

This is in response to your request for an opinion relating to the application of the Idaho competitive bidding statutes and the Idaho Davis-Bacon provisions to municipal construction contracts. Your request enumerates the three questions which you desire to have answered; each of which will be specifically referred to herein.

I.

"Whether or not cities, counties, etc. have to comply with the Idaho competitive bidding statutes."

The provisions of the respective bidding statutes relating to cities and counties are substantially similar and thus can be considered together. However, unless a specific statutory provision relating to a particular governmental subdivision is, or has been, enacted the analysis of this opinion will generally apply to the competitive bidding requirements for all political subdivisions of the State of Idaho.

The answer to your first question is to be found within the language of Section 31-4001, *Idaho Code*, and Section 50-341, *Idaho Code*. The competitive bidding provisions applicable to counties, Section 31-4001, *Idaho Code*, reads as follows:

"This act shall apply to all counties of the state of Idaho, but shall be subject to the provisions of any specific statute pertaining to the letting of any contract or the purchase or acquisition of any commodity or thing by any county by soliciting and receiving competitive bids therefor, and shall not be construed as modifying or amending the provisions of any such statute, nor preventing the county from doing any work by its own employees."

Similarly, the competitive bidding provisions applicable to cities, Section 50-341, *Idaho Code*, states:

"A. The following provisions relative to competitive bidding apply to all cities of the state of Idaho, that shall be subject to the provisions of any specific statute pertaining to the letting of any contract, purchase or acquisition of any commodity or thing by soliciting and receiving competitive bids therefor, and shall not be construed as modifying or amending the provisions of any such statute, nor preventing the city from doing any work, by its own employees."

The language of the above-cited statutes announces the general application of competitive bidding procedures for all counties and cities in the State of Idaho, while deferring its application to a specific statute which may govern the letting of the particular contract. Therefore, unless the nature of a proposed contract is governed by a specific statute of *Idaho Code*, such contract is subject to the procedures dictated by the provisions cited herein.

The language of both bidding statutes providing that the provisions shall not be construed as preventing a county or city from doing any work by its own employees may appear on its face as authorizing a city or county to avoid competitive bidding procedures merely by doing its own construction work. If such an interpretation were to be applied to such language its effect would render the competitive bidding provisions relative to counties and cities meaningless and without force. Such language must be interpreted in light of the general policy of competitive bidding statutes.

Generally, the provisions of statutes requiring competitive bidding in the letting of municipal and county contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable. They are enacted for the benefit of property holders and taxpayers and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. 10 *McQuillin, Municipal Corporations*, Section 29.29. Likewise, the provisions of competitive bidding statutes are strictly construed and will not be extended beyond the reasonable purport. Such provisions must be read in light of the reason for their enactments and will not be applied contrary to their intended purpose. 10 *McQuillin, Municipal Corporations*, Section 29.29. In light of the above cited authority, I must conclude that the language in Sections 31-4002 and 50-341, *Idaho Code*, which allows a city or county to do any work by its own employees must be interpreted more strictly than it may appear on its face. The phrase "and shall not be construed as preventing the county (or city) from doing any work by its own employees" must be construed so as to authorize the county or city to perform construction work without complying to the competitive bidding procedures *only* where such construction work can be performed with the general county or city work force employed by such governmental subdivisions. Pursuant to such an interpretation, the city or county may properly perform its own construction work without proceeding to bid the contract where such construction work is of such scope and nature that may reasonably be performed with the average work force on the employment rolls of the city or county. Conversely, I must conclude that where construction work to be performed by a city or county is of such scope and nature as to require a construction work force in excess of the normal employment rolls of the city or county involved, the city and/or county is compelled to comply with the competitive bidding requirements of Sections 31-4001 and/or 50-341, *Idaho Code*. A city or county may not avoid the requirements of competitive bidding by employing an unusual staff of workmen to perform specific construction work under the guise of public employment.

Such interpretation is in line with the general rule that competitive bidding statutes in the letting of municipal or county contracts is uniformly construed as mandatory and jurisdictional and non-observance will render the contract void and unenforceable. 10 *McQuillin, Municipal Corporations*, Section 29.30. There appears one authorized exception to the general rule that competitive bidding statutes are mandatory for county and city entities. Such exception is found enumerated in Section 31-4013, *Idaho Code*, and Section 50-341 L, stating:

"If there is a great public calamity, as an extraordinary fire, flood, storm, epidemic, or other disaster, or if it is necessary to do emergency work to prepare for national or local defense, the county commissioners (city council) may pass a resolution declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health, or property. Upon adoption of the resolution, it may expend any sum required in the emergency without complying (compliance) with this act (section)."

Only where the nature of and the circumstances surrounding the expenditure of public funds falls within the definition of the above-quoted statutory exception can the county or city avoid the mandatory provisions of competitive bidding. *Reynolds Construction Co. v. County of Twin Falls*, 92 Idaho 61, 437 P.2d 14 (1968).

Similarly, in the competitive bidding provisions applicable to both county and city governments it is provided that:

"When the expenditure contemplated exceeds two thousand five hundred dollars (\$2,500), the expenditure shall be contracted for and let to the lowest responsible bidder." *Idaho Code*, Section 31-4003 and *Idaho Code*, Section 50-341C.

The language of the above-cited provision, by the use of the word "shall" enunciates the mandatory nature of the competitive bidding provisions for both counties and cities. *Hansen v. Kootenai County Board of County Commissioners*, 93 Idaho 655, 471 P.2d 42 (1970).

In review, the answer to the first question you have posed may be summarized as follows:

1. A city or county may perform any construction work by its own employees and therefore avoid the competitive bidding procedures only where the scope and nature of such construction work can be reasonably performed with the normal and usual employment roll of the city or county.

2. All contracts in which the expenditure contemplated exceeds \$2,500 must be submitted to the competitive bidding provisions of Title 31, Chapter 40 and Title 50, Chapter 3, *Idaho Code*, for counties and cities respectively unless the nature of the construction work and the factual circumstances surrounding the expenditure fall within the emergency exceptions of Section 31-4013 and 50-341 L, *Idaho Code*.

II

"Does it make any difference whether or not Federal funding is included in these construction projects?"

I must conclude that the use of federal funding in construction contracts does not alter the above analysis of the competitive bidding provisions relating to county and municipal contracts. *Idaho Code*

, Section 31-4002 states:

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bidding provisions relating to county and municipal contracts. *Idaho Code*, Section 31-4002 states:

l within the emergency exceptions of Section 31-4013 and 50-341 L, *Idaho Code*.

II

"Does it make any difference whether or not Federal funding is included in these construction projects?"

I must conclude that the use of federal funding in construction contracts does not alter the above analysis of the competitive bidding provisions relating to county and municipal contracts. *Idaho Code*, Section 31-4002 states:

“As used in this act, ‘expenditure’ means the granting of a contract, franchise or authority to another by the county, and every manner and means whereby the county disburses county funds or obligates itself to disburse county funds; provided, however, that ‘expenditure’ does not include disbursement of county funds to any county employee, official or agent or to any person performing personal service for the county.”

Likewise *Idaho Code*, Section 50-341B provides:

“The word ‘expenditure’ shall mean the granting of a contract, franchise or authority to another by the city, and every manner and means whereby the city disburses funds or obligates itself to disburse funds; provided, however, that ‘expenditure’ does not include disbursement of funds to any city employee, official or agent or for the performance of personal services to the city.”

The above definitions of “expenditure” within the meaning of the competitive bidding provisions for both county and city entities is sufficiently broad so as to include federal funds provided to the city or county for use in the performance of construction work. A federal grant which releases federal funds to the county or city authority and authorizes such authorities to disburse the funds properly falls within the definition of expenditure as contemplated by the competitive bidding provisions. I therefore conclude that the use of federal funding for construction work by a city or county is subject to the mandatory provisions of competitive bidding statutes.

III.

“Does the prevailing wage rate of Title 44, Chapter 10, Idaho Code, apply to municipal and county construction projects?”

This question will first be answered with reference to construction contracts which are mandatorily subject to the competitive bidding provisions applicable to cities and counties. *Idaho Code*, Section 44-1001 provides:

“In all state, county, municipal and school construction, repair, and maintenance work, under any of the laws of this state, the contractor, ***must further pay the standard prevailing wages in effect as paid in the county seat of the county in which the work is being performed.****”

Further, Section 44-1002, *Idaho Code*, states:

“In all contracts hereafter let for state, county, municipal, and school construction, repair, and maintenance work under any of the laws of this state there shall be inserted in each of said contracts a provision by which *** said contractor must further pay the standard prevailing rate of wages in effect as paid in the county seat of the county in which the work is being performed****”

These two statutes require that the standard prevailing wage, as defined

therein, be paid for all contracts of construction work which are let pursuant to the competitive bidding provisions as herein analyzed. Further *Idaho Code*, Section 44-1006, establishes a means whereby the prevailing wages may be determined by the Commissioner of Labor in accordance with rates established by the Davis-Bacon Section of the United States Department of Labor. Thus, it is concluded that for any construction contract which is subject to the mandatory competitive bidding procedures governing counties and cities, the standard prevailing wages must necessarily be made a part of such construction contract; that prevailing wage to be established by the Commissioner of Labor pursuant to Section 44-1006, *Idaho Code*.

It is now necessary to analyze the role of the Commissioner of Labor with respect to construction work which is of such scope and nature as to be reasonably performed by city or county employees; i.e., the general employment force of the particular city or county involved. Section 44-1101, *Idaho Code*, establishes the wage rate to be paid to "all laborers, workmen, mechanics or other persons now employed in manual labor *** by or on behalf of any county, city, township, or other municipality of said state, except in cases of extraordinary emergency which may arise in time of war***." Such rate of pay is established as "not less than the current rate of per diem wages in the locality in which the work is performed***." Therefore, all construction work which may be properly performed by the county or city by use of its own employment staff so as to avoid the mandatory competitive bidding provisions *is subject* to the current rate of per diem wages as referred to in the above-cited statute.

It is to be noted that Section 44-1101, *Idaho Code*, does not establish a procedure whereby the current rate of per diem wages is to be determined. However, in light of the provisions of Title 44, Chapter 10, relative to the establishment of the standard prevailing wages, it may be concluded that the term "current rate of per diem wages" means the same as "standard prevailing wages" and is to be determined in the same manner as provided in Section 44-1006, *Idaho Code*.

Such an interpretation is necessary to avoid the absurdity of authorizing a different rate of pay for city employees performing construction work than that rate of pay which is required by statute to be paid to employees of a private construction firm obtaining a construction contract pursuant to competitive bidding. The logical conclusion to be drawn from the various provisions of the *Idaho Code* relative to this subject is that the Commissioner of Labor will determine the current wage rate of per diem wages in the same manner as he is authorized to determine the standard prevailing wage pursuant to Section 44-1006, *Idaho Code*.

OFFICIAL OPINION NO. 73-160

March 28, 1973

TO: Gary M. Haman
Kootenai County Prosecuting Attorney

FROM: W. Anthony Park

The question presented for opinion is as follows: "May a written resignation of an elected county official be withdrawn and rescinded after the same has been accepted by the Board of County Commissioners?"

Under the facts presented this question must be answered in the negative. The operative facts germane to this opinion can be summarized as follows: The duly elected Sheriff of Kootenai County by letter dated March 8, 1973, proffered the following letter to the County Commissioners of Kootenai County. Which letter reads as follows: "Sirs, I hereby tender my resignation effective April 9, 1973. Signed James H. Fitzpatrick."

That same day the County Commissioners for Kootenai County accepted the resignation tendered and advised Mr. Fitzpatrick of this decision by letter dated March 8, 1973. On March 14, 1973, Sheriff Fitzpatrick, by letter addressed to the Kootenai County Commissioners, requested that his previous resignation be withdrawn and that he be granted a 30 to 90 day leave of absence. By letter, the same date, the County Commissioners advised Sheriff Fitzpatrick that they had rejected his request to withdraw his resignation of March 8, 1973. In essence what occurred was: 1. An unequivocal resignation by a duly elected county official delivered to the proper authority. 2. The acceptance of such resignation by the proper authority, and 3. a subsequent attempt to withdraw the previous resignation.

The Legislature in *Idaho Code*, Section 59-902(4), has provided the method of resignation for county officers. In substance this section provides that the county officer's resignation must be in writing and made to the County Board of Commissioners. The section further provides, "Such resignation shall not take effect until accepted by the Board or officer to whom the same is made." By law, the resignation was effective on the date of its acceptance, being March 8, 1973.

The only remaining question is whether the elected Sheriff may withdraw the resignation after its acceptance but prior to the date fixed by such resignation as the last day in office. In *People v. Kerner*, 157 N.E.2d 555 (Ill. 1960), the Illinois Court held that the resignation could not be withdrawn after its effective date. Under the Illinois law the effective date of a resignation was construed to be the date of its submission to the proper authority, regardless of the date fixed in the resignation as the last day in office.

This same result would be rendered under the facts presented herein for opinion. The only difference is that under Idaho law the effective date of a resignation is the date of its acceptance by the proper authority.

To this same effect is *Rider v. City of Batesville*, 245 S.W.2d 833 (Ark. 1952). In that case the Chief of Police resigned at the request of the Mayor and several Aldermen. The resignation was to be "effective now or at your will." This was accepted by the City Council, however the Chief of Police was asked to continue until a suitable replacement could be found. The acceptance occurred on June 28, 1949. On August 24, 1949, the Chief of Police requested in writing the return of his resignation. Nothing was done with regard to this request. Subsequently examinations were given to fill the Chief of Police position and an individual was selected. The former Chief of Police surrendered the office to the new selectee without protest. The former Chief of Police then filed suit contending that he should be restored to his office since his resignation had been withdrawn. The Court in holding the withdrawal ineffective stated:

"While some courts hold that an unconditional resignation of a public officer to take effect immediately cannot be withdrawn, the general rule, apart from statutory provisions, is that a mere presentation of a resignation does not work a vacancy and a resignation is not complete *until accepted by the proper authority*. *McQuillin Municipal Corporations* (3rd Ed.), § 12.125; 43 Am.Jur., Public Officers, § 167. In most jurisdictions a resignation may be withdrawn before it is acted upon but not after it has been accepted, and a resignation effective in the future may not ordinarily be withdrawn after acceptance. Although there is authority to the contrary, the preferable rule is stated in 67 C.J.S., Officers, § 55f, as follows: 'If an acceptance is regarded as essential in order to render a resignation effective, an unconditional resignation to take effect at a future date may not be withdrawn after it has been accepted. See also, 43 Am.Jur., Public Officers, § 170.' " (Emphasis added)

The Batesville case set forth the general rule adopted in the jurisdictions that have considered the question. See 82 A.L.R.2d 750 and cases cited therein, and *Collins v. Board of Firemen, Policemen et al.*, 290 S.W.2d 719 (Tex. 1956); and *Crouch v. Civil Service Comm. of Texas City*, 459 S.W.2d 491 (Tex. 1970). To the effect that a withdrawal prior to acceptance is effective see *Haine v. Googe*, 248 F.Supp. 349 (1965); for cases holding that a withdrawal of a resignation can be made at any time prior to the date when the resignation is to take effect when acceptance is deemed immaterial see *State v. Murphy*, 97 P. 391 (Nev. 1908). This line of authority is not controlling in Idaho since by statute acceptance by the proper authority is the effective date of resignation. (*Idaho Code*, 59-902.)

In conclusion, our research has failed to disclose any cases, absent duress, that permit withdrawal of a duly accepted resignation where acceptance is a material to the effectiveness of the resignation.

OFFICIAL OPINION NO. 73-161

March 30, 1973

TO: James E. Lloyd
Nez Perce County Clerk

FROM: Warren Felton

You have asked us about the effect of the 1972 amendment to Section 31-3104, *Idaho Code*, raising the salaries for some of the various county commissioners. You have asked when that law goes into effect and whether it can be retroactive to apply to all of 1973.

Attached is a copy of the bill as passed. It has an emergency clause stating that the salary changes shall be in full force and effect on and after the passage and approval of the bill.

The bill was approved by the Governor on March 16, 1973.

The State Supreme Court dealt with a similar situation in the case of *Higer vs. Hanson* 67 Idaho 45,170 P 2d 411, where the Court considered when a raise in pay for the members of the Court would become effective. In that case there was no emergency clause and under the terms of Section 67-510, *Idaho Code*, as it then read, laws which did not have an emergency clause became effective sixty (60) days after the end of the legislative session, so the Court held that the law changing their pay rate became effective sixty (60) days after the end of the 1945 session of the Idaho Legislature or on May 8, 1945.

In the case at hand there is an emergency clause so by analogy under the terms of Section 67-510, *Idaho Code*, the law changing the salaries of various county commissioners became effective on March 16, 1973 when it was signed by the Governor.

We do not find any authority whatever for the proposition that the law changes the salaries of the county commissioners for that period before it became effective on March 16, 1973.

P.S. — We believe this would also apply to the Prosecuting Attorneys.

OFFICIAL OPINION NO. 73-162

April 3, 1973

TO: Ben F. Eberhardt
Chief, Department of Probation & Parole
State Board of Correction

FROM: Wayne G. Crookston, Jr.

In your letter of March 6, 1973, you requested some direction in regard to parole revocation in light of the recent United States Supreme Court decision of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.ed.2d 487 (1972), and

its effect on Sections 20-229, 20-229A and 20-229B, *Idaho Code*. The Idaho statutes were essentially in line with the dictates laid out in the *Morrissey* case, and thus drastic changes in Idaho law are not necessary. However, the Supreme Court ruling did provide that a parolee has a right to an informal on-site preliminary hearing which the Idaho statutes do not provide.

The *Morrissey* decision provides the parolee certain procedural safeguards which must be followed before his parole can be lawfully revoked. The parolee is entitled to an on-site preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. This preliminary hearing should be conducted by an independent officer, i.e., someone other than the parolee's parole officer, and this officer need not be a judicial officer.

The *Morrissey* case sets down the minimum due process requirements of the probable cause hearing as follows:

"With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence.

The hearing officer shall have the duty of making a summary, or digest, of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for final decision of the parole board on revocation." 33 L.ed.2d 497-498.

If the hearing officer determines that reasonable cause exists to believe that conditions of parole have been violated, such is sufficient to warrant further detention of the parolee and return to the Idaho State Penitentiary for final disposition. Upon return to the Penitentiary, the parolee, if he desires one, must be afforded a hearing on the merits to determine any contested relevant facts and consideration of whether the facts as determined warrant revocation. The minimum requirements of due process for this revocation hearing on the merits are as follows:

"They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole

board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 33 L.ed.2d 499.

As can be seen, *Morrissey* provides a two-part procedure for parole revocation, i.e., a preliminary hearing to determine probable cause and a revocation hearing for final determination. Sections 20-229, 20-229A and 20-229B, *Idaho Code*, provide the suspected parole violator a right to an on-site merit hearing to determine if the parole conditions have been violated. The parolee may waive the on-site hearing and request that the parole revocation hearing be held at the Penitentiary. In either case, the hearing provided is on the merits, i.e., a revocation hearing for final determination. Thus, Idaho procedure does not provide the parolee a preliminary hearing to determine probable cause. To come in line with the dictates of *Morrissey v. Brewer*, the parolee must now be afforded the right to an on-site preliminary hearing. The procedural safeguards pertaining to this preliminary hearing, outlined above, must also be complied with.

Compliance with the *Morrissey* decision will then give parolees the right to an on-site preliminary hearing and, according to Idaho statutes, the right to an on-site final hearing on the merits of parole revocation. Prior to each hearing the necessary procedural safeguards outlined in *Morrissey* must be given the parolee and explained to him. However, the parolee may waive any of his rights and elect to proceed to disposition. Any such waiver should be made part of the parole revocation record.

OFFICIAL OPINION NO. 73-163

April 3, 1973

TO: Janet M. Wick
Department of Environmental & Community Services

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your request for an opinion in which you asked the following question: "What are the requirements for reporting abortions performed after the twentieth week of gestation in the State of Idaho?"

There are three situations that would affect the reporting of aborted fetuses: (1) When the fetus is aborted within the first twenty weeks of gestation and such fetus shows no evidence of life; (2) When the fetus is aborted after more than twenty weeks of gestation and such fetus shows no evidence of life; and (3) When the aborted fetus shows evidence of life regardless of gestation period.

The Vital Statistics Act of 1949, (Sections 39-241 through 39-242, *Idaho Code*) provides the reporting procedure for births, stillbirths and deaths. In order to determine what reporting procedure must be followed, it is necessary to decide the nature of the aborted fetus. Section 39-241(b) states: "'Live birth' means the birth of a child who shows evidence of life after the child is entirely

outside the mother." Section 39-241(c) provides: "'Stillbirth' mean (sic) a birth after 20 weeks gestation which is not a live birth."

At the present time the law only requires the reporting of live births and stillbirths; thus by definition, a fetus showing no evidence of life which is "born" within the first twenty weeks of gestation does not have to be reported to the state registrar. Consequently situation (1) above does not require reporting.

However as to (2) above, the situation is different. By definition, a fetus which is aborted after twenty weeks gestation would be considered a "stillbirth" and thus would have to be reported as provided in Section 39-258 for stillbirths.

In accordance with the definition of "live Birth" contained in Section 39-241(b) above, situation (3) would have to be considered a live birth regardless of the length of the gestation period and would have to be reported in accordance with Section 39-256, *Idaho Code*. If the child died, regardless of how long the evidence of life continued, there would have to be a corresponding death certificate filed as provided in Section 39-258, *Idaho Code*.

It should be pointed out that when abortion occurs after a twenty week gestation period, the local registrar, pursuant to Section 39-258, *Idaho Code*, must refer such case to the coroner because such "stillbirth" resulted from "other than natural causes."

OFFICIAL OPINION NO. 73-164

April 4, 1973

TO: Kent Ellis
Chief, Grants-in-Aid Division
State Parks & Recreation Department

FROM: Paul J. Buser

We are pleased to respond to your five March 28, 1973 inquiries concerning the Idaho Motorbike Recreation Fund Act. We will answer the questions in the order in which you presented them.

1. In relation to 49.2707.2, can trails or other recreational facilities for off-road motorbike use be developed and maintained on other than state and federal land? We are thinking of city, county, or other public property.

Trails or other recreational facilities for off-road motorbike use cannot be developed on city, county or other public property in which the state does not have a legal interest. The purchase or lease of land under state ownership, authorized by subsection one, and the development and maintenance of trails and other recreational facilities on state lands, directed by subsection two, do not mean city and county real properties. Local government unit property is distinct from "state lands" and "land under state ownership."

However, reading the act in conjunction with the organic act establishing the park and recreation board, we find that state and local governments can cooperate to achieve development and maintenance of off-road trails and other recreational facilities on what was *formerly* local government unit land.

Counties have the power to lease and sell county property to the state. Sections 31-808 and 836, *Idaho Code*. Cities have the power to convey and lease real property as well. Section 50-301, *Idaho Code*. With this understanding it is legally acceptable for local government units to contract with the state parks department so that the department "secures" land from them for purposes of implementing the act. Section 49-2707(1) and (2). Likewise, the Parks and Recreation Board has the power to cooperate with local governments of the state for purposes of acquiring land to be designated as a state recreation area (e.g., land to be used for trails for off-road motorbike use). This power includes the right to secure agreements or contracts with local government in Idaho to accomplish that acquisition. Section 67-4223(d), *Idaho Code*.

So, what cannot be done by strict adherence to the Idaho Motorbike Recreation Fund Act and its application to state and federal lands only, can be done through lease and sale of local government lands to the Parks and Recreation Department. The land can then be considered "state land" or "land under state ownership" for purposes of the act. Section 49-2707(1) and (2). The Parks and Recreation Department, cities and counties will be cooperating in such a matter as to promote the best interests of recreational area in the state while at the same time validly implementing the act.

2. Can funds be dispersed to cities, counties or other groups acting as local project sponsors for the development and subsequent operation and maintenance of motorbike related facilities, or must the Department of Parks and Recreation contract directly for the development and then be responsible for operation and maintenance?

3. If the answer to Question No. 2 is in the affirmative, would sponsorship of a local project be limited to public entities?

Yes, the Motorbike Recreation Fund monies can be distributed to cities and counties – which will act as local project sponsors – as long as the funds are for "the securing, maintenance, construction or development of trails and other recreational facilities for off-road motorbike use on state and federal lands." Section 49-2707(2). The park board has the power to appoint advisory, local and regional park and recreation councils, to consider, study and advise in the work of the department for the extension, development, use and maintenance of any areas which are to be considered as future park or recreation sites or which are designated as park and recreational areas. Section 67-4223(c), *Idaho Code*. It also has the power to cooperate with local governments of the state for the purpose of acquiring, supervising, improving, developing, extending or maintaining lands which are designated as state recreational areas and to secure agreements or contracts with local governments of this state. Section 67-4223(d), *Idaho Code*. This authority can reasonably be interpreted to include local government sponsorship of projects funded under the Idaho Motorbike Recreation Fund Act.

Yes, the sponsorship must be limited to public entities. The park board may appoint regional and local advisors to help implement the purposes of the act, but it may not disburse motorbike recreation funds to private entities for sponsorship for local motorbike projects. Public entities must retain control of local projects. The act is a legislatively created police power of the state to be administered by the state and its agencies.

4. Under the provision of 49-2707, could the costs incurred in administering the fund be legally deducted from the fund?

Yes. Since it will obviously take time, money and manpower to administer the act, the fund is the natural place to look for financial backing. If the motorbike recreation fund could not be used for costs of administration, the park board would have to reach into the general park and recreation fund and thus risk depleting the resources for the already existing park and recreation programs. The benefits for administering the Motorbike Recreation Fund Act — securing, maintenance, construction and development of trails and other recreational facilities for off-road motorbike use on state and federal lands — must somehow be underwritten. The act says that the monies derived from the fund shall be used to do that underwriting, Section 49-2707, *Idaho Code*. This does not mean that the general park and recreation fund cannot also be tapped for costs of administration. But that decision is left to the park board's discretion. Section 67-4223(a) and (b), *Idaho Code*.

5. Under 49-2708.2, is it necessary that a quorum of the Advisory Committee meet with the State Park Board at least twice a year, or would one or two members meeting with the Board satisfy this requirement?

Many Idaho agencies have express statutory requirements on organization and proceedings of meetings for their commissions and their advisory boards. Those provisions almost uniformly include a quorum requirement to conduct official business. Though that requirement is absent from the instant act, we would have to say that it is implied. At least a quorum of advisory members is necessary for proper administration of this act.

One of the advisory committee's few duties is the important one of co-responsibility with the state park board to administer the Motorbike Recreation Fund. Section 49-2708(3), *Idaho Code*. Without a majority present, representation of the best interests of recreational motorbike activity from the various districts from which advisors are appointed is doubtful. Moreover, the collision of opposing thoughts on issues of vital concern to motorbike riders would be lost without a quorum. It would no longer be an advisory committee but merely a rubber stamp for the views of the few advisory members who attend the meetings.

OFFICIAL OPINION NO. 73-165

April 5, 1973

TO: Gordon Randall
Executive Director, Potato Commission

FROM: Michael G. Morfitt

You requested an opinion as to whether or not a member of the Commission who has been appointed to fill an unexpired term was eligible for reappointment more than once.

Idaho Law provides in Section 22-1202, *Idaho Code*, that "the term of office shall be three (3) years and no commissioner shall serve more than two (2) consecutive terms." This must be interpreted to mean that no commissioner may serve for more than two full terms, as the provision defines a "term" as a three year period before it prohibits a commissioner from serving more than two consecutive terms. The same section also provides that a term starts at a specific date and lasts for three years from that date. Therefore, a commissioner who had been appointed to serve an unexpired term would not have served a "term" for the defined, three-year period. The result, then, is that a commissioner may serve two consecutive full terms, regardless if he had been appointed to complete an unexpired, partial term prior to being appointed for a full, statutory term.

OFFICIAL OPINION NO. 73-166

April 6, 1973

TO: Richard J. Hutchison
Deputy Director
Idaho Personnel Commission

FROM: W. Anthony Park

The question you present for opinion is: What is the status of Bureau of Narcotics and Drug Enforcement employees who were hired under the Idaho Personnel Commission Rules and Regulations? Such employees are exempt from the provisions of Title 67, Chapter 53, *Idaho Code*.

The controlling section is *Idaho Code*, Section 67-5303(c). This section reads in part as follows:

"Exempt employees shall be:***

(c) All employees and officers in the office, and at the residence, of the governor; and all *employees* and officers in the offices of the lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, and state superintendent of public instruction who are appointed on and after the effective date of this act.***" (Emphasis added)

The classification of "employees" was added by an amendment in 1969 which was effective March 18, 1969. This sub-section remained unchanged in 1972.

The Bureau of Narcotics and Drug Enforcement was transferred to the Attorney General's Office in January, 1972. These employees of the Bureau of Narcotics and Drug Enforcement were all appointed by the Attorney General after March 8, 1969, and by law are exempt from the provisions of Title 67, Chapter 53, *Idaho Code*.

In conclusion, since their status as exempt employees was required as a matter of law, the fact that they were appointed ostensibly under the provisions of Title 67- Chapter 53, *Idaho Code*, would not affect such status.

OFFICIAL OPINION NO. 73-167

April 10, 1973

TO: William W. Black
Administrative Magistrate
Magistrates Division A
District Court of Bonneville County

FROM: Warren Felton

The question of destruction of records has always been somewhat bothersome.

Consider Sections 9-331, 9-332, 9-333 and 9-334, *Idaho Code*. Section 9-331, *Idaho Code* gives the county officers permissive authority to microfilm records. Section 9-332, *Idaho Code*, says:

9-332. Destruction of originals when not less than 10 years old. — Any such document, plat, paper, written instrument or book reproduced as provided in section 9-331, the original of which is not less than 10 years old, can be disposed of or destroyed only upon order of the district court having jurisdiction, and the reproductions substituted therefor as public records. Written notice shall be given the Idaho State Historical Society sixty days prior to the destruction of any such original.

Thus, microfilmed records more than 10 years old can be destroyed if so ordered by the district court. We believe the matter is for the local district court to decide. The State Historical Society in Boise should be advised 60 days before destruction of records occurs. Also, Section 1-907(c), *Idaho Code*, makes it the duty of the senior district judge of a district to supervise clerks of court.

Nothing is said about records less than 10 years old but possibly the district courts might consider this too. We would like to point out to you that rules have been proposed and are under consideration by the State Supreme Court as to destruction of records.

Finally, we are enclosing for your information 2 earlier opinions issued from this office relating to this matter.

OFFICIAL OPINION NO. 73-168

April 10, 1973

TO: Homer R. Garrett
 Department of Probation & Parole
FROM: Wayne G. Crookston, Jr.

Pursuant to our conversations and your request as to State employees running for city offices, it definitely appears that they can. Section 20-204, *Idaho Code*, states that employees of the Board of Correction shall not serve as the representative, officer, or employee of any political party. Under the Personnel Commission rules, it is stated that participation in prohibited political activities is ground for discharge. Section 67-5309(n) 17, *Idaho Code*. Section 67-5311, *Idaho Code*, describes the political activity limitation as follows:

(1) No employee of a state department covered by this act, except those hereinbefore exempt, shall:

(a) Use his official authority or influence for the purpose of interfering with an election to or a nomination for office, or affecting the result thereof, or

(b) Directly or indirectly coerce, attempt to coerce, command or direct any other such officer or employee to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, or person for political purpose.

(2) No such officer or employee shall take an active part in political organization management. All such employees shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

From the statutes it can be seen that only partisan political activity is proscribed, and thus a State employee could run for and hold a non-partisan office. City councilman would be such an office.

OFFICIAL OPINION NO. 73-169

April 11, 1973

TO: Peter G. Leriget
 Latah County Prosecuting Attorney
FROM: Paul J. Buser

Effective July 1, 1973, Session Law Chapter No. 83 requires all recreation districts to prepare a annual budget, publish it one time in a newspaper within the proposed recreation district and hold a public hearing on the budget before adoption. A copy of these added sections to the Recreation District Law is enclosed with this letter.

These legislative amendments should fill the void where there were no previous public notice and hearing requirements in the Recreation District Law, Section 31-4301 et seq., *Idaho Code*. Therefore, in response to your March 12, 1973 inquiry, it is this office's suggestion that the citizens of the Deary area come forward again with their petition for the formation of a recreation district.

It would behoove the petitioners to file their proposal on or after July 1, 1973. They will then have the benefit of acting on existing legal guidelines and requirements concerning notice and public hearing on the budget. If the budget is not approved, there will be no need for the non-petitioners to contest the formation of the district. Surely, the district could not continue without local support of the budget. The district could be dissolved by those budget dissenters in protest of the proposed budget. Section 31-4320, *Idaho Code*.

If the district is challenged again, notwithstanding the new notice and hearing requirements and petitioner adherence to the requisites of filing, we would anticipate Judge Felton to hold the same way. Your office should make sure to appeal any decision forthcoming from that district court.

OFFICIAL OPINION NO. 73-170

April 18, 1973

TO: J. D. Hancock
Madison County Prosecuting Attorney

FROM: W. Anthony Park

In regard to the previous letter to you from this office dated March 20, 1973, Mr. Felton and I discussed this problem before he wrote to you and, after reviewing his letter, it seems to me that he was attempting to give you some guidelines from which to advise your clients.

However, if you want a formal opinion, we suggest that you advise the Board of Commissioners to obey the plain words of Section 31-3503, *Idaho Code*. This, after all, is the law, which, as you are aware, carries with it a strong presumption of constitutionality. Anyone who disagrees with the law is free to take the matter to the courts where the validity of Section 31-3503, *Idaho Code* can properly be determined. I trust this is the information you desire.

OFFICIAL OPINION NO. 73-171

April 20, 1973

TO: Robert J. Fanning
Bonneville County Prosecuting Attorney

FROM: J. Dennis Williams

This is to acknowledge the receipt of your letter of March 16, 1973 requesting an opinion from the Attorney General regarding the use of federal

matching funds and civil defense funds in building a new jail.

In this regard, it appears that a law enacted in 1970 found in *Idaho Code*, Sections 67-2326 through 67-2333 would encourage such a joint exercise of authority and powers between the affected agencies. Therefore, if there are no federal laws or regulations prohibiting such agreements, there appears to be no state impediment to such plans.

Attached is an agreement for the joint operation of a new proposed law enforcement center between Cassia County and the city of Burley. You might find this helpful in drafting a similar agreement between Bonneville County and the affected federal agencies.

OFFICIAL OPINION NO. 73-172

April 20, 1973

TO: Ben Cavaness
Power County Prosecuting Attorney

FROM: G. Kent Taylor

The Office of the Attorney General is in receipt of your request for an opinion dated March 19, 1973 in which you ask the following question: "Is it the responsibility of the prosecuting attorney to represent the county hospital board?"

Section 31-2604, *Idaho Code* provides the duties of the prosecuting attorney and in subsection 1 of that section it states:

"1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party;***

***3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers."

The question becomes whether or not the members of the county hospital board should be considered public officers within the meaning and intent of subsection 3 of Section 31-2604, *Idaho Code*.

It should be noted that Section 31-2001, *Idaho Code* enumerates the offices which constitute "county officers." That section provides that the officers of a county are: "1. A sheriff. 2. A clerk of the district court,***. 3. An assessor. 4. A prosecuting attorney. 5. A county treasurer***. 6. A coroner. 7. Three (3) members of the board of county commissioners." For purposes of this opinion the Office of the Attorney General shall consider the phrase "public officers" to be the same as "county officers" because of the lack of definition of the phrase "public officers." Upon a general review of the definition of that phrase it appears that the meaning has been decided on a case by case basis.

Applying the aforementioned definition of county officers it is very apparent that the prosecuting attorney must only represent the county officers as enumerated in Section 31-2001, *Idaho Code*. I should also point out this has been the traditional approach taken in the various counties throughout the State of Idaho.

OFFICIAL OPINION NO. 73-173

April 26, 1973

TO: Lary C. Walker
Washington County Prosecuting Attorney

FROM: Warren Felton

As per your letter and our phone conversations, I am writing you regarding the purchase of a rock crusher and trade in of the one the County now owns.

You have asked the following question:

"The first question then is does the purchase of a rock crusher to meet the needs of the County in crushing rock constitute an ordinary and necessary expenditure thereby relieving them from the requirements set forth in Article 8, Section 3 of the Constitution. The law requires that they maintain county roads for the public. It is possible, however, in this County, to contract for the gravel used by the County in any given year. However, due to the limitations and other problems, this would be much more expensive over a period of time than obtaining a rock crusher."

You should consider the cases such as *Swensen vs. Buildings, Inc.* 93 Idaho 466; *Reynolds Construction Co. vs. Twin Falls* 92 Idaho 61. They seem to indicate that this would not be an ordinary and necessary expense. On the other hand, the cases of *Pocatello vs. Peterson* 93 Idaho 774, *Horton Trust & C. Bank vs. Clearwater County* 235 F 752, and *Gem Hospital, Inc. vs. Grangeville* 69 Idaho 6, by analogy may indicate that such an expense is an ordinary and necessary expense when coupled with the case of *Thompson vs. Glindman* 33 Idaho 394, which you cited.

However, after reading all the cases cited under Article 8, Section 3 of the *Idaho Constitution* on the subject, I am inclined to the opinion that this would not be an ordinary and necessary expenditure, see for instance *Allen vs. Doumeq Highway District* 33 Idaho 249, where it was held that construction of a bridge was not an ordinary and necessary expense.

However, making such a choice is always a gamble and you could easily decide after reviewing the cases that this is an ordinary and necessary expense. I know this all sounds somewhat undecided. I do not mean it that way, I am just looking over the cases and it is very hard from them to come to a decision, but as I said above, my answer in this case would be no; but I would not fault anyone who made the other decision. The statutes, *Constitution* and cases just do not quite answer your question.

Your second question concerning buying additional space for court rooms — I would suggest that you carefully read Sections 31-1001, and Chapter 40, Title 31 of the *Idaho Code*.

I do not believe the purchase of a room for courthouse could be considered ordinary and necessary under the cases cited above, but it might be possible to do this on a lease purchase arrangement, see *Hanson vs. Kootenai County Commissioners* 93 Idaho 655.

OFFICIAL OPINION NO. 73-174

April 26, 1973

TO: John R. Marks, M.D.
Assistant Administrator
Department of Environmental & Community Services

FROM: James R. Hargis

We wish to respond to your request for an opinion of this office on the education of the mentally handicapped, the local school district's responsibility of that education, and whether or not the education of the mentally handicapped is part of any education program and service that is normally provided by the regular school system.

Each public school district is responsible for and shall provide for the education and training of the exceptional pupils resident therein. Section 33-2001, *Idaho Code*, "Exceptional children are defined as those children whose handicaps, or whose capabilities, are so great as to require special education and special service in order to develop to their fullest capacity. Section 33-2002, *Idaho Code*, specifically included in the definition are the mentally retarded children.

While a school district is responsible for and shall provide for the education of the exceptional child, the legislature has provided alternative ways by which a district can meet that responsibility. A district may establish its own program and operate that program as part of the regular school program, taking into account the special requirements necessary to educate the mentally retarded.

The second alternative by which a district may meet its legal responsibility to educate the mentally retarded is to contract for those educational services with a duly recognized service agency capable of meeting the educational standards set by law and the State Board of Education. In those instances where a district does contract for the services, the educational programs are not provided for in the regular school system. State funding, regardless of the method of providing the educational services, basically remains the same. However, your request for our opinion does not go to state funding questions.

In conclusion, we would state that where a district contracts for the educational services for the mentally retarded student of that district, those educational programs are not normally provided by the regular school system;

that is, the schools of the district do not actually perform the educational services, but rather support financially the educational services performed by another.

OFFICIAL OPINION NO. 73-175

April 26, 1973

TO: Roger C. Liedtke
V.F.W. Service Officer

FROM: W. Anthony Park

In your letter and recent phone conversation with Warren Felton you have asked for an interpretation of Sections 65-601 and 65-602, *Idaho Code*, which relate to County Veteran Service officers.

Section 65-601, *Idaho Code* reads as follows:

"65-601. Service officer appointed to aid veterans or dependents. — The board of county commissioners of any county in the state shall have power and authority and in its discretion may appoint a service officer whose duty it shall be to give aid and assistance to any veteran, widow, widower or dependent thereof in applying to the federal or state veterans' agencies for all benefits and aid to which the veteran, widow, widower or dependent thereof is entitled by federal, state or local laws, rules or regulations. Such appointment may, in the discretion of the board of county commissioners, be a separate office or additional duty imposed upon an existing county official, or [,] at the discretion of the board, such appointment may be made, and the expenses and salary thereof financed in conjunction with any service organization or organizations operating within the county."

You will notice from the section that it is left to the "discretion" of the county commissioners as to whether to appoint such an officer or not.

The term "discretion," when applied to public officers, means a power or right conferred on the officers by law whereby they may act or not act according to the dictates of their own good judgment and conscience, uncontrolled by others. *State vs. Tindell* 112 Kans 256, 210 P 619; *Board of P. Road Commissioners, etc. vs. Johnson* Tex 231 SW 859. Thus it is within the discretion of the county commissioners whether or not they will appoint a veteranservice officer.

You will also notice that the duty may be given to another county officer or can be established as a separate office and that some discretion is implied as to the method of financing the office. Section 65-602, *Idaho Code*, states that once there is such an office in the county the county commissioners shall fix the compensation and provide for office, facilities and supplies for proper maintenance of such office. However, while the law provides for a county contribution to the salary of such officer, it also indicates that the county

commissioners are not necessarily required to pay the whole salary of such officer.

In short, these sections do not require such an office or officer, they only provide that the county commissioners *may* create such an office and *may* appoint such an officer. Thus, if you wish to prevail upon the county commissioners of any county to fill the office you should convince them of the necessity for it.

We will be glad to aid you in this effort in any way we can. The veterans' laws are complex and veterans often need aid in gaining their rights under these laws.

OFFICIAL OPINION NO. 73-176

April 26, 1973

TO: William L. Chancey
Chairman, Board of County Commissioners
Twin Falls County

FROM: Paul J. Buser

Your February 20, 1973 letter concerning the problems of handling whey disposal has been forwarded to me for response.

Members of this office and I have discussed the necessity of constant handling, large quantities being dumped at one time, the sealing characteristic of this waste material, intolerable odor and the improbability of either known ranches and farm operations or the municipality undertaking to process the whey as a usable by-product. However, to answer your specific question — whether the county is "obligated under existing codes to accept this product for disposal" — we must answer in the affirmative.

Section 31-4403, *Idaho Code*, states

It shall be the duty of the board of county commissioners in each of the several counties to acquire sites or facilities, and maintain and operate solid waste disposal systems.

Section 31-4405, *Idaho Code*, states

All solid waste disposal systems shall be located, maintained and operated according to rules and regulations promulgated and adopted by the state board of health.

These statutory mandates are clear and to the point when read together. They anticipate that some wastes will be more odiferous, in greater amounts and generally more reprehensible than other wastes. The Idaho Solid Waste Control regulations and standards, effective September 4, 1968 give reason to this interpretation.

The rules and regulations for sanitary landfills and community modified landfills require certain handling of hazardous and highly putrescible wastes such as unprocessed whey.

Sanitary landfills:

Section 3.22, *Idaho Solid Waste Control, Rules & Regulations* states

Sewage solids or liquids (septic tank or cesspool pumpings and sewage sludge and grit), rendering plant waste, and other hazardous materials shall be disposed of in a sanitary landfill only if special provisions are made for immediate sanitary disposal when the material is delivered to the site. Hazardous substances shall include but not be limited to sewage, poison, acids, caustics, and explosives.

Section 3.23, *Idaho Solid Waste Control, etc.* states

When dead animals or highly putrescible wastes are not accepted in the refuse portion of the sanitary landfill, a separate pit or trench may be provided for the disposal of animal carcasses or large quantities of highly putrescible wastes. These wastes, when in a trench or pit separate from the sanitary landfill, shall be covered immediately when received or deposited with at least two feet of compacted cover material.

Community Modified Landfills:

Section 4.19, *Idaho Solid Waste Control* states

Sewage solids or liquids (septic tank or cesspool pumpings and sewage sludge and grit), rendering plant wastes, and other hazardous materials shall be disposed of in a modified landfill only if special provisions are made for disposal immediately as the material is received. Hazardous substances shall include but not be limited to sewage, poisons, acids, caustics and explosives.

Section 4.20, *Idaho Solid Waste Control* states

If animal carcasses or large quantities of highly putrescible wastes are to be permitted at a modified landfill, then a separate trench or pit shall be provided for their disposal. These wastes shall be placed in a trench or pit separate from the modified landfill and shall be covered with cover material at least two feet deep and compacted as the materials are received or deposited at the site.

It should be emphasized that these minimum standards require immediate treatment and compaction of particular depth.

We realize that it may be difficult to give such prompt and thorough attendance to the many gallons of whey disposed of at the Twin Falls County landfill. On the other hand, if the problem is of great magnitude but you do not want taxpayers to bear the brunt of purchasing a processor, we recommend that the county (a) collect more user fees from Swift and Company so the county's return is commensurate with the time, money and effort it spends disposing of and controlling the whey waste, and (b) seek financial assistance from state, federal and private sources so that added manpower and equipment can appropriately deal with the problems as you describe them. These are fully legislatively authorized actions. Section 31-4404, *Idaho Code*.

Since you do not wish to levy taxes nor reach into current revenues to finance the county's waste disposal facilities, the above two recommendations are the most practical and viable alternatives. Granted, the company will protest the increase in its user fee if the county charges what Swift feels is an exorbitant raise in fee. Nevertheless, if the suggestion is not heeded, the county will effectively continue subsidizing Swift's inability and evident refusal to dispose of and treat or process its own waste. Should the company then attempt to dispose of the waste at other than a landfill site the county should promptly prosecute either for violations of the solid waste disposal rules and regulations, if applicable, or for public nuisance. The method and basis for prosecution would of course depend upon the circumstances of the case (parties involved and affected, the company's new chosen dumpsite, the company's good faith efforts in remedying its own problem).

Your position is not enviable but your statutory duty is clear. The board of county commissioners has broad authority and responsibility to operate, maintain and fund the solid waste disposal facilities in Twin Falls County. Section 31-4402, 4403, 4404, 4405, *Idaho Code*. It has the power to bring injunctive action and to request criminal penalties for violators of your county ordinance on solid waste disposal. Section 31-4406. Unless the county wishes to take advantage of its ability to contract for or actually build a processor to remedy the immediate problem, it must necessarily increase Swift's user fee and seek monies from other sources to meet the expenses incurred in treating that company's refuse.

P.S. Proposed new solid waste management regulations and standards have been drawn up just this month. Emphasis is placed on sanitary landfills. The community modified landfills and community improved dumps of the 1968 regulations and standards are not allowed under the proposed regulations.

OFFICIAL OPINION NO. 73-177

April 27, 1973

TO: Leslie T. Lund
Chief, Weigh Station Division
Department of Law Enforcement

FROM: James W. Blaine

The question was raised at your meeting yesterday as to farmers leasing ten-wheel trucks for transporting farm products from the field to storage areas. These vehicles are not registered but are being operated as slow-moving vehicles under Section 49-801A, *Idaho Code*.

A slow-moving vehicle is defined by the statute, amongst other things, as a vehicle which is not normally operated on the highways of the state or as an instrument of husbandry.

I am therefore of the opinion that a truck which is equipped to haul farm

products from the farm to the market does not fall in this category and would have to be titled and registered. However, there would be exceptions to this rule which I believe would have to be taken up on an individual basis. One of these, in my opinion, would be a vehicle used primarily for irrigation purposes but be required to cross a highway occasionally or to be operated on a highway for a short distance to move from one field to another. Another type of vehicle which could conceivably come within the exception would be a truck which has a manure spreader mounted on the frame, operated principally upon the farming property, only occasionally using the highway to cross to one field to another or traveling upon the highway only for a short distance or even operated on the highway to refill the hopper.

I think our biggest problem with slow-moving vehicles is the term "implements of husbandry." Whether or not a vehicle coming under the term "implement of husbandry" would come within the provisions of the definition of a slow-moving vehicle would require an individual examination of each piece of equipment and its manner of operating, since the statute does not define implement of husbandry.

Implements of husbandry has been defined by Judge Bellwood in *State vs. Warr*, which was a case involving a spreader trailer and tried in the Fifth Judicial District Court in Minidoka County, in which Judge Bellwood defines an implement of husbandry as follows:

"An implement of husbandry is a vehicle or piece of equipment or machinery designed for agricultural purposes, used primarily in the conduct of agricultural operations and used principally off the highway."

A similar question has been raised and tried in Idaho County in the case of *State vs. Parks*, in which Judge Maynard comes to the same conclusion and in which case a fertilizer spreader mounted on a trailer was involved.

It would be my opinion that the box, tank or container in which the fertilizer is placed could be mounted either upon a trailer or could be mounted on a truck. However, in all of these cases where the operator desires to operate under the provisions of Section 49-801A, *Idaho Code*, would be limited in their operation as to the times, speed and manner in which they are operated.

In answer to your question concerning the trucks you described, it is my conclusion they would not meet the definition of slow-moving vehicles unless those particular vehicles are not normally operated upon the highway, nor are they implements of husbandry, as Judge Bellwood has defined the term. Therefore, they must be registered.

OFFICIAL OPINION NO. 73-178

May 3, 1973

TO: M. Terry McMorrow
Secretary-Treasurer
Meridian Cemetery District

FROM: Warren Felton

You have asked this office for an interpretation of House Bill 186 of the 42nd Legislature or Chapter 85 of the 1973 Session Laws. Your question was as follows:

"It is our understanding that House Bill 186 will become law on July 1, 1973. Will it be necessary by law to have a proposed budget and hearing before certifying levy figures in September 1973 and if so would this budget be for the fiscal period of Jan-Dec 1973 or Jan-Dec 1974. We have always felt when a levy is set in the Fall that this is for expenses of the following year."

Section 27-121 provides that at the last regular meeting of the Cemetery Maintenance Board prior to the third Monday in September in each year the board may levy a tax and must through its secretary transmit to the county auditor and assessor and the State Board of Equilization certified copies of the resolution for the levy as provided for by Section 63-915, *Idaho Code*, and that such taxes will be collected as provided for by Section 63-918, *Idaho Code*.

Section 63-921, *Idaho Code*, indicates that a tax cannot be levied for the year in which the levy is made. The whole idea of county and municipal taxes in Idaho is that the tax is levied in the year before the taxes are paid, based upon previously estimated budgets which set out what taxes will be necessary for the following year.

It will be necessary to hold a budget hearing this year in either July, August or early in September if the Cemetery Maintenance Board proposes to adopt a budget of more than \$1,000.00 for the next year. The budget would be for the year 1974.

A copy of the new law is attached, refer to it for the details of providing for, and holding, the budget hearing.

OFFICIAL OPINION NO. 73-179

April 30, 1973

TO: Robert M. Nielsen
Minidoka County Prosecuting Attorney

FROM: Warren Felton

You have asked whether or not Mr. Bethke, the Recorder of Minidoka County, Idaho should accept for filing continuation statements under Section

28-9-403(3), *Idaho Code* which are sent to him more than 6 months before the expiration date of the financing statement. The section says in substance that a continuation statement may be filed by the secured party within 6 months before and 60 days after the expiration of the financing certificate.

We are unable to find any case on this point or any opinion, etc., relating to it either. The reporting services for the U.C.C. fail to show any such cases or opinions either.

If the Farmers Home Administration has any authorities on this subject we would like to see them.

In the absence of any such authority we are inclined to agree with you, Mr. Nielsen, that the Recorder should accept filings of continuation statements filed more than 6 months before the expiration date of the financing statement. Suppose a court should hold such filing valid; the Recorder might subject himself to tort liability for failing to file the continuation statement. Whereas, on the other hand, no one will particularly suffer if the continuation statement is filed early. This fact appears in the records. No one is damaged or misled thereby in any way.

The Recorder may wish to advise the person filing a continuation statement early, of the wording of Section 28-9-403(3), *Idaho Code*, and advise them to seek legal counsel with regard to the early filing, but we would certainly suggest that the continuation statement should not be refused for filing for this reason.

OFFICIAL OPINION NO. 73-180

April 30, 1973

TO: Robert H. DesAulniers
Assistant to the Administrator
Department of Environmental & Community Services

FROM: Paul J. Buser

Your April 2, 1973 letter has been referred to me by Bob Bushnell. Your specific question was stated as follows:

If the State Auditor is served a garnishment to attach wages, is it assumed that the Ada County Sheriff (who is the only sheriff in the State who can legally do this) has afforded a hearing to the employee?

Inasmuch as a judgment is required before wages may be garnished, it can be validly assumed that that service by the sheriff of Ada County upon the state auditor of a copy of the writ of execution and a notice of garnishment is one which follows a hearing for the employee or state agency involved. Section 11-202, *Idaho Code*. The assumption is particularly sound in light of the recent Supreme Court decisions in *Sniadach v. Family Finance*, 395 U.S. 340 (1969) and *Fuentes v. Shevin*, 40 U.S.L.W. 4692 (1972).

In *Sniadach* the Wisconsin garnishment statute (wherein notice and opportu-

nity to be heard were not given before the "in rem" seizure of wages) was held unconstitutional as a violation of due process. The Court was concerned that the subject person did not have a chance to be heard on a matter which so gravely concerned the individual.

We deal here with wages — a specialized type of property presenting distinct problems in our economic system. 395 U.S. 340.

The hardships incumbent upon the defendant are obvious when less than full salary is paid. The employee must rearrange management of his personal finances so that he can cope with the reduction in salary. With no hearing and only summary execution, the garnishment proceeding becomes abhorrent to constitutional due process requirements.

Fuentes dealt with a different topic (replevin) but the substantive holding on due process accorded to the defendant strengthens the purpose and intent of both the relevant Idaho statutes, Sections 11-202 and 28-35-104, *Idaho Code*, and *Sniadach*. The suspect replevin statutes of Pennsylvania and Florida were held unconstitutional for allowing a private person, without hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a process of "ex parte" application to a court clerk. Again, the absence of an initial hearing was fatal to the self-help remedy. The Court said basically that procedural due process is a must when one acts to deprive another of his possessions. Those parties whose rights are to be affected are entitled to be heard. In order that they may enjoy that right they must be notified.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to *protect his use and possession of property from arbitrary encroachment* — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitution and political history, that we place on a person's rights to enjoy what is his, free of government interference. 40 U.S.L.W. 4696. (Emphasis added)

In light of the abovementioned Idaho statutes and these two Supreme Court holdings, there should be no reason not to assume that hearing, notice and judgment have been accorded a defendant, be he an individual person or the State of Idaho. It is surely not unreasonable to assume that these express legislative and judicial requirements are being carried out in a garnishment proceeding.

One last note. You mention in your letter "that the Ada County Sheriff . . . has afforded a hearing to the employee?" Strictly speaking, language with reference to a "sheriff's court" or "sheriff's jury" is *passee* in Idaho. A notice, hearing and court judgment for or against execution is controlling today, not a verdict of the sheriff's jury.

OFFICIAL OPINION NO. 73-181

May 1, 1973

TO: Armand L. Bird
Executive Secretary, Board of Medicine

FROM: Clarence D. Suiter

In response to your recent inquiry regarding the subject of acupuncture, we would suggest that we will need more guidance from you or your organization before we can accurately categorize the phenomena. From what we know of the treatment method it would appear that acupuncture falls squarely within the definition of the practice of medicine as outlined in *Idaho Code*, 54-1802. However, our feeble understanding of the nature of acupuncture does not necessarily make that term incompatible with the definition of the chiropractic contained in *Idaho Code*, 54-712. The only area in which we can feel secure in enunciating a conclusion based on our present knowledge, is in the field of naturopathy, and it is our opinion that naturopaths may not legally employ the system of acupuncture for any medical purpose.

Seemingly, the main concern enunciated in your letter concerning acupuncture centers around the field of naturopathy, and so we would like to restrict our conclusion herein to that area only. Once again, it is our opinion, based upon our sketchy understanding of the nature of acupuncture, that naturopaths may not employ acupuncture in the practice of their healing art. If you would furnish us with a comprehensive definition of exactly what acupuncture is, how it is employed, and its effect on the body, we would attempt to more carefully and thoroughly extract a legal definition from the term.

We do feel that your Board has the undeniable authority to propose and adopt regulations not only for the definition of the term acupuncture, but for the regulation of the use thereof. If we can be of assistance in your formation of rules and regulations regarding the system and use of acupuncture, we should be most happy to do so.

OFFICIAL OPINION NO. 73-182

May 2, 1973

TO: Dr. Marshall T. Keating
Superintendent
Moscow School District #281

FROM: James R. Hargis

We wish to respond to your letter of April 30, 1973, wherein you requested the opinion of this office on the question of a "write-in" levy proposal different from that levy proposal to be submitted to the electors of your district by the trustees thereof. You have informed us that the Trustees of your district have by resolution proposed a 16 mill M & O levy to your electors, the election to be

held May 8, 1973. You have also forwarded a copy of a flyer, encouraging patrons of the district to change the 16 mill proposal to 19 mills and to vote for a 19 mill levy imposition.

We are of the opinion that such a "write-in" or electors amendment at the polls is improper and ballots so marked would be considered as mutilated ballots. The decision to impose a levy obligation and the amount of that obligation are fiscal duties imposed exclusively by law on the trustees of the district. Chapter 8, Title 33, *Idaho Code*, as amended. The trustees may impose a levy of 27 mills on their own motion. If the financial needs of the district are so great that a higher millage is required, the trustees must obtain the favorable approval for the increase from the qualified electors. It is the duty of the trustees to inform the electors of the need for the increase and the amount thereof. The electors are limited to approving or disapproving the amount submitted to them by the trustees. But to increase or decrease the amount of the proposed levy by the electors strips the trustees of their duty to set the levy for the maintenance and operation of the schools in the district. The final decision on the amount of the levy must be made by the trustees. That decision is what the electors in effect review at the polls. There are no provisions established by law whereby the amount of the proposed levy can be amended or modified by the electors. A mill levy election is strictly an affirmative or negative election. In this regard, it differs substantially from a trustee election where the elector may vote for any candidate on the ballot or by writing in the name of another.

We cannot help but express our concern for administering an election where there are basically three alternatives to the outcome: 1. Approval of the amount of the levy as proposed by the trustees; 2. Disapproval of that proposal; and 3. an elector determined levy. It must be emphasized that any mill levy election must pass by at least a majority of the electors voting in that election. Any more than 2 alternatives, approval or disapproval, would render the majority approval requirement meaningless. The majority requirement further supports the conclusion that a mill levy election is based on the proposal submitted to the electors by the trustees.

OFFICIAL OPINION NO. 73-183

May 7, 1973

TO: Murray Michael
Air Pollution Division
Department of Environmental & Community Services

FROM: Paul J. Buser

In answer to your inquiry "whether the \$300 penalty provision of Section 39-117, *Idaho Code*, precludes the \$1,000 penalty of Section 39-108," we respond in the negative.

These laws are not necessarily inconsistent. One provides a civil penalty beginning with the tenth day after the expiration of the time fixed for the taking

of preventive or corrective measures in the board's order. Section 39-108(6), *Idaho Code*. The other authorizes a misdemeanor fine. Section 39-117, *Idaho Code*. They are both meant to be used to prevent violations of the public health and environmental laws, rules and regulations.

Legislative intent did not mean to render one or the other nugatory. Neither need one be exclusive of the other. They should be harmonized consistently with the policy behind them in accordance with the legal theory, "in pari materia." Such a theory states that statutes relating to the same subject, though enacted at different times, are "in pari materia" and should be construed together. *Peavey v. McCombs*, 26 Idaho 143 (1914); *Chicago & N.W. Ry. Co. v. City of Seward*, 88 N.W.2d 175 (Neb. 1958).

Further, specific provisions must be given effect notwithstanding general provisions which are broad enough to include the subject to which the specific provisions related, i.e. in our case – environmental and health protection. *State v. Coney*, 372 P.2d 348 (Ha. 1962).

OFFICIAL OPINION NO. 73-184

May 7, 1973

TO: Lary C. Walker
Washington County Prosecuting Attorney

FROM: Warren Felton

This letter is in answer to your request concerning procedures to be used in handling Federal Revenue Sharing Funds.

Section 123(a)(4) Public Law 92-512 and the Federal Regulations 31-51.33 state that the county will provide for the expenditure of entitlement funds "...only in accordance with the laws and procedures applicable to the expenditure of its own revenues."

I had previously thought that these moneys were federal and that the times for county budget proceedings were unimportant. After considering the matter of the time limits written into the county budget laws, I believe I must renege on what I said to you over the phone. The times and time limits set out in the budget laws are what make the budget laws work. They are not separable from the rest of that law and probably cannot be separated therefrom in such a way as to leave workable or cogent statutes. Therefore we believe that the budget proceedings for expenditure of these funds will have to proceed within the same time limits and at the same time as your ordinary budget. The wording of the federal law and regulation is too clear to allow for any other interpretation than that you must follow out your ordinary budget procedures at the specified times.

OFFICIAL OPINION NO. 73-185

May 7, 1973

TO: Lary C. Walker
Washington County Prosecuting Attorney

FROM: Warren Felton

This is in answer to your letter concerning Senate Bill 1080, Chapter 166, 1973 Idaho Session Laws relating to contracts to promote projects concerning the aged. The pertinent portion of your letter is as follows:

"Under the purvue of that Statute, we find no authorization that allows the County to fund such programs out of tax revenue funds. We presume the intent of the Statute is to allow the County Commissioners to use Revenue Sharing Funds wherein they are designated as Grantees to receive the funds to sponsor the aged, for use to support the Senior Citizen programs or other such programs in the County.

Would you please give your opinion as to the County's authority under that Statute, whether they have authority or statutory right to use any County funds received by taxation for the benefit of the Senior Citizens, and what provisions the contract should contain if Revenue Sharing Funds are used to support the aged.

It is our initial reaction that such a contract should designate that they receive funds from other sources, that such funds are not tax funds, and that such funds will only be available for the Senior Citizens as long as the County is a recipient of such funds. We feel that it should further provide that the funds be expended in conformity with the laws of the State of Idaho and also that they not be mixed with other federal funds as set forth in the Federal Revenue Sharing Rules and Regulations."

Concerning the first above quoted paragraph of your letter; we do not quite agree with the first sentence of that paragraph if it could be interpreted to the affect that the county may not be authorized to spend any county funds for this purpose. In reading through Chapter 8 of Title 31, *Idaho Code*, there are a number of functions and powers that the county commissioners have where there are no specific authorizations to spend county funds. Section 31-811, *Idaho Code*, authorizes the county commissioners to levy such taxes as may be necessary to defray the current expenses of the county and is generally held to authorize taxation for those purposes not specifically provided for by law, *Shoshone Highway District vs. Anderson* (1912) Idaho 109 which generally includes all of the purposes provided for in Chapter 8, Title 31, *Idaho Code*. Thus we do believe that county funds could be spent for this purpose. Also Article 12, Section 2, *Idaho Constitution*, generally recognizes the ability of counties and cities to make and enforce within their limits such local regulations as are not in conflict with general law. This is a pretty broad power. It is cited here to show the extent of the power of the board of county commissioners. The county commissioners then, within the law where it speaks of the subject,

or where the law is silent and not contrary to the proposed action, can generally take such actions as they deem desirable if they proceed properly.

Thus, we believe they could expend funds provided for under Section 31-811, *Idaho Code* for the purposes of Senate Bill 1080.

The precautions you state in your letter may certainly be desirable in relation to such contracts.

We will be glad to help or advise you in relation to such contracts if you have some specific contract in mind.

OFFICIAL OPINION NO. 73-186

May 8, 1973

TO: Robert Olson
Director, Regional Environmental Programs
Environmental & Community Services

FROM: Paul J. Buser

We are pleased to reply to your April 24, 1973 inquiry concerning the responsibility for removal and disposal of animal carcasses from Idaho streams, lakes and reservoirs. Your specific questions were:

- 1) In instances where the owner of the carcass can be determined (brand, etc), we hold the owner responsible for removal and disposal. Are we correct in this approach?
- 2) In instances where there is no way to determine the owner because all markings have been removed, the carcass deteriorated beyond recognition of markings, or it is a wild animal carcass, who then is responsible for removal from the water for final disposal? If the carcass is not floating but has washed upon the banks, who is responsible for removal and disposal?

In answer to your first question, we reply in the affirmative. Though an animal has died, the ownership characteristics do not end with the death of the animal. Assuming the animal is useless for rendering purposes or for any other economically benefiting purpose, the owner must still make every reasonable attempt to adequately remove and/or dispose of the animal. Public nuisance actions are quite proper if the owner does not take the appropriate steps. Section 18-5901 et. seq., *Idaho Code*.

This does not mean the owner must bury or destroy the animal on his own land. It does mean the owner can contract with municipal authorities who would take care of this type of solid waste. Also, the owner might contract with or solicit the assistance of other parties who would provide their services to remedy the problem. Under no circumstances may the owner haphazardly dispose of the carcass; criminal penalties are quite clear when it comes to what is a violation of the public health and safety laws:

18-5803. Exposure of animal carcasses. Every person who puts the carcass of any dead animal, or the offal of any slaughter pen, corral or butcher shop, *into any river, creek, pond, street, alley, public highway or road in common use, or who attempts to destroy the same by fire within one-fourth of a mile of any city, town or village, is guilty of a misdemeanor.* (Emphasis added)

18-5807. Leaving carcasses near highways, dwellings and streams, and pollution of water used for domestic purposes. Any person who shall knowingly leave the carcass of any animal within a quarter of a mile of any inhabited dwelling, or on, along or within a quarter of a mile of any public highway or stream or water, for a longer period than twenty-four hours, without burying the same, and by such exposure or burial within 200 feet of any stream, canal, ditch, flume or other irrigation works shall pollute or contaminate, so as to render unfit for domestic use, any natural stream of water, or the water in any canal, ditch, flume or other irrigation works, used by others for domestic purposes, shall be guilty of a misdemeanor, and upon conviction shall be fined any sum not to exceed \$100.00.

Also, if the owner attempts to dispose of the dead animal on public lands without authority he may be subject to criminal trespass and injury to property charges under specified circumstances. Section 18-7001 et seq., *Idaho Code*.

In the second situation, where the owner of the dead animal is unknown and the carcass is either floating or comes to rest on a non-owner's property, the responsibility for removal and disposal is upon the county or counties wherein the carcass lies. Counties are obligated by law to administer and operate solid waste disposal systems. Section 31-4401 et seq., *Idaho Code*.

The solid waste disposal laws were passed for the purpose of reducing the threat to health posed by refuse such as animal carcasses. This legislative intent is further indicated by the Idaho solid waste control regulations and standards, which became effective September 4, 1968.

The definition of "solid waste" in these rules and regulations is "all useless, unwanted or discarded . . . wastes including . . . animal carcasses." Section A, 1.1. Whether a county has a sanitary landfill, a community modified landfill, a community improved dump or a community open dump does not matter. The rules and regulations speak specifically to removal and disposal of animal carcasses for all of these sites. Sections B, 3.23; 4.20; 5.19; 6.0; 10.0. Further the law clearly states:

It shall be the duty of the board of county commissioners in each of the several counties to acquire sites or facilities, and maintain and operate solid waste disposal systems. Section 31-4403, *Idaho Code*.

Neither the statutory mandate nor the applicable solid waste control rules and regulations are ambiguous. Both of these legal guidelines arise under the authority of Title 31, Counties and County Law. It is the county, then, which has the responsibility for disposing and removing animal carcasses when the owner is unknown as in the second situation.

OFFICIAL OPINION NO. 73-187

May 9, 1973

TO: Marjorie Ruth Moon
State Treasurer

FROM: Wayne Meuleman

This is in response to your request of April 5, 1973, for an opinion interpreting House Bills 184 and 185. There appears to be some ambiguity in the language of such bills as enacted by the 1973 Legislature. To properly resolve the ambiguities of the statutory language, certain established legal principles provide guidance in the determination of the intended meaning. I will summarize the applicable principles of statutory interpretation at the outset.

In construing statutes, it is the duty of the court to ascertain legislative intent, and to give effect thereto; in ascertaining intent, it must not only examine literal wording of the language but take into account other matters such as context, object and view, evils, history of the times, and legislation on the same subject, public policy, contemporary construction, and the like. *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963); *Idaho Public Utilities Commission v. V-1 Oil Company*, 90 Idaho 415, 412 P.2d 581 (1966); *Knight v. Employment Security Agency*, 88 Idaho 262, 398 P.2d 643 (1965). The intent of the Legislature in enacting statutes is ascertained by giving statutory words their natural significance. But if such procedure leads to unreasonable results plainly at variance with the policy of legislation as a whole, the court must examine the matter further with respect to the reason for the enactment and give effect to a statute in accordance with its design and purpose even to the point of sacrificing, if necessary, the literal meaning in order that the purpose of the statute may not fail. *Acheson v. Fujiko Furusho* (C.A. Idaho, 1954), 212 F.2d 284. A further aid to statutory interpretation is that the construction given to a statute by the executive or administrative officers of the state is entitled to great weight and will be followed by the court unless there are cogent reasons for doing otherwise. *Idaho Public Utilities Commission v. V-1 Oil*, *supra*. With these general principles of statutory interpretation in mind, I will analyze the specific questions you have raised relative to your duties regarding House Bill 184 and House Bill 185.

The implications of House Bills 184 and 185, when taken as a whole, reveal a legislative intent to accomplish two major functions not previously provided for: To authorize the acquisition of time certificates of deposits by the State for maturities of "not less than thirty days" and to more closely correlate the rate of return on such time deposits to the Federal treasury bill rates while maintaining a premium rate favorable to the State. Reference to the prior statute will indicate a less flexible system for computing premium return on time deposit certificates and further that time deposits of a maturity from thirty days through fifty-nine days were statutorily prohibited as state investments. Reading the amendments of House Bills 184 and 185 in relation to the prior statute assist in resolving the apparent ambiguities you have raised.

You first note some confusion regarding the amended language stating, "... for the time deposits maturing after thirty (30) days, but within fifty-nine (59) days, the rate will be equal to the quoted bond equivalent rate for U.S. treasury bills of like maturity ..." House Bill 184, P.2, Ls. 12-15; House Bill 185, P.2, Ls. 27-30. You interpret this language to mean that the words "like maturity" require a distinct bond interest rate be established by the State Treasurer for time deposits maturing on days thirty-one (31), thirty-two (32), thirty-three (33), etc., consecutively through the fifty-ninth day based upon the treasury bill bond equivalent rate for U.S. treasury bills of a maturity of a comparable number of days. As you have indicated, the bond equivalent rate quotations are issued on a weekly rather than daily basis; therefore, a bond equivalency quotation is not available for each of the consecutive dates for bonds maturing within days thirty-one through fifty-nine. Such an interpretation may be excessively restrictive from an administrative standpoint and in terms of legislative intent.

With respect to the interest rate provisions regarding time deposits maturing between thirty and sixty days, a liberal and flexible interpretation of the language of such provisions will promote the public policy supporting the statutes and likewise conform to the legislative intent in enacting such provisions. In line with the general principles of statutory interpretation, this office views the language above quoted to mean that the State Treasurer may establish the interest rates on time deposits maturing at a period which is not specifically quoted in the treasury bill quotations to be the highest bond equivalent rate quoted for treasury bills of the duration nearest the maturity period on the time deposit under consideration. Such interpretation will allow for the administrative flexibility necessary for the State Treasurer to reasonably carry out the purpose of the act and additionally secure the highest rate of return on state time deposits while conforming to the established federal money market relative to treasury bills.

Secondly, you question the apparent omission from the statute of thirty (30) day and sixty (60) day time certificates. As you know, the provisions relating to the applicable interest rates for time deposit certificates refer to certificates of a duration "after thirty days but within fifty-nine days" and further for time certificates "after sixty days," thus technically omitting the thirty day and sixty day time certificates. From a purely technical standpoint, it would appear that no provision is made for the establishment of interest rates on the thirty day and sixty day time deposit certificates; however, again it is necessary to view the legislative intent and underlying policy of the statute as a whole in determining whether such omission was in fact intentional. It is my conclusion such omission was not intended by the Legislature, but rather occurred as a result of clerical error.

Referring you to Section 67-2742 of House Bill 184 and Section 57-131 of House Bill 185, you will note that such sections were amended to authorize time deposits evidenced by certificates of deposits having "a maturity of not less than thirty days." Such language would indicate a legislative intent to authorize the issuance of a time deposit certificate for maturities down to and including thirty

day time deposits. Furthermore, upon review of Section 67-2743 of House Bill 184 and Section 47-132 of House Bill 185, it would appear that the legislative intent is to provide a procedure whereby the State Treasurer may establish an appropriate rate of interest for all time deposit certificates which are authorized by statute. This office therefore concludes that although technically the thirty day and sixty day time deposit certificates are omitted from the sections of House Bills 184 and 185 which provide a procedure for establishing an applicable interest rate, it is the legislative intent to include the thirty day deposit and the sixty day deposit within such provisions.

Regarding the thirty day time deposit certificate, the appropriate procedure for establishing the applicable interest rate shall be the procedural method designated for time deposits maturing "after thirty days and within fifty-nine days." Therefore, the interest rate for thirty day time deposits shall be determined in reference to the quoted bond equivalent rate for U.S. treasury bills of like maturity.

Respecting the sixty day time deposit, the appropriate procedure to be followed in establishing the interest rate shall be by reference to "the average rate bid for U.S. treasury bills at the most recent auction proceeding the first day of each calendar month during the year plus an additional premium"; that premium being the same as is applicable for time deposit certificates of a duration lying between the periods of sixty-one days through ninety-one days. The use of such procedure for determination of the appropriate interest rate on sixty day time deposits conforms with the legislative intent and the public policy for which the statute was enacted.

Finally, you have noted that the U.S. Treasury Department auction for two hundred seventy-three day treasury bills has been cancelled; such cancellation occurring prior to the passage of House Bills 184 and 185 by the Idaho Legislature. The cancellation of the U.S. Treasury auction for two hundred seventy-three day treasury bills tends to create a latent ambiguity in the language of House Bills 184 and 185. Both bills contain language to the effect:

' . . . on all other maturities the rate shall not exceed the average rate bid for United States treasury bills at the most recent auction proceeding the first day of each calendar month during the year plus an additional premium as hereinafter calculated. . . . for time deposits maturing after one hundred eighty-two (182) days but within two hundred seventy-three (273) days, the rate shall be the treasury bill rate for two hundred s venty-three (273) day treasury bills plus a premium of seven and one half per cent (7½%) of said treasury bill rate; . . ." House Bill 184, P.2, LS. 15-19 and LS. 26-31; House Bill 185, P.2, LS. 29-30 and P.3, Ls. 1-5.

You have questioned whether the cancellation of the two hundred seventy-three day treasury bill auction has the effect of prohibiting the State from purchasing time deposits of a maturity of one hundred eighty two days through two hundred seventy-three days.

Again having in mind the legislative intent and public policy supporting the enactment of House Bills 184 and 185, this office concludes that during the

period for which the two hundred and seventy-three day treasury bill auction is not conducted, the State Treasurer should resort to the quoted bond equivalent rate for U.S. treasury bills of a similar maturity in the same manner as is appropriate for time deposits maturing between days thirty-one and fifty-nine. The particular language which relates to interest rates on time certificates of a duration from one hundred eighty-two days to two hundred seventy-three days states specifically that; "the rate shall not *exceed* the average rates bid for U.S. treasury bills of the most recent auction;" therefore, from an administrative standpoint, you would be in compliance with the provisions so long as the bond equivalency rate relied upon for the particular time certificate under consideration does not exceed the last two hundred seventy-three (273) day treasury bill auction interest rate. Where the quoted bond equivalent rate for the time certificate of a particular duration does in fact exceed the average interest rate bid for U.S. treasury bills at the last conducted auction for two hundred and seventy-three day treasury bills, you then may resort to the average rate bid at the last conducted treasury bills to determine the basic applicable interest rate to which the seven and one half per cent (7½%) premium applies.

You should note that the particular language regarding the most recent U.S. treasury bill auction in House Bills 184 and 185 is identical to the prior law. Therefore, such language should be construed in the same manner as it was prior to enactment of House Bills 184 and 185 wherever possible. The above interpretation is in conformity with the legislative intent and public policy of the bill. Such interpretation conforms with the federally established money market system for treasury bills and by the same token is within the reasonable and practicable administrative performance of the duties of the State Treasurer.

This analysis will provide a basis for reasonable administration of the current law as enacted by the 1973 Legislature. However, steps should be taken at the earliest opportunity to eliminate existing ambiguities in House Bills 184 and 185.

OFFICIAL OPINION NO. 73-188

May 10, 1973

TO: Steven E. Clayton
Acting City Attorney
City of Hailey

FROM: Donald E. Knickrehm

The Attorney General has asked me to respond to your letter of May 9, requesting an opinion on the provisions of *Idaho Code* § 50-501 as amended. I have included a copy of the enactment amending Section 50-501 passed in the last Legislature and signed by the Governor. As amended, Section 50-501 makes the holding of referendum by any municipality in Idaho mandatory upon the presentation of a petition in proper form executed by twenty per cent of the qualified electorate of the municipality. I can find no basis in the wording of the statute as amended or in the case law in Idaho for restriction of the referendum

provisions from application to annexation ordinances. There are two very old cases in other states, both of which turned upon the particular statutory context in those jurisdictions, which held referendum procedures inapplicable to annexation ordinances. The same statutory context does not exist in Idaho.

The only other restriction in the cases upon the application of the referendum procedure by municipalities is found in the case of *Swain v. Fritchman*, 21 Idaho 783 (1912). That case held the referendum procedure inapplicable to ordinances levying taxes, but again the decision was based upon the wording of the referendum provision and the statutory context at that time, and that context no longer exists. It is our conclusion, then, that the amended referendum procedure effective July 1 of this year under *Idaho Code*, Section 50-501 as amended, does apply to annexation ordinances at least insofar as the referendum procedure is invoked within a reasonable time of the passage of the annexation ordinance. It is certainly possible that a substantial passage of time might result in some vested rights in the residents of the annexed area, and raise constitutional barriers to the deannexation of the area by referendum procedure. This is not an issue here.

Your second question was whether the present provisions of Section 50-501, *Idaho Code*, prevent any type of a referendum election from taking place in Hailey? Clearly, Section 50-501 as presently existent does not provide for a referendum as such. However, it is our opinion that there is a general authority in the cities of the state to make expenditures for advisory elections where the city council deems that to be in the public interest. It would simply be a matter of the city council enacting an ordinance providing for the presentation of a given question to the electorate at a special election or the next regular election to be held in the jurisdiction. The results, of course, would not be binding upon the council.

OFFICIAL OPINION NO. 73-189

May 10, 1973

TO: Marjorie Ruth Moon
State Treasurer

FROM: James G. Reid

This letter is in response to your request for an opinion from this office as to whether or not the responsibility for clipping coupons on bonds which are required to be deposited with the State Treasurer pursuant to House Bill 194 falls on the State Treasurer for amounts deposited in excess of \$25,000.

House Bill 194 was an amendment to Section 41-317, *Idaho Code*, and in part, reads as follows:

"SPECIAL DEPOSIT — WORKMEN'S COMPENSATION INSURERS. —

(1) For authority to write workmen's compensation coverages in this state a foreign or alien insurer shall, in addition to any other requirement

therefor under this code, deposit and maintain on deposit with the state treasurer of Idaho through the commissioner cash, time certificate of deposit assigned to the state treasurer, surety bond issued by someone other than the insurer, or securities eligible for deposit under section 41-803, Idaho Code, in the amount of *not less than* twenty-five thousand dollars (\$25,000). The state treasurer of Idaho shall keep the same in a safe place provided by the state or in custody for his account with a bank, trust department or national bank in the state of Idaho as may be designated by the state treasurer. All costs and expenses incurred by virtue of such trust agreements with banks, trust departments or national banks, *including the cost of clipping and forwarding interest coupons*, shall be borne by the depositing insurer." (Emphasis added)

The thrust of the amendments to Section 41-317, *Idaho Code*, was to provide workmen's compensation insurers alternate means of complying with the special deposit regulation by allowing them to assign to the State Treasurer time certificate deposits or surety bonds in addition to cash or securities. In addition, a provision was made in the amendment allowing the State Treasurer to deposit these newly accepted forms of security with various banks, and at the same time, require that the depository bank bear the cost of clipping and forwarding interest coupons on eligible securities. Although there is a minimum of \$25,000 which must be deposited with the State Treasurer, this certainly cannot be construed to mean that any sums deposited over \$25,000 would require the State Treasurer to bear the responsibility of clipping and forwarding interest coupons.

Therefore, it is the opinion of this office that House Bill 194, which amended Section 41-317 of the *Idaho Code*, in no manner requires the State Treasurer to assume any responsibility for the clipping and forwarding of interest coupons on eligible securities deposited with the State Treasurer pursuant to the *Code*.

OFFICIAL OPINION NO. 73-190

May 11, 1973

TO: Jerry Shively
President, Idaho Falls Education Association

FROM: James R. Hargis

We wish to respond to your letter of May 4, 1973, concerning the eligibility of certain candidates for your forthcoming trustee elections in District #91.

You have asked whether or not a teacher and the spouse of a teacher can be eligible for candidacy and, if elected, can serve on the board of trustees. Marriage alone is no bar to candidacy for any office nor is it a bar to eligibility to serve so long as the marriage does not otherwise change the qualifications to serve; i.e., citizenship or residency.

However, your questions do not really involve qualifications or eligibility.

Rather, your questions have to do with the contractual relationship between the candidates, if elected, and the board or the candidate's spouse's contractual relationship with the board.

Section 33-507, *Idaho Code*, specifically prohibits members of the board of trustees having a direct or indirect pecuniary interest in any contract with the district. The pertinent language of Section 33-507, *Idaho Code* is as follows: "It shall be unlawful for any trustee to have pecuniary interest directly or indirectly in any contract or other transaction pertaining to the maintenance or conduct of the school district, or to accept any reward or compensation for services rendered as a trustee." We do not believe this language is susceptible to any interpretation other than a contracting teacher falls within its restrictions. This would appear to mean that Mr. Begley, the teacher-candidate, could not contract with the trustees as a teacher should he be elected to the board. He can be a teacher or a board member, but not both. The decision as to which position he chooses to accept should he be elected, is his. The fact that he is a teacher does not affect his eligibility to serve on the board of trustees. But as a trustee he may not enter into any contract with the board as a teacher employed by that board.

The above cited section of the *Code* also makes it unlawful for a board of trustees to enter into a contract with the spouse of a member of the board, where the contract requires the payment of district funds to the spouse. This is based in part on the manner in which persons in Idaho hold community property. Therefore, while Mrs. Ferguson may be a qualified candidate and may be elected, the board may not enter into a contract with Mrs. Ferguson's husband.

OFFICIAL OPINION NO. 73-191

May 11, 1973

TO: Dean G. Huntsman
Executive Secretary
Idaho Association of Commissioners & Clerks

FROM: Warren Felton

You have asked two questions relating to "actual and necessary expenses."

The first question was:

"Frequently the question comes up in various counties as to whether or not it is legal for County Commissioners to include as "actual and necessary expenses," mileage charges in traveling to and from their home to attend meetings at the county courthouse, or other meetings pertaining to county business."

There is much law in Idaho on this subject, however the cases and statutes tend to confuse one rather than being too instructive. However, we will attempt to lead you through these cases and laws. The case of *Corker vs. Pence*, 12 Idaho

152 has the following to say on this subject:

“In the second cause of action the informer alleges the collection of illegal fees by the respondent, in that he presented a claim for \$6 for board while attending meetings of the board. In *Stookey v. Board*, 6 Idaho, 542, 57 Pac. 312, *Reynolds v. Board*, 6 Idaho, 787, 59 Pac. 730, *Clyne v. Bingham County*, 7 Idaho, 75 60 Pac. 76, this court held that an officer was not entitled to compensation for his board. In 1901, after the above cases had been decided by this court, the legislature by an act approved March 14, 1901 (Sess. Laws 1901, p. 227), defines “actual and necessary expenses,” and includes therein all traveling expenses incurred by any county officer when absent from his residence in the performance of duties of his office. This was clearly intended to allow to the officers their board when absent from their residence in the performance of the duties of their office. That being true, the board was authorized to allow the respondent his claim for board when absent from his residence in the performance of his official duties.”

Now it is also true under Sections 31-703 and 31-704, *Idaho Code*, the county has to be divided into 3 districts as nearly equal as may be in population and that one county commissioner must come from each district. As said in *Stover vs. Washington County*, 63 Idaho 145:

“The cases of *Rankin v. Jauman*, 4 Idaho 394, 39 Pac. 1111, and *Miller v. Smith*, 7 Idaho 204, 61 Pac. 824, relied on by respondents, are not thought to be decisive of this case. There the compensation of commissioners was fixed at a per diem wage; and it was held in the Jauman case that this per diem allowance could only cover the actual number of days the Board was in session. The Miller-Smith case dealt with official misconduct for which the commissioner was removed. It is true that both per diem wages and traveling expenses were involved in the decision of these cases, but neither the circumstances nor the statutes there considered are involved here. The latter case dealt with a serious abuse which had sprung up and required reprimand. We are dealing with an entirely different statute, fixing an annual salary and authorizing the payment of “actual and necessary expenses” to a commissioner “when absent from his residence in the performance of the duties of his office.” *The statute requires the county to be divided into three commission districts, (sec. 30-604, I.C.A.) and one commissioner to be elected from each district, so that it is not practicable for more than one commissioner to be a resident in close proximity to the court house; and yet each is required to attend the meetings of the Board.* It was said at the hearing by one witness, that the deceased had phoned that he would go by the dealers on his way to the Board meeting and order a load of coal delivered to an indigent county charge. This is adverted to merely to illustrate one of the varied and sundry duties of a commissioner. (Emphasis added)

As stated in the two cases above quoted from, between 1901, (Idaho Session Law 1901 p227) and January 1957 (Idaho Session Law 1957, Ch 312, Idaho

Session Laws 1955 Ch 175) there was a definition of "actual and necessary expenses" in the section providing for the salaries of county commissioners (Section 31-3104, *Idaho Code*); but this provision was repealed in 1957, and the section was reenacted (Idaho Session Laws 1957 CH 312) with wording somewhat different and the definition was deleted. The title of the new act is not helpful; it merely states that Section 31-3104, *Idaho Code*, as amended is repealed and that the new provision provides for the salaries of county commissioners. It can and has been argued back and forth that the repeal of the definition of "actual and necessary expenses" in effect does away with the basis for the statements in the above quoted cases and puts us back where we were before the 1901 enactment of the definition of "actual and necessary expenses." This would mean that county commissioners could only consider those expenses "actual and necessary" which were referred to in the cases of *Stookey vs. Board*, 6 Idaho 542, *Reynolds vs. Board* 6 Idaho 787 and *Clyne vs. Bingham County* 7 Idaho 73. In that case an officer could not collect board but would have been allowed to collect mileage and possibly room or stabling a team used in going from place to place under "actual and necessary expenses." See also *Rankin vs. Jauman*, 4 Idaho 53, *Müller vs. Smith*, 7 Idaho 204 and *Panting vs. Isaman*, 7 Idaho 581. However there is another statute which deals with this matter in a somewhat oblique manner. It is Section 31-3105, *Idaho Code*. The first portion of the section deals with county commissioners earning more than \$5,000 a year, and requires that they devote full time to the offices they hold as county commissioners. The last clause of this section reads as follows: "... provided that in counties whose county commissioners receive \$5,000.00 or more per annum, the county commissioners shall not be entitled to their hotel expenses incurred while at the county seat." Idaho has had a provision like this since 1913, (1913 Idaho Session Laws Ch 194 sec. 2). This section by necessary implication implies a number of things such as the fact that all county commissioners should be entitled to mileage and board while at the county seat, and also that county commissioners earning less than \$5,000.00 a year are also entitled to their hotel expenses while at the county seat.

Thus after considering the cases and statutes, a general rule begins to emerge as to county commissioners: they may, where they do not live in the county seat, charge mileage and board, that is meals, while at the county seat on official business, as well as away from the county seat on official business. This writer believes that by logic and good conscience this must be limited so that such charges as board and lodgings are not charged while at the person's town of residence. The cases cited herein support this view. Also as to county commissioners earning less than \$5,000.00 a year; they may also charge for hotel accommodations when they are away from their homes while at the county seat attending to their business as county commissioners.

As to the second question, you ask whether other county officials and county employees come under the same provisions as above explained for county commissioners.

One's first reaction to this might be public officials should all be treated alike, so other officials should also be under the same rules, but there are a number of

reasons why this may not necessarily be true. For one thing county commissioners are required by law to live in different areas of the county but must go to the county seats to transact much of their business. Most other public officials can choose whether they will live at the county seat, or at or near their regular place of duty. They thus are not forced into the same amount of travel as are county commissioners. There does not appear to be any statute relating to this question and thus under Article 12, Section 2 of the *Idaho Constitution* the county commissioners could meet and pass an ordinance upon this subject. Understandably the answer to this second question depends to a great extent on the sound discretion of the county commissioners of the various counties. The county commissioners do have to use good and sound judgment in such a situation and their decisions might have to stand up to court tests if some of the other officials or citizens were dissatisfied with the decisions of the commissioners of some particular county.

If a county employee was required by the county commissioners to work a long way from his home it might be that the commissioners of a particular county could allow him to collect "actual and necessary expenses" mileage, or board or room or some combination thereof; on the other hand, they might not. It depends upon the circumstances and the discretion of the commissioners.

Thus in answer to your second question, it can only be replied that since the legislature has not spoken on this subject the county commissioners of the various counties control the matter — each group for their own county, and the answers could differ widely depending on the various situations.

OFFICIAL OPINION NO. 73-192

May 11, 1973

TO: Michael L. Frost
Director, Clearwater Valley Regional Planning Commission

FROM: Donald E. Knickrehm

We are pleased to respond to your request for an Attorney General's opinion on the question of whether a Board of County Commissioners must wait for a recommendation from the County Planning and Zoning Commission, and whether the County must hold a public hearing, prior to the granting of a rezoning application.

In our opinion, the answer to both is affirmative. The provisions of Sections 31-3801, 31-3804, 50-1204, 50-1205 and 50-1210, *Idaho Code*, make it clear that a County Board of Commissioners can neither adopt nor amend zoning ordinances without first being in receipt of recommendations thereon by the County Planning and Zoning Board, and subsequently holding a public hearing thereon. In regard to the hearing requirement, the Idaho Supreme Court just last month, in the case of *Citizens for Better Government v. Valley County* (No. 11094, filed April 4, 1973), affirmed the decision of a District Court that a

Valley County Zoning change adopted without prior hearing was void. The law is clear. Enactment of a zoning ordinance by the Nez Perce County Commission prior to receipt of a County Planning and Zoning Commission recommendation thereon, and without a public hearing after proper notice is contrary to the mandate of the law authorizing Idaho counties to enact zoning regulations.

OFFICIAL OPINION NO. 73-193

No opinion is assigned to this number.

OFFICIAL OPINION NO. 73-194

May 15, 1973

TO: William J. Murphy
Administrative Assistant
Office of the Governor

FROM: Clarence D. Suiter

You recently requested information from this office relevant to certain aspects of the Idaho State Tax Commission. You requested that a number of proposals be examined by us and solicited our opinion relative to the feasibility thereof. Our observations are as follows:

You ask whether the Governor may designate which of the commissioners shall serve as chairman of the Tax Commission. The answer to the query is contained in *Idaho Code*, Section 63-506 where it provides specifically that;

“The commission shall meet within thirty (30) days after the appointment and confirmation of its members, at which time it shall elect one of its members chairman . . .”

You then ask whether the Governor may legally designate the areas of administrative responsibility with which each commissioner will be charged. The answer to that query is also contained in *Idaho Code*, Section 63-506, where it is stated:

“The commission shall delegate to each member of the commission responsibility for administration and control of one or more departments of taxation and responsibility for the functions of that department . . .”

You then ask whether the Governor could designate new administrative positions within the Tax Commission which would have administrative authority over one or all of the individual tax commissioners. The answer to this question is a bit more complex than the answers to the first two queries because it involves the entire scope of separation of powers of the branches of government all mixed in with constitutional and statutory directives. To try to cut through the smog and summarize the conclusion briefly, it seems abundantly clear that without legislative authorization to do so, the Governor can neither establish new administrative positions within the Tax Commission nor indirectly establish

a system whereby any authority over the Tax Commission or commissioners can be exercised beyond the grant of power given to the Governor by the Constitution and our statutes. Exactly what you mean by "administrative authority" is not known, but it is assumed that you mean, in the final analysis, some control over one or more individual commissioners' function or functions connected with official duties.

Subparagraph (d) in your note is moot except for the last sentence and it seems to me that any action in the nature of that which you propose would require legislation to accomplish. Perhaps if I had specific proposals to analyze, the answer might be different but my imagination is not fertile enough to devise possible exceptions.

You also ask under what conditions may the Governor acquire the resignation of one or all of the tax commissioners prior to the expiration of their terms of office. Once again, I cannot imagine any circumstances under which this proposal would be possible, but if you have something in mind, I could conceivably fit it in, or at least think about it.

Regarding the chairman of the Tax Commission, you ask whether he may designate the areas of administrative responsibility which are assigned to each commissioner without individual concurrence. First of all, the chairman may not singly designate an area of administrative responsibility for an individual commissioner but a quorum decision that an individual commissioner shall have the responsibility for any given area does not require the concurrence of the designee.

The answer to the second question concerning the tax commission chairman and his establishment of merit system positions which would have authority over other commission members must be answered in the negative except in the case of the establishment of positions with the concurrence of a quorum of commission members, and then the authority of such designated merit system employees would only extend to ministerial type tasks or duties as the responsibility for discretionary decisions must rest with commission members and any delegated discretionary decision-making must always be subject to ratification by commission members.

The third question involving the chairman of the Tax Commission is difficult to answer because the basic premise is erroneous; that is, the chairman of the Tax Commission does not assign areas of administrative responsibility as is pointed out above. However, the Commission must delegate to each member responsibility for administration and control of one or more department of taxation by the mandatory language of Section 63-506, *Idaho Code*, but the same section seems to require that the commission as a whole, or at least a majority thereof, must act in the policy making areas.

Your final question relating to possible reorganization of the Tax Commission under S.J.R. 132 will have to be answered in the negative, for the reason that the Tax Commission is not an executive agency and therefore not included in the reorganization contemplated by S.J.R. 132, but rather the Tax Commission is constitutionally created almost as a separate but equal entity.

OFFICIAL OPINION NO. 73-195

May 16, 1973

TO: L. Clark Hand, Col.
Idaho State Police

FROM: James W. Blaine

Section 49-1113, *Idaho Code*, authorizes the issuance of a citation for a traffic offense for which the defendant is not taken into custody, on certain occasions, but by the signing of the citation, the defendant is given the opportunity of appearing before the proper court within five days.

Section 49-1115, *Idaho Code*, authorizes the person arrested for certain traffic violations to appear in a court *other* than the court that has jurisdiction over the traffic offense when it is mutually agreed between the officer and the defendant that such appearance would be more convenient to both.

It has come to the attention of this office that there have been numerous occasions where the officer has extended this courtesy to motor vehicle operators to whom they have issued traffic citations and, when such defendant does appear, there is a plea of not guilty. In this event, it would then be necessary for the officer to leave his regular post to attend court in another jurisdiction and it also places an additional burden upon the prosecutors and magistrates of the jurisdiction other than the one within which the offense was committed. It is my understanding under Criminal Rule 20, promulgated by the Idaho Supreme Court, that in these instances the cases are being referred back to the court in which the offense was committed. This procedure takes additional time and work on the part of the clerks, magistrates and prosecutors.

I am therefore suggesting to you that you advise your officers that, before agreeing to allow a traffic violator to appear in a court *other* than in the county where the offense took place, to ascertain with a fair degree of accuracy that the defendant intends to enter a plea of guilty. If such can not be obtained to the satisfaction of the officer, the defendant should be processed within the county where the offense took place under the regular procedures.

The provisions of the above statute were meant, of course, for the benefit of the traveling public, and the discretion is solely with the officer. This discretion should be executed judiciously, courteously and with the best interest of all parties concerned.

OFFICIAL OPINION NO. 73-196

May 16, 1973

TO: M. D. Gregersen
Director, Occupational License Bureau

FROM: W. Anthony Park

I am in receipt of your request for an opinion on Title 31, Chapter 28, Section 8, *Idaho Code*, which provides as follows:

"31-2808. Making Final Disposition of Dead Human Bodies Prohibited. — No coroner or person acting as coroner who is a licensed funeral director or a licensed embalmer, owner, proprietor or employee of any establishment engaged in making final disposition of dead human bodies, and no establishment with which such coroner or person acting as coroner is associated, shall, except for ambulance services, perform any of the services of a funeral director or embalmer or furnish any materials connected with or incidental to the final disposition of the body of any person whose death is required by law to be investigated by such coroner or other person acting in that capacity. Any person who violates this section shall be guilty of a misdemeanor. Provided, however, that the provisions of this section shall not be applicable in counties wherein there resides only one licensed funeral director or licensed embalmer."

You have asked that the following questions be answered:

- (1) Must the coroner refrain from performing any services as a mortician wherein he has been required to function in the capacity of coroner since another mortician is now available?
- (2) Is the coroner obligated to inform the other mortician of all or any such cases?
- (3) At what point in time would the exception no longer apply after a county has gone from one to more than one licensed funeral director or licensed mortician?

To answer your questions I would prefer not to respond to them in numerical order submitted, but to answer the questions generally with a direct response in the questions as a conclusion.

I am unable to determine from your question whether the coroner in question (who is a mortician) was elected in the last general election and whether or not the second mortician moved into the same county after the past general election. I will assume for purposes of this opinion that the mortician in question was elected at the last general election and prior to the second mortician entering the county. Obviously this statute clearly prohibits a mortician serving as coroner in a county where more than one mortician resides. There is nothing in the statute indicating the intent of the legislature that the prohibition therein was to have any other than prospective application. Had the statute contained *ex post facto* application, it would have been prohibited under the provisions of Article I,

Section 9, Clause 3 and Article I, Section 10, Clause 1 of the *United States Constitution* and Article I, Section 16 of the *Idaho Constitution*.

If the resignation of a coroner, or the inability of the coroner to act was not otherwise provided for, it would follow that a coroner, notwithstanding that he comes within the definition of Title 31, Chapter 28, Section 8, *Idaho Code*, could complete his term of office. However, Section 5 of the Act provides that the district judge may discharge the duties of the coroner or he may appoint someone within the county to serve as coroner with like authority and subject to the same obligations and procedures as an elected coroner.

It is obvious to me that the intent of the legislature in providing the prohibition contained in the Act intended to eliminate a situation where an elected official could obtain benefits in a private occupation by reason of his office. For instance, a family of a decedent would be reluctant to move the body from one mortician's office who happened to have the remains by reason of his office to another mortician's place of business, and thus, there would be the element of a conflict of interest. It would seem most reasonable, and in comport, with the standards of morticians, that the coroner in question resign, thus allowing the district judge to appoint or assign some other person other than a mortician to serve in the capacity of a coroner.

You understand that I am using the term "mortician" in the sense of encompassing all of the prohibited persons in Section 8 of the Act.

The answer to your second question is negative. The obligation is to inform the family members. This would also hold true to the disposition of indigent remains to be buried by the county.

I believe that the answer to your third question is contained in the body of the foregoing dissertation. It is obvious, of course, under no circumstances could a coroner so proscribed by the statute serve longer than his present term if more than one mortician resided in the county. More than that, it is my conclusion that the coroner in question should resign and appropriate procedures be initiated by the district judge for appointment of a successor.

OFFICIAL OPINION NO. 73-197

May 18, 1973

TO: R. Keith Higginson
Director, Department of Water Administration

FROM: Nathan W. Higer

You have asked whether or not the county auditors and treasurer in a county which has a water district must collect the charges made by the watermaster for delivery. This will involve an interpretation of I.C. § 42-610-618 inclusive.

I will briefly discuss the pertinent portions of those statutes:

I.C. § 42-610 provides that the watermaster SHALL file with the county

auditor-recorder a statement showing proper distribution of all expenses for distribution. The charge to canal companies "SHALL be collected in the manner provided by law for the collection of other taxes . . ."

§ 42-611 provides that the watermaster is to present his bill for payment to the county commissioners who SHALL order a warrant issued. Then the "auditor and recorder of said county SHALL add the amounts charged to the land of the users . . . to the taxes of said land or ditches . . . which SHALL be collected along with other taxes . . ."

§ 42-612 provides that a budget shall be prepared at the water district annual meeting.

§ 42-613 provides that said budget (42-612) SHALL be filed with . . . the county auditor . . . Each auditor . . . SHALL immediately make up a roll showing the amount of said budget to be collected by his county . . . When said roll is completed, the county auditor SHALL deliver the same to the county treasurer for collection . . . The county treasurer, upon receipt of said roll, SHALL open a special account to be known as Water District Funds . . ."

§ 42-616 provides that said "water district SHALL have the right to collect any charges due and unpaid, by civil action, said action to be brought in any court of competent jurisdiction, in the name of the county treasurer to whom such charges are payable . . ."

§ 42-618 provides that the water district MAY decide to have the watermaster collect the charges himself instead of as outlined above, which decision must be made at the annual meeting of the water district.

The laws quoted above provide, of course, a very comprehensive method of collecting the charges of water distribution. The legislature apparently recognized the difficulty a watermaster might have in collecting and directed the county auditor and treasurer to be the collecting agents through the tax rolls. I think it is quite obvious from the mandatory language used by the legislature, that the respective counties are required by law to collect the assessments through its taxing procedure.

Therefore, unless the water district decides to authorize the watermaster to collect the assessment directly as provided in § 42-618, the counties are obligated by law to collect the water assessments as provided above and in the same manner as other taxes are collected.

OFFICIAL OPINION NO. 73-198

May 18, 1973

TO: Representative Emery E. Hedlund

FROM: W. Anthony Park

The question is, "May a resident of Kootenai County register his motor vehicle in Benewah County."

The controlling *Idaho Code* Sections do not permit a resident of one county to register his motor vehicle and obtain the plates therefor in a county other than his county of residence.

The provisions of *Idaho Code* Sections 49-108, 49-109 and 49-113 provide that the owner of a motor vehicle must apply to and obtain from the assessor of the county in which the owner or applicant resides the registration and the plates for such vehicle. There are certain exceptions for lienholders, manufacturers, dealers and foreign registered vehicles, who must apply to the Commissioner of Law Enforcement for such registration and plates.

This office has contacted Mr. Virgil King, Ada County Assessor and he will be advising you by separate cover of the motor vehicle registration by mail procedures recently adopted for use in Ada County.

OFFICIAL OPINION NO. 73-199

May 22, 1973

TO: Dr. Darrell W. Brock
State Laboratory

FROM: Paul J. Buser

On May 2nd we received a request from you to answer an inquiry directed to you by Mutual of Enumclaw, an insurance company based in Spokane. The Enumclaw letter stated:

Dorothy Kohlhepp – deceased victim of auto accident 3/10/73

Vasser-Rawls funeral home of Lewiston, Idaho indicated to me that a blood test was made on Mrs. Kohlhepp, an auto accident victim, and sent to your office.

Our company insured Mrs. Kohlhepp, and in our accident investigation, we need the blood alcohol reading taken by Vasser-Rawls, and also what level is indicated by law to constitute drunkenness.

Thank you,

/s/ John Scrivner

Section 49-1016, as amended, *Idaho Code*, requires the following:

The administrator of environmental protection and health, jointly with the various county coroners, shall provide a system and procedure whereby all morticians in the state of Idaho shall obtain blood samples from all pedestrians and motor vehicle operators who have died as a result of and contemporaneously with an accident involving a motor vehicle.

All investigating police officers shall report such fatalities to the county coroner or follow the procedure established by the joint action of the board and the various coroners.

The blood sample, with such information as may be required, will be

delivered to the administrator of environmental protection and health or his designee. Upon receipt of such sample the administrator will cause such tests as may be required to determine the amount of alcohol, narcotics and dangerous drugs contained in such sample.

The results of such tests shall be used exclusively for statistical purposes and the sample shall never be identified with the name of the deceased.

Any person releasing or making public such information other than as herein prescribed, shall be guilty of a misdemeanor. (Emphasis added)

In light of this statute, the state laboratory should not release blood sample information to inquiring insurance companies. The law can be reasonably interpreted to allow release of such information to county coroners and law enforcement officers conducting criminal investigations. However, insurance companies seeking results of blood sample tests must be denied access by the laboratory. Said companies may seek production through the legal process.

There is an obvious legislative intent to protect the integrity of the deceased and those close to him. Release to insurance companies would be considered "public" in terms of the statute and is therefore proscribed by law.

OFFICIAL OPINION NO. 73-200

May 25, 1973

TO: Floyd C. Robinson
Mayor, City of Franklin

FROM: Warren Felton

The Attorney General, Mr. Park, has asked me to answer your recent letter concerning whether or not citizens can tape record your city council meetings.

First it must be remarked that under Section 59-1024, *Idaho Code*, the meetings of your city council must be public except for executive sessions. The section reads as follows:

"59-1024. Meetings to be open - Executive sessions. - All meetings, regular and special, of boards, commissions and authorities created by or operating as agencies of any county, city or village not now declared to be open to the public are hereby declared to be public meetings open to the public at all times; provided, however, that nothing contained in this act shall be construed to prevent any such board, commission or authority from holding executive sessions from which the public is excluded, but no ordinances, resolutions, rules or regulations shall be finally adopted at such executive session."

On the other hand it is up to the mayor and city council to provide reasonable rules for the conduct of the city council meetings, Section 50-602, *Idaho Code*. The mayor presides over the meetings, determines the order of business and the city council may prescribe reasonable rules for such meetings.

If the city at present lacks any rules as to tape recorders, if the persons recording the meeting do not interfere with the conduct of the meeting, they would, in all likelihood, be within their rights to record the happenings at the meeting. If these persons, did, on the other hand, interfere with the council meetings, the mayor and council could take such steps as were necessary to restore order and allow continuance of the council meeting.

The city council could pass an ordinance or make rules for the conduct of its meetings which would deal with tape recorders. They could probably legitimately provide that such meetings would not be recorded if this will tend to keep order in meetings and will serve some other legitimate purpose. In *Gowey vs. Siggelkow*, 85 Idaho 574, 587 to 588 a village council had appointed a chairman and then tried to remove him as chairman. He refused to be dismissed as chairman and the Court said the council could dismiss him as chairman. The Idaho Supreme Court quotes with approval a Minnesota case, *Childs vs. Kiichli*, 53 Minn. 147, 54 N.W. 1069, where it was said:

"A city council is a local legislative body, and in creating it the legislature, by implication, within the limits prescribed, conferred upon it all the powers and privileges in the manner of conducting their own proceedings usually recognized by parliamentary law as belonging to such bodies; and it would require a clear and explicit expression of legislative intention to that effect to justify the conclusion that it was the design to deprive this city council of the universally recognized parliamentary right of control . . .";

See also 4 McQuillin, *Municipal Corporations*, Section 13.42.

Thus, if there is some good reason to do so the city council should be able to control its own proceedings to the extent of disallowing recording devices without violating Section 59-1024, *Idaho Code*.

OFFICIAL OPINION NO. 73-201

May 28, 1973

TO: Tom D. McEldowney
Commissioner, Department of Finance

FROM: James G. Reid

You have asked for an opinion from this office as to whether a corporation may operate under an assumed name and if so, how such corporation should be licensed.

In answer to your first question, it is the opinion of this office that a corporation may operate in the State of Idaho under an assumed name. *Idaho Code*, Section 53-501, requires that any person or persons who shall transact business in the State of Idaho under an assumed or fictitious name must first file in the office of the county recorder a certificate which sets forth the name in which the business is to be conducted. However, *Idaho Code*, Section 54-504

exempts corporations from the assumed business name statute.

By virtue of the exemption contained in *Idaho Code*, Section 54-504, it is therefore obvious that a corporation may operate under an assumed name.

In response to your second question in which you inquire as to how such corporation should be licensed, it would be the opinion of this office that they may be licensed under either the corporate name or the assumed name. In the case of *Colorado Milling and Elevator Co. v. A. H. Procter*, 58 Idaho 578, 76 P.2d 438 (1938), the court in discussing the exemption for corporations under the assumed business name statute stated at page 583:

"In written instruments, pleadings, process, etc., misdescriptions very often creep into the corporate name with what effect will be seen later, and a corporation may contract, acquire rights or incur obligations in a fictitious or trade name. Like any individual, a corporation may assume a name other than its legal name and carry on business in such assumed name, but in order to apply this doctrine, incorporation by some name must be established."

Based on the above case, it would appear that so long as a corporation is duly incorporated or authorized to do business in the State of Idaho, it may obtain a license from the Department of Finance under either the name stated in the articles of incorporation or the assumed business name; for example, XYZ Corporation d/b/a ABC Enterprises.

OFFICIAL OPINION NO. 73-202

May 30, 1973

TO: Pete T. Cenarrusa
Secretary of State

FROM: Clarence D. Suiter

Receipt is hereby acknowledged of your letter of May 29, 1973, regarding Section 34-1706 of the *Idaho Code*. You ask in your letter for advice concerning the above cited Section and, in particular, the reference to the "cursory examination of the names upon the petitions . . ."

Specifically, *Idaho Code*, Section 34-1706, provides in part:

All petitions with attached signature sheets will be presented to the Secretary of State . . . on the same day, and a cursory examination of the petitions shall be made by such officer . . . The cursory examination shall be made to determine whether the petitions apparently contain the necessary number of signatures.

Webster's Seventh New Collegiate Dictionary defines "cursory" as "rapidly often superficially performed: hasty." The section of the *Idaho Code* cited above provides that the cursory examination shall be modified as follows:

(b) If the cursory examination of the signatures sheets reveals:

(i) Erasures on any signature;

(ii) Illegible or undecipherable signatures;

(iii) Signatures not properly identified by all of the information required on the sheet;

the officer making such cursory examination shall summarily reject such signatures and such rejected signatures shall not be counted. Each rejected signature shall be drawn through with ink and initialed by the rejecting officer . . .”

We would interpret the foregoing section to require a quick evaluation by you of the signature sheets attached to any recall petitions with the objective of determining the number of legible or decipherable signatures thereon. In this endeavor, you may not be aided by typed or printed lists of the signatures contained in the petitions for then the determination would not be yours but would be some other person's interpretation of what the name was on the petition. Correspondingly, during your cursory examination you may not be aided or prompted by any individuals either pro or con for once again such assistance would destroy the intent of the law which requires your subjective opinion regarding each individual signature on the petition. It was obviously the intent of the Legislature in enacting this statute that the Secretary of State or the county clerk or city clerk, as the case may be, should make an independent quick evaluation of the signatures contained on such petitions and that responsibility should not and cannot be delegated to any other officer or individual.

We view the two words “illegible” and “undecipherable” for all intents and purposes as meaning the same thing and can be used interchangeably. One can imagine situations where the two words would have different meanings and in some particular situations may have to be applied differently and should any set of facts present itself to you that causes serious difficulty, we would be happy to assist in applying the proper definition. However, it is our opinion that you may proceed with your cursory examination of the signature sheets on any petition using the words illegible and undecipherable interchangeably.

In regard to the petitions presently before you – that is, the Patricia McDermott recall petitions – the Attorney General has assigned me personally to be present at all times while you are performing your statutory duty and examining these petitions for any assistance and advice we might be able to render you. If you need any amplification or further expression from this office in regard to *Idaho Code*, Section 34-1706, please advise.

OFFICIAL OPINION NO. 73-203

June 1, 1973

TO: Tom D. McEldowney
 Commissioner, Department of Finance

FROM: James G. Reid

You have requested an opinion from this office as to whether or not an Idaho corporation may issue corporate stock without voting rights.

Idaho Code, Section 30-134, addresses itself to the voting rights of stock and, in part, reads as follows:

"Except as otherwise provided in the articles of incorporation, every shareholder of record shall have the right at every shareholders' meeting to one (1) vote for every share standing in his name on the books of the corporation . . ." (Emphasis added)

In *Idaho Code*, Section 30-103(e), it is stated that the articles of incorporation for a prospective corporation must include among other things the relative rights, voting power, preferences and restrictions granted to or imposed upon the shares of each class of stock.

Bearing the above two provisions of the *Idaho Code*, in mind, it is the opinion of this office that a corporation in the State of Idaho may issue non-voting corporate stock provided that the corporation, in filing its articles of incorporation, states specifically which class or classes of stock they intend to signify as being non-voting.

This opinion is further substantiated by the recent amendment to the *Idaho Constitution*, Article II, Section 4, which provides for the issuance of non-voting stock.

OFFICIAL OPINION NO. 73-204

June 1, 1973

TO: Stratton P. Laggis
 Legal Counsel
 Blaine County School District

FROM: James R. Hargis

We wish to respond to our conversation with you this date concerning hearings before the Professional Practices Commission.

We wish to reaffirm that neither the State Board of Education, the Professional Standards Commission, nor any other office or agency concerned with education is or can become involved in the employment practices, choices, or problems of a public school district. These are matters between the trustees of the district and the employees for applicants and candidates for positions with

the district. We are unaware of any administrative agency of the State which has statutory or other legal authority to hear and review whether employment exists or ought to exist between a person and the district.

The hearing authority of the Professional Standards Commission is limited to those situations, adversary in nature, where certain parties listed can file a complaint before the Commission, alleging improper or unprofessional conduct by a certified member of the education profession. Section 33-1255, *Idaho Code*. It should be noted that the subject of the hearing is the ethical or professional practices, or the competency of a teacher under a contract employment. The Commission's hearing authority does not extend to a review of the employment practices of a board of trustees. The Professional Standards Commission Act, Section 33-1252, et seq., *Idaho Code*, is an attempt to police ranks of the education profession. It does not extend to the issues before a board of trustees when it decides to employ or terminate a member of the profession; nor does the authority extend to a review of the conclusions the board of trustees reached on those employment issues.

We do not wish to comment on any legal remedies which may or may not be available to review an employment decision of a board of trustees. But we are of the opinion that there is no state administrative machinery available to perform that task.

OFFICIAL OPINION NO. 73-205

June 4, 1973

TO: Jerry Brown
Associate Director
Treasure Valley Comprehensive Health Planning Agency, Inc.

FROM: James W. Blaine

You have requested an opinion from the office of the Attorney General as to whether or not the dedicated fund (Abandoned Vehicle Fund), created under Section 5 of House Bill 98 of the 1973 Session of the Idaho Legislature, could be co-mingled with highway funds and used for other highway purposes.

It is our opinion that Section 5 creates a fund which would be known as the "Abandoned Vehicle Fund" and the monies therein would be used only for the purpose of defraying expenses, debts and costs incurred in carrying out the provisions of House Bill 98. The fact that an additional \$1.50 is added to the annual motor vehicle license fee and is collected in addition to the annual motor vehicle license fee would not change the purpose for which these extra funds would be used.

In my opinion, as we discussed over the telephone the other day, there are numerous aspects of the bill needing correction if it is to pass the legislature and become a useful tool. I would be glad to discuss them with you or any other group at any time.

OFFICIAL OPINION NO. 73-206

June 5, 1973

TO: Glenn W. Nichols
Director, State Planning & Community Affairs Agency

FROM: Warren Felton

I have been asked to answer your recent letter concerning the possibility of adopting a zoning ordinance containing a zoning map which does not describe precise zoning boundaries.

Zoning ordinances generally contain provisions making violation thereof a misdemeanor and providing for prevention of unauthorized uses, as set forth in Sections 50-1207 and 50-1209, *Idaho Code*, thus such ordinances are penal in nature.

It is a cardinal principle of statutory or ordinance construction that as to laws and ordinances which are penal in nature the statute or ordinance must be sufficiently certain to show what it was intended to prohibit and punish. There are many cases on this subject, two of them are as follows; *Lewiston v. Mathewson*, 78 Idaho 347; and *State v. Blacksten*, 86 Idaho 401.

In other words any citizen must be able to read the ordinance and tell from it what zone his property is in and what he can or cannot do in relation to that property and what actions will constitute a violation of the law in relation to that property.

The usual form for zoning ordinances is to refer to the zoning map to show what property is in which zone. However, it might be possible to describe all the property in the city in the ordinance by meets and bounds and place the descriptions of the property with reference to the various zones and thus, not use a zoning map; but this writer is not familiar with any zoning ordinances which attempt to describe all property in any city or county by meets and bounds and state which zones such property is in. This would certainly lengthen and complicate the ordinance.

You have stated in your letter:

Basically, the unique zoning concept is in the adoption of a zoning map without specific delineation of zoning boundaries. The zoning map would, therefore, be used as a guide when approving conditional use permits. The zoning ordinance as proposed would include uses and zoning districts similar to typical ordinances. It is envisioned that all uses would be allowed through the issuance of conditional use permits."

It would be very difficult, if not impracticable, to attempt to draft a zoning ordinance which would give every citizen notice of what zone he was in, what he could do with his property and what he could not do with his property within the concept you set out above. For these reasons, unless the ordinance describes the property in the city or county by meets and bounds and specifies what zones the property of the city or county is in, we would doubt the possibility of carrying out this concept under present Idaho law.

OFFICIAL OPINION NO. 73-207

June 5, 1973

TO: D. F. Engelking
State Superintendent
Department of Education

FROM: James R. Hargis

We wish to respond to the inquiry concerning the purpose of the annual meetings of boards of trustees of the various school districts. Since recodification in 1963 of the school laws in general, the only required activity at the annual meeting is the organization of the board of trustees: the swearing in of new members, the selection of chairman, vice-chairman, clerk, and in other than elementary districts, a treasurer. Section 33-506, *Idaho Code*.

The annual meeting shall be held, according to law, on the date of the regular June board meeting. For calendar year 1973, we believe that it would be wise for the districts to hold two annual meetings. This strange conclusion is based on the amendment to Section 33-510, *Idaho Code*. That section establishes the date for the annual meeting. At the present time, that meeting shall be in June. However, the Legislature provided that the annual meeting shall be in July. S.B. 1044. That amendment, though, is not effective until July 1, 1973. Therefore, it would appear that the districts should still hold the annual June meetings. The boards of trustees should also hold a meeting in July on the regular meeting date of that month and designate it as the annual meeting.

OFFICIAL OPINION NO. 73-208

June 6, 1973

TO: Robert Hay
Commissioner, Department of Insurance

FROM: James G. Reid

You have requested an opinion from this office as to whether or not the following participating plan of insurance constitutes Vendor's Single Interest insurance as defined in an opinion dated October 10, 1972, issued by this office to Commissioner Thomas D. McEldowney so as to place it within the prohibitions of that opinion.

The participating plan you inquire about may be described as follows: The coverage applies to loss occasioned by fire, theft, or collision occurring during the period covered under the installment loan agreement. In order to invoke the provisions of the participating plan, repossession on the part of a bank or dealer is not necessary. When the loss occurs, the buyer/borrower may invoke the coverage by paying a basic deductible of \$50.00 on a comprehensive loss and \$100.00 on collision with an additional 20% of the amount of the loss up to a maximum of \$150.00. The maximum amount payable for any one loss cannot, however, exceed the unpaid balance under the conditional sales contract.

Under the opinion dated October 10, 1972, Vendor's Single Interest insurance was defined as insurance protecting the creditor against the debtor's default or other credit loss for the reason that (a) the debtor's default is a condition precedent to the benefits being provided; (b) the benefits are paid only to the creditor, not the debtor; and (c) although the benefits provided by the coverage are measured by the extent of damage to or the value of the collateral they are nevertheless limited to the outstanding balance of the debt.

Under the participating plan described above, the insurance coverage provided is similar to V.S.I. only to the extent that the benefits provided by the coverage are measured by the outstanding balance of the debt. Under the participating plan, the debtor's default is not a condition to the benefits being provided and further, it is possible for the debtor himself to receive the benefits rather than having them accrue solely to the interest of the creditor. It is therefore our opinion that the participating plan that you inquire about does not fall within the definition of Vendor's Single Interest insurance, and as such, does not fall under the prohibitions contained in the opinion dated October 10, 1972, concerning Vendor's Single Interest insurance.

OFFICIAL OPINION NO. 73-209

June 6, 1973

TO: Pete T. Cenarrusa
Secretary of State

FROM: W. Anthony Park

You have asked this office for a formal opinion on the question of whether recall petitions, once having been rejected after the cursory examination required by 34-1706, *Idaho Code*, for not containing all of the information demanded by Idaho recall statutes, can subsequently be cured of their initial defects without the gathering of further signatures. Or, to put it another way, can the promoters of the recall through their own actions, and without further recourse to the original signators, add the necessary information to the petitions in order to meet the requirements of 34-1706?

A recital of the factual background in this matter is necessary before analyzing the effect of Idaho's recall laws on those facts. On Tuesday, May 29, 1973, a group of citizens from Bannock County brought into your office some 2,559 signatures contained on petitions purporting to seek the recall, pursuant to statute, of Representative Patricia McDermott, incumbent member of the Idaho House of Representatives, District 34, in Pocatello. On Wednesday, May 30th, you conducted the "cursory examination" required by 34-1706, *Idaho Code*. That statute provides, in pertinent part, as follows:

"(b) If the cursory examination of the signature sheets reveals:

- (i) Erasures on any signature;
- (ii) Illegible or undecipherable signatures;
- (iii) Signatures not properly identified by all of the information

required on the sheet;

the officer making such cursory examination shall summarily reject such signatures and such rejected signatures shall not be counted. Each rejected signature shall be drawn through with ink and initialed by the rejecting officer. If the total number of signatures not rejected is not sufficient to satisfy the number required by section 34-1702, Idaho Code, all petitions with attached signature sheets shall be returned to the person attempting to file them, and further signatures may be gathered."

Your examination pursuant to the above quoted statute revealed that some 2,230 signatures were "not properly identified by all of the information required on the sheet", in that they failed to include the post office address required by 34-1703, *Idaho Code*. Pursuant to the oral advice of Chief Deputy Attorney General Clarence D. Suiter, you quite properly rejected those signatures and returned them to the petitioners as required by law.

On Monday, June 4, 1973, at 5:07 p.m., petitioners came to your office and handed to you for filing the petitions containing the rejected 2,230 signatures to which had been added by some third party the earlier omitted information, to wit, the post office address. The petitioners also delivered to you at that time eleven new signatures which contained all of the required information.

Counsel for petitioners makes two basic arguments on behalf of his clients: (1) The petitions originally lodged with the Secretary of State on May 29, 1973, should not have been rejected and, notwithstanding the omission of the post office address, should have been deemed to have met the requirements of 34-1706 concerning the "cursory examination" by you. (2) That in any event, since the petitions now contain all of the required information, you have no discretion to make a qualitative evaluation of the way in which information was added but may only examine the signatures and accompanying information to ascertain whether the requirements of the statute have been satisfied.

Counsel for the subject of the recall, Representative McDermott, basically argues in response to both of these stated positions that: (1) The petitions were properly rejected by you in the first instance since 34-1706 (b) (iii) requires that the signatures must be identified by "all of the information" required by the statute, and (2) that 34-1706, *Idaho Code*, when read in conjunction with other provisions of Idaho recall law, requires petitioners to obtain new signatures after a summary rejection by the Secretary of State.

Although this office has earlier advised you that the original petitions were properly rejected in the first instance, such advice was of necessity oral. Since I have not addressed myself to this question in writing, and since counsel for the petitioners has asked that the original rejection be rescinded, it is appropriate to address myself to that question in this opinion.

On March 6, 1973, at the initiation of the recall movement, petitioners brought into your office, pursuant to 34-1706, *Idaho Code*, their original recall petitions for approval by you as to the "form" of such petitions. You asked for my assistance in approving the form and, by letter to Assistant Secretary of State John F. Croner, dated March 6, 1973, I advised you that the form of the

petition was proper and conformed to statutory requirements. I specifically disclaimed in that letter any evaluation of signatures and limited my opinion only to the *form* of the petition as presented. You will recall that the petition form transmitted for approval contained categories for *all* of the information required by statute, I am attaching to this opinion a copy of my letter to you. It is my understanding that a copy of that letter was delivered to the petitioners at that time.

Notwithstanding that the petition form as approved contained a space for the signator to include his post office address, some 2,230 of those signators failed to do so. 34-1706 is clear in its requirements. It mandates you, as Secretary of State, in the course of your cursory examination, to insure that the signatures are properly identified by *all* of the information specified on the petition form and to reject all signatures not properly identified. It is our opinion that the obvious legislative intent for such a requirement was to prevent fraudulent signing, to prevent duplication of signatures and to conform as closely as possible to Idaho's requirements for voter registration. In other words, the legislature clearly desired only proper signatures on these petitions and took pains to insure that would be the result. In the subject case, there can be no doubt that an important part of the required information was omitted, that the omission occurred in spite of the fact that the approved forms specifically listed the post office address and as a necessary result, there can be no doubt that such petitions were properly rejected.

We will now move to petitioners second contention, that the modified petitions must now be accepted by you for filing.

34-1706, *Idaho Code*, specifies that after the Secretary of State had made a decision to reject signatures, he shall "*summarily reject such signatures and such rejected signatures shall not be counted.*" The statute further requires that the rejected signatures shall be drawn through with ink and initialed by the Secretary of State. It then goes on to say that, after all rejections have been made, if the number of signatures not rejected is not sufficient according to law, "*all petitions with attached signature sheets shall be returned to the person attempting to file them, and further signatures may be gathered.*" [Emphasis supplied].

As you can see from the language quoted above, the statute mandates that rejected signatures shall not be counted, and when signatures have once been rejected, further signatures may be obtained. Obviously, the addition of an interlineated address by a person not the original signator can not be determined to be a "further signature". *Webster's New Collegiate Dictionary International Thesaurus*, 3rd Ed., indicates that adjectives for the term "further" include the terms additional, new, supplementary, extra, and more. In light of the definitions heretofore indicated for the term "further", the only logical interpretation of the language of 34-1706, *Idaho Code*, allowing further signatures to be gathered would be to construe such language as meaning that the petitioners must collect new signatures in the place of those signatures which have been rejected pursuant to the cursory examination. Such new signatures,

however, need not necessarily be collected from persons who have not previously signed the recall petition, but could include new, additional, or supplementary signatures of those persons whose signatures were initially rejected. The Secretary of State surely has not *conditionally* rejected the incomplete signatures in the first instance but rather, pursuant to the requirements of the statute, has rejected them outright. The statute provides a method of rehabilitation for the defect by permitting petitioners to obtain further signatures. This they have not done in the instant case.

However, I do not think it necessary to rely only on 34-1706, *Idaho Code*, to construe the legislative intent in this regard. 34-1703 (2), *Idaho Code*, sets forth the form for recall petitions for members of the state legislature. The form as required by this statute provides that each signator state the following information:

"I am a registered elector of Legislative District No. _____, my residence, post office address, legislative district number, county, election precinct and the date I signed this petition are correctly written after my name."

The above quoted language would certainly seem to indicate that the legislature intended that each signator, *at the time of signing*, review and certify as to the accuracy of the information required. Such a requirement ties in closely with the legislative intent of 34-1706, *Idaho Code*, requiring that further signatures be gathered, since the statement of the signators on the petition form itself indicates that the legislature contemplated that each individual signator verify the necessary vital supporting information. In other words, when a signature has been rejected for lack of information, the legislature in its wisdom required a new signature in order that the original signator could certify the addition of the omitted material.

34-1705, *Idaho Code*, lends additional weight to our construction of legislative intent. This section sets out the oath which the circulators of the petitions are required to make on each and every signature sheet submitted. The language of the oath specified in the statute is as follows:

"I, (*name of the circulator*), swear, under penalty of perjury, that every person who signed this sheet of the foregoing petition signed his or her name thereto in my presence. I believe that each has stated his or her name and *the accompanying required* information on the signature sheet correctly, and that the person was eligible to sign this petition." [Emphasis supplied].

The language contained in the oath again gives substantial support to our construction of the legislative intent in this area. By requiring the verifier, or circulator, of the petition to swear under oath that each signator has stated his or her name, together with all of the required accompanying information correctly, it seems clear that the legislature intended that each signator in each instance certify the name and supporting data. Again, the foregoing requirements contained in 34-1705, *Idaho Code*, support our conclusion that the legislature wanted rejected signatures to be rehabilitated by new signatures, in

order that each signator on his or her own behalf certify as to the accuracy of the required information. (Although it is not necessary for purposes of this opinion, I feel constrained to point out that each person who had earlier verified under oath the accuracy of the name and accompanying information, could possibly be placed in a compromising position by third party manipulation of signature information to which the verifier was not a party; yet apparently none of the verifiers have been given an opportunity to amend their oaths. In view of the perjury penalty stated in the oath, it would seem that the petitioners might have considered permitting the verifiers to either withdraw the verification or amend it accordingly.)

In summary then, my opinion is that (1) the signatures which were not accompanied by the post office address of the signators were fatally defective and were properly rejected by you pursuant to 34-1706 (b) (iii), *Idaho Code*, and (2) that the attempted correction of the fatal defect by petitioners through the device of third party addition of the omitted post office address was not sufficient in view of the clear legislative mandate that rejected signatures be replaced with new signatures. To construe the meaning of the above section otherwise would in effect be authorizing a person other than the purported signator, to create a legal "signature" of a person other than himself without direct immediate authorization or even knowledge on the part of the person whose signature the script purports to be.

OFFICIAL OPINION NO. 73-210

June 6, 1973

TO: Raymond W. May
Director, Board of Corrections

FROM: Wayne G. Crookston, Jr.

I am in receipt of your letter requesting an opinion concerning *Idaho Code*, Section 20-223. This particular statute has been of concern to all persons involved in Idaho criminal justice and it is time that a logical interpretation of the section be made. Thus, I will answer your question concerning its effect on sentencing and give an opinion as to how the statute is to be interpreted.

To aid in the discussion of *Idaho Code*, Section 20-223, it is necessary that the prisoners committed for various crimes be categorized. Those prisoners committing the crimes of homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, or assault with intent to kill shall be classed as violent. Those prisoners serving sentences for rape, incest, crime against nature, or committing a lewd act upon a child or with an attempt or assault with intent to commit any of said crimes, or whose history and conduct indicate that he is a sexually dangerous person, shall be classed as sex oriented. Those prisoners serving as habitual offenders shall be classed as habituals.

In 1947, *Idaho Code*, Section 20-223, read as follows:

20-223. Parole, rules and regulations governing — Offense and parolable. — The state board of correction shall have the power to establish rules and regulations under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole outside the penitentiary but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the board; *provided, however, that no person serving a life sentence in the state penitentiary shall be eligible for release on parole until he has served at least ten years. That no person serving sentence in the state penitentiary for any of the following crimes, to-wit: homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, assault with intent to kill, or murder in the second degree, shall be released on parole before he has served at least one-third of his sentence.* Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interests of society, not as a reward of clemency. It shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes that he is able and willing to fulfill the obligations of a law abiding citizen. The board may also by their rules and regulations fix the times and conditions under which any application denied shall be reconsidered. [Emphasis added]

As can be seen by the underlined portion above, there was in 1947 the requirement that before a prisoner committed for a violent crime could be paroled he must have served one-third of his sentence. In 1950, the statute was amended to provide requirements for parole of prisoners committed for sex crimes. Thus, after 1950, *Idaho Code*, Section 20-223, read as stated below:

20-223. PAROLE, RULES AND REGULATIONS GOVERNING — OFFENSE NOT PAROLABLE. — The state board of correction shall have the power to establish rules and regulations under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole outside the penitentiary but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the board; provided, however, that no person serving a life sentence in the state penitentiary shall be eligible for release on parole until he has served at least ten years. That no person serving sentence in the state penitentiary for any of the following crimes, to-wit: homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, assault with intent to kill, or murder in the second degree, shall be released on parole before he has served at least one-third of his sentence. That no person serving sentence in the state penitentiary for any of the following crimes, to-wit: rape, incest, crime against nature, or

committing a lewd act upon a child or with an attempt or assault with intent to commit any of said crimes, or whose history and conduct indicate to the state board of correction that he is a sexually dangerous person, shall be released on probation or parole except upon the examination and recommendation of one or more psychiatrists licensed to practice medicine in the State of Idaho, to be selected by the state board of correction, *and upon such recommendation, to be released on probation or parole only to the state hospital which such examiners shall deem best equipped to treat such person, and that any such person shall not be released from such state hospital except upon the examination and recommendation of one or more psychiatrists licensed to practice medicine in the State of Idaho, to be selected by the state board of correction, at least one of whom shall not be the superintendent of such state hospital.* Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interests of society, not as a reward of clemency. It shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes that he is able and willing to fulfill the obligations of a law abiding citizen. The board may also by their rules and regulations fix the times and conditions under which any application denied shall be reconsidered.

No person or persons who have been committed to the state penitentiary for the crime of murder in the first or second degree in which the crime was committed in the commission or attempt to commit any sex offense upon the person of the victim of such crime, shall be released from the said penitentiary before the expiration of the full term of his or their sentence, by said board, by pardon, parole or probation. [Emphasis added]

The 1950 amendment concerned the probation or parole of any prisoner committed on a sex related offense or, even though not committed on a sex offense, whose history and conduct indicate that he is a sexually dangerous person. Such prisoners could not receive probation or parole except upon the examination and recommendation of one or more psychiatrists and then only to a state hospital. The prisoner could then be paroled from the hospital only upon the examination and recommendation of a psychiatrist. In 1970, the legislature removed the portion (underlined above) of the statute that required a parole to a state hospital and then, in turn, a parole from the hospital. Thus, after 1970, the sex offender or sexually dangerous person could be paroled the same as all other prisoners without making a stay in a state hospital.

In 1971, the legislature added an entire paragraph, the meaning of which we are most concerned. They added the underlined portion of the statute as laid out below and it presently reads as follows:

20-223. PAROLE, RULES AND REGULATIONS GOVERNING OFFENSES NOT PAROLABLE. – The state board of correction shall

have the power to establish rules and regulations under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the board; provided, however, that no person serving a life sentence shall be eligible for release on parole until he has served at least ten (10) years. No person serving sentence for any of the following crimes: homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, assault with intent to kill, or murder in the second degree, shall be released on parole before he has served at least one-third (1/3) of his sentence. No person serving sentence for any of the following crimes: rape, incest, crime against nature, or committing a lewd act upon a child or with an attempt or assault with intent to commit any of the said crimes, or whose history and conduct indicate to the state board of correction that he is a sexually dangerous person, shall be released or paroled except upon the examination and recommendation of one or more psychiatrists licensed to practice medicine in the state of Idaho, to be selected by the state board of correction. Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interests of society, not as a reward of clemency. It shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes that he is able and willing to fulfil the obligations of a law abiding citizen. The board may also by their rules and regulations fix the times and conditions under which any application denied shall be reconsidered.

The board shall not accept an application for parole and shall not interview any prisoner for parole who was committed for any of the following crimes; any crime for which the prisoner received a life sentence, any crime of violence, to-wit: homicide in any degree, treason, rape where violence is an element of the crime, robbery of any kind, kidnapping, burglary when armed with a dangerous weapon, assault with intent to kill, or murder in the second degree, any crime of rape, incest, crime against nature, or committing a lewd act upon a child, or with an attempt or assault with intent to commit any of said crimes, or any prisoner serving a sentence as a habitual offender, until said prisoner has served either a period of five (5) years or one-third (1/3) of the original sentence, whichever is the least. The above limitation on parole eligibility shall affect only those prisoners who are sentenced on and after the first day of July, 1971.

No person or persons who have been committed for the crime of murder in the first or second degree in which the crime was committed in the commission or attempt to commit any sex offense upon the person of the victim of such crime, shall be released from custody before the expiration

of the full term of his or their sentence, by said board, by pardon, or parole. [Emphasis added]

From a comparison of the 1947 version and the present statute it can be seen that prisoners committed for violent crimes must still serve one-third of their sentence before they can be paroled. The 1971 amendment grouped prisoners committed for violent crimes with those committing sex crimes and those serving time as habitual offenders and made it a requirement that before the Board of Correction could accept an application for parole or interview such a prisoner for parole, the prisoner must have served one-third of his original sentence or five years, whichever is the least. The portion of the statute providing that prisoners committed for violent crimes must serve at least one-third of their sentence before they can be paroled, which has been the law since 1947, is not to be confused with the 1971 amendment. The most recent addition *only* provides that the Board cannot accept an application of or interview any prisoner committed for a violent crime, sex crime, or as an habitual offender until he serves the lesser of one-third of his original sentence or five years.

Thus, *Idaho Code*, Section 20-223 is to be interpreted as follows: The sex prisoner and the one serving as an habitual offender can make application for parole and can be interviewed for parole by the Board of Correction after serving the lesser of five years or one-third of his original sentence and at that point in time can be paroled. Thus, the sex criminal or habitual offender serving more than fifteen years can still be paroled after serving five years. In the case of a violent criminal it must first be determined whether he is serving a sentence of fifteen or more years. If he is serving less than fifteen years, the violent prisoner can make application for parole and be interviewed by the Board after the expiration of one-third of his sentence and can be paroled after serving that one-third. If the violent prisoner is serving more than fifteen years, he can make application for parole and be interviewed by the Board at the expiration of five years, as allowed by the 1971 amendment. *However, he cannot be paroled until having served one-third of his sentence as required since 1947 by Section 20-223.*

Two simple examples will aid in understanding the application of 20-223 to violent criminals:

(1) Consider the prisoner sentence of nine years for kidnapping. Pursuant to the 1971 amendment, the Board cannot accept his application for parole or be interviewed until one-third of his sentence has been served or three years. He can be paroled at this point even though he is a violent criminal because he has served three years, one-third of his sentence, pursuant to the 1947 and present portion of 20-223.

(2) Now consider a prisoner sentenced to twenty-one years for second degree murder. Pursuant to the five year portion of the 1971 amendment, the Board can accept his application and interview him for parole after he has served the five years. However, he cannot be paroled at this time since he has not served seven years, one-third of his original sentence, as

required by the 1947 enacted portion of 20-223.

Concerning how Section 20-223 affects prisoners who were convicted prior to July 1, 1971, but sentenced after that date, it clearly appears from the statute that the legislature intended that the sentencing date be determinative as the section reads in part:

The above limitation on parole eligibility shall affect only those prisoners who are sentenced on and after the first day of July, 1971.

Thus, any prisoner who committed a crime or was convicted of a crime before July 1, 1971, and yet sentenced after that date is governed by the 1971 version of *Idaho Code*, Section 20-223. If a prisoner was sentenced prior to July 1, 1971, his parole eligibility is governed by the law in effect at the time of his sentencing. Thus, for example, a prisoner sentenced twenty years for a non-violent rape on May 5, 1970, could be paroled the day after he was received at the institution if he had an examination and recommendation of a licensed psychiatrist. Another example would be the prisoner committed on first degree murder for twenty-seven years on May 5, 1967, could not be paroled until having served the requisite nine years, one-third of his sentence. Prior to his parole, the Board must have the prisoner appear and be interviewed prior to parole but the statute does not give any time limit as when this must occur. As an aid to determining what parole requirements affect each sentencing date see the attached table.

This opinion should answer your questions and give some direction as to the application of *Idaho Code*, Section 20-223.

OFFICIAL OPINION NO. 73-211

June 7, 1973

TO: Rolland R. Reid
Director, Bureau of Mines & Geology

FROM: Warren Felton

We have studied the contract you have sent us as to permission for you to use Union Pacific Railroad property for the purpose of measuring water quantity in two locations. We have also read their letter asking whether or not you have authority to enter into such a contract.

We believe you do have such authority. Your law states in part in Section 47-203 that the Bureau of Mines may conduct studies in the field and make hydrographic surveys in relation thereto. We believe that such a statement implies the power to make necessary agreements to use the sites necessary for such surveys. See *Nello L. Teer Co. v. North Carolina State Highway Commission*, 143 S.E. 2d 447, 265 N.C. 1; *Lerfora v. Riley*, 57 P.2d 140, 6 Cal. 2d 171; *State v. Merchants National Bank of St. Paul*, 177 N.W. 135, 145 Minn. 322; *School District No. 24 of Woods County v. Hodge*, 183 P.2d 575, 199 Okla. 81; and *Murray v. State Board of Regents*, 401 P.2d 898, 194 Kan. 686.

This type of contract is well within your powers implied under your law. You should execute this contract. On the other hand, there is one paragraph of this contract that would probably be illegal under Idaho law and should therefore be deleted. That is Section 4 of the contract.

Section 29-114, *Idaho Code* reads as follows:

“29-114. Indemnification of promisee for negligence — Effect on existing agreements. — A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective [May 18, 1971].”

The meaning of this statute and its effect are obvious. It would probably apply here because of the use of the word “structure”. This would probably include your weirs or whatever.

OFFICIAL OPINION NO. 73-212

June 7, 1973

TO: Andrew F. James
Gooding County Prosecuting Attorney

FROM: Warren Felton

You have asked us two questions. Your first question relates to the effective dates of House Bill 259, Chapter 299, 1973 Idaho Session Laws and House Bill 289, Chapter 809, 1973 Idaho Session Laws.

You state that the Governor approved the same, March 16, 1973 and that they have an effective date of March 19, 1973. This is not quite so, see the attached bills. I think you are confusing the dates of filing with the Secretary of State with the effective date. The *Constitution* and statutes cited in my earlier letter, Section 22, Article 3 and Section 67-510, *Idaho Code*, have been construed to mean that the act, in case of an emergency, becomes effective upon the day the act was approved by the Governor. *State v. Cleveland*, 42 Idaho 803, 810; 248 P. 831. We do not think this refers to the date of filing but to the actual day of signing.

As to your second question, we have looked carefully at the various meanings and interpretations of the term annual in *Words and Phrases* and I have inquired into the case of *Higer v. Hanson*, 67 Idaho 45, 170 P.2d 411. In that case the Supreme Court in figuring their own salaries which were increased so much “per

annum" divided the new amount into 12 and paid one 1/12th of that sum for each month thereafter, or proportionate parts thereof for terms of less than a month. Section 31-3101, *Idaho Code* states that county officers are to be paid monthly. We believe that the above cited case, *Higer v. Hanson* indicates that the accepted procedure is to pay 1/12th of the annual salary, not as suggested by the auditor, first deducting January, February and March at the old rate from the new total salary and then dividing the remainder into 9. This would amount to the county officers whose salaries were increased receiving 9 months of salary at a higher annual rate than specified by the Code. At the end of the 9 months their salaries would then again be reduced to the right rate. We do not believe that this is what was intended. The definition of annual that seems more suitable is that it means, in this case, a year without specifying when the year starts and to divide the annual salary by 12, and pay at this rate each month thereafter will result in the officers being paid at the proper annual rate.

OFFICIAL OPINION NO. 73-213

June 22, 1973

TO: James E. Risch
Ada County Prosecuting Attorney

FROM: W. Anthony Park

This letter is in response to yours of June 15, 1973, and pursuant to our conversation on Tuesday, June 19th.

As I indicated to you, I do agree that you and I have discussed in the past the propriety of the attorney general advising county officials in legal matters. My recollection of that conversation was that I would not presume to render legal opinions to Ada County officials without conferring with you on the matter and certainly not in any event unless unusual and unforeseen circumstances arise. I don't believe that I absolutely precluded myself from ever advising county officers in appropriate circumstances, primarily because I am not willing to admit that the attorney general does not have a right to do so. However, that is a legal interpretation which we do not need to go into at this time.

In this subject case, although I had read the tentative letter to Mr. Planting, I had intended to discuss the matter with you before authorizing its release. Somehow the letter got into the "out" basket for mailing without my knowledge. Although I do not intend to comment on the merits of this particular problem, had I conferred with you at the time I reviewed the letter, I would not have sent it. It is my feeling, generally, that county officials should rely primarily on the prosecuting attorney of their county for interpretation of legal questions.

I have concluded that, in this instance, it would be inappropriate for the attorney general to render an opinion. I am, accordingly, withdrawing the opinion, and by carbon copy of this letter I am so advising Mr. Planting. Please

accept my apology for any difficulty or inconvenience it may have caused to all of the parties involved. Best personal regards.

Encl.

TO: Clarence A. Planting
Ada County Clerk

FROM: Warren Felton

You have asked whether county commissioners may accept appointments as deputy sheriffs. We feel that they should not do so. The question is whether a conflict could arise in the duties involved or whether the functions of the two offices are inconsistent. If one office has some control or supervision over the other, the offices are regarded as generally inconsistent and one person should not hold both offices at the same time. See 3 McQuillin on *Municipal Corporations*, Section 67, page 294 and 67 *CJS, Officers*, Section 23, pages 133-151.

In this case, Section 31-802, *Idaho Code* provides that the county commissioners are to supervise the other county officers; further, under Chapter 16, Title 31, *Idaho Code* the county commissioners approve and set the amounts of funds available to the other county officers. For these reasons we believe there would be an inherent conflict in the duties of the two offices and that county commissioners are prohibited from serving as deputy sheriffs, or vice versa.

OFFICIAL OPINION NO. 73-214

June 8, 1973

TO: Joe R. Williams
State Auditor

FROM: James C. Weaver

Several local attorneys have recently raised a question as to the appropriate limits upon garnishment of wages. This is to advise you of the question, and of our view of the answer.

The question is whether in every case 25% of disposable earnings is available for garnishment. This question arises in light of the wording of Section 11-207, *Idaho Code*, which states in part:

Garnishment shall not exceed (a) twenty-five per cent (25%) of his disposable earnings for that week, or (b) the amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage . . . in effect at the time the earnings are payable, whichever is less.

A quick calculation based on present minimum wages seems to indicate that

until disposable earnings for the month approach two hundred and seventy dollars (\$270.00), the lesser amount is derived by subtracting the minimum wage multiple from the disposable earnings amount.

In addition it should be noted that as to "consumer sales" there is a specific exemption which applies a multiple of forty (40) times the federal minimum wage rather than thirty (30). (*Idaho Code*, Section 28-35-105).

OFFICIAL OPINION NO. 73-215

June 8, 1973

TO: Cecil D. Andrus
Governor

FROM: W. Anthony Park

By letter dated May 24, you have inquired of the meaning of Paragraph 18 of a form of grazing and farming lease used by the State Board of Land Commissioners. Paragraph 18 provides:

These lands are not to be closed at any time to the use of the general public for hunting and/or fishing purposes, subject to the statute and/or rules and regulations of the Fish & Game Department.

More particularly the issue is whether Section 36-2502 of the *Idaho Code* is to be read as one of the statutes of the Fish and Game Department to which Paragraph 18 is subject. Section 36-2502 provides in pertinent part:

Whenever a tract of land shall have been inclosed by the owner with a fence and signs * * * warning persons not to trespass thereon, * * * it shall be a misdemeanor for any person to enter upon said inclosed land and discharge any firearm thereupon or to enter said land for the purpose of hunting or trapping thereon without the consent of the owner or person in charge of said land. * * * An entryman upon land under the laws of the United States, or a lessee or contract-purchaser of state lands, shall be deemed an owner within the meaning of this section. [Emphasis added].

Section 36-2502 places criminal sanctions behind no trespassing signs whenever the owner of a tract of land chooses to post his property. A lessee or contract-purchaser of state land is an "owner" for purposes of this statute. If Section 36-2502 is read into Paragraph 18, the paragraph becomes meaningless, a nullity, for despite the assertion that the lands are not to be closed at any time to hunting or fishing, the lessee would nonetheless enjoy the right under Section 36-2502 to close the lands, in fact, to hunting and fishing by the general public.

Whether a lessee of state lands will post or will not post his property is a proper subject of negotiations between an applicant for a lease and the State Board of Land Commissioners. Since these lands remain public lands subject to use and occupancy by the lessee, it seems appropriate to require as a condition of the lease that the lands not be closed to hunting and fishing when not inconsistent with the lessee's use of the land. It is of interest to note that

Paragraph 18 or language similar thereto does not appear in the state's cottage site lease form and does not appear in the certificate of purchase. Apparently, the State Board of Land Commissioners recognizes that hunting and fishing may be inconsistent with the use of public land as a cottage site and may be inconsistent with the use and legal or equitable interest of the contract purchaser.

A reasonable interpretation of Paragraph 18, one that makes the paragraph meaningful, is that the lands are not to be closed at any time to the use of the general public for hunting or fishing purposes, subject to the statutes or rules and regulations of the Fish and Game Department under their general authority to preserve, protect, perpetuate, and manage wildlife within the State of Idaho. The lessee and the State Board of Land Commissioners could not agree between themselves that the land would be open for hunting and fishing at all times regardless of the Fish and Game Department's regulations on seasons, limits, licenses and tags, etc. Section 36-2502 is not a "statute of the Fish and Game Department" in its capacity to preserve, protect, perpetuate, and manage wildlife. It is a criminal statute bearing upon the authority of an owner, not the Fish and Game Department, to control hunting and fishing on his property.

Accordingly, I am of the view that Section 36-2502, *Idaho Code*, does not circumscribe Paragraph 18. Rather, Paragraph 18 is an agreement between the lessee and the State Board of Land Commissioners that the lessee shall take no action that will close the land to the use of the general public for hunting or fishing purposes, realizing at the same time that the Fish and Game Department has the overriding statutory authority to regulate hunting and fishing upon any and all lands within the State of Idaho.

Paragraph 18 is legally enforceable and not against public policy. *See*, generally, 17 C.J.S. Contracts § 211, *et seq.* It advances the commonweal by assuring full and consistent uses of state land by the lessee, grazing or farming, and the general public, hunting and fishing. A person may agree not to do that which he has a legal right to do, 17 C.J.S. Contracts § 264, especially when the legal right under Section 36-2502 does not arise independently but solely as a result of the state lease.

To avoid any misunderstanding in the future, I recommend that Paragraph 18 be amended by changing the period at the end of the paragraph to a comma and adding the phrase "Section 36-2502, *Idaho Code*, notwithstanding."

OFFICIAL OPINION NO. 73-216

June 8, 1973

TO: Peter Leriget
Latah County Prosecuting Attorney

FROM: Warren Felton

From the discussions we have had and the correspondence you have shown to me, you have a number of questions relating to the Latah County Planning and

Zoning Commission and the actions of that Board and the Latah County Commissioners relating to the Latah County Zoning Ordinance, the meetings of the Planning and Zoning Commissioners, the publication of the zoning map, etc.

If I understand correctly, the Latah County Commissioners originally appointed a Latah Planning and Zoning Commission of 12 members. Later, because the zoning ordinance wasn't prepared and more than half of the members of the Planning and Zoning Commission were not attending meetings, the County Commissioners, rather than appoint new members to replace those not attending the meetings, appointed alternates or deputies for each of the existing members or (and I am not too clear on this point) increased the membership of the Planning and Zoning Commission to 24. Then the few original members attending and the alternates, deputies or new members (whichever) put together a zoning ordinance and zoning map. There was also some question or mention about the ability of Planning and Zoning Commission members who were absent, and the power or ability of such absent members to vote while absent. Then to compound the matter, I understand that a zoning ordinance was prepared and passed and published but that the map setting out the various locations of the zoning districts was not published with, or as part of the ordinance, has not been published and that without the map there was no way to identify which property was in which zone.

We have also been asked what is the effect of further zoning actions of the Planning and Zoning Commission so composed and county commissioners in view of such situations.

To begin with, I would like to caution that an opinion of this office is only advice, does not have the strength of a court decision nor does it authoritatively determine the law on any subject matter.

Several Idaho statutes relate to this matter and it might be well to set them out here:

"31-3801. Grant of power. — For the purpose of promoting the health, safety, morals and general welfare, to provide for orderly development of land and to protect property values, the board of county commissioners of each county in the state of Idaho is hereby authorized and empowered to exercise for its county all the powers granted to the legislative bodies of cities and villages by sections 50-401 through 50-409 [50-1201 through 50-1209], Idaho Code, except that in the exercise of the power granted in section 50-405 [50-1205], Idaho Code, in case a proposed change is protested, a favorable vote of two thirds (2/3) of the board of county commissioners shall be required before such amendment shall become effective."

The above section refers to Sections 50-401 to 50-409. These sections have since been repealed and replaced by 50-1201 to 50-1210, but one section of the repealed law is different from the newer law. It is 50-406 (Idaho Session Laws 1925, Chapter 174, Section 6, page 310) which reads as follows:

"50-406. Zoning commission. — In order to avail itself of the power

conferred by this chapter, such legislative body shall appoint a commission to be known as the Zoning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report; *and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission.* Where a city planning commission already exists, it may be appointed as the zoning commission.” [Emphasis added]

The reason for including this repealed statute is that where specific sections of statutes are adopted by another law, as in Sections 31-3801 and 31-3804, such adoption takes the statute as it existed at the time of the adoption of the second statute and subsequent repeal of, additions to or modifications of the first statute are not included in the second statute. The repeal of the first statute does not change the second statute and where the second statute refers to the first statute, the first statute still exists for the purposes of the second statute although repealed for other purposes.

Nampa Meridian Irrigation District v. Barker
38 Idaho 5 2d

Beverly v. Webb
68 Idaho 118

Achenbach v. Kencaid
25 Idaho 768

Gillesby v. Board of County Commissioners
17 Idaho 586

Boise City v. Baxter
41 Idaho 368

Section 31-3804 is also important. It reads as follows:

“31-3804. Zoning commission. — The board of county commissioners of each county shall appoint a commission as authorized under the sections 50-2701 through 50-2708 [50-1101 through 50-1106], Idaho Code, which shall be entitled the zoning commission, and which shall function with the powers and duties and subject to the provisions of said sections; provided, that at least one third (1/3) of the members of the county zoning commission shall be resident taxpayers of a municipality within the county. In addition to the original recommendation of a comprehensive county plan of districts and regulations required to be made by the zoning commission to the board of county commissioners, on the zoning commission’s initiative or on request by the board of county commissioners, it shall from time to time review and recommend amendments and additions to such plan and regulations. *The board of county commissioners shall not hold public hearings nor take action upon the original plan and regulations proposed, nor amendments and additions thereto, until recommendations thereon have been received from the zoning*

commission." [Emphasis added]

You will notice that Section 31-3804, above quoted, refers to Sections 50-2701 to 50-2708 which are now repealed and replaced by similar Sections 50-1101 to 50-1106 but both sections, old Section 50-2702 (1935 1st Extra Session, Chapter 51, Section 2, page 134); and new Section 50-1101 (1967, Chapter 429, Section 203, page 1249) provide that a planning commission shall consist of from 6 to 12 members to be appointed by the Board of County Commissioners.

The only exception to the number of members is provided for in the case of a "regional" planning commission consisting of two or more counties (old section), Section 50-2706, *Idaho Code* (1935 1st Extra Session, Chapter 51, Section 6, page 134) and (new section) "Joint Planning Commissions," 50-1105, *Idaho Code* (1967, Chapter 429, Section 207, page 1249). The new section provides for joint commissions relating to two or more counties or a county and one or more cities.

In the case of a "regional" or "joint" commission, the membership of the "regional" or "joint" commission is determined by the Planning and Zoning Commission itself and thus such a "regional" or "joint" commission could possibly have 24 or more members. But all other planning and zoning commissions can only have from 6 to 12 members as provided by the above cited sections.

It is said in *McQuillin on Municipal Corporations*, Section 16.10, Volume 5, page 145 that:

"Substantial compliance with requisite procedure in enactment of an ordinance is prerequisite to its validity, and no ordinance is valid unless and until mandatory prerequisites to its enactment and promulgation are substantially observed. For example, such prerequisites commonly are regarded as conditions precedent to final action on ordinances relating to public works and improvements to be paid for by special assessment or taxation; they are jurisdictional in their nature and noncompliance with them leaves the local legislative body without power to adopt the ordinance."

Also in relation to this matter consider the recent case of *Citizens for Better Government v. County of Valley, Idaho*, April 4, 1973, No. 11094, 508 P.2d 550. A copy of that case is attached to this opinion. There it was held that certain of the requirements of the statutes for zoning were mandatory and must be complied with before a valid ordinance could be passed and because proper notice was not given and no hearing was held the zoning ordinance of Valley County was declared to be void. This case appears to be much the same and that case could well be applied here if the courts were to rule on the matter.

In *McQuillin*, op. cit., Sec. 16.28, page 173 it is said:

"There can be no valid ordinance until it is properly passed by the legally constituted legislative body of a municipality, and 'pass' as applied to enactment of local laws comprehends all necessary steps to create the

law.”

In this case the last sentence of Section 31-3804, provides that the Board of County Commissioners shall not take any action on the original zoning plan regulations or subsequent amendments or changes thereto until the zoning commission has made its recommendations thereon.

This must necessarily mean a “validly composed” zoning commission. The Latah County Zoning Commission would only be “validly composed” if it is deemed to be a “joint” or “regional” zoning commission composed of 2 or more counties or a county and one or more cities.

However, all of the above may be academic since if we understand correctly the ordinance which was proposed by the Latah County Planning and Zoning Commission did not have metes and bounds descriptions of the various zones, but only referred to the zoning map to describe the zones; as we understand it, the ordinance was published at length but the zoning map was not published at all. If this startling state of affairs exists, it is doubtful that any zoning ordinance exists at all or that any other actions of the Board of County Commissioners thereafter as to zoning have any affect as law at all.

Zoning ordinances are usually criminal in nature. (31-714, 50-1209, *Idaho Code*). Criminal ordinances must be certain; that is to say, a person must be able to look at the ordinance and be able to know what zone his property is in, what he can and cannot do with that property. Unless there is specificity, such an ordinance is void for ambiguity, *Lewiston v. Mathewson*, 78 Idaho 347. In this case the ordinance has no meaning without the map since the map is an integral and necessary part of the ordinance. If the ordinance must be published under Section 31-715, *Idaho Code*, the map must also be published.

In a similar case, Georgia has declared that failure to publish a zoning map with a zoning ordinance voided the ordinance and made it inoperative from the beginning. *Waycross v. Boatright*, 104 Ga. App. 685, 122 S.E. 2d 475; see also *McQuillin* op. cit., Volume 5, Sec. 16.12, page 149.

As to correction of this matter see *McQuillin*, op. cit., Volume 5, Sec. 1693, page 299:

“Generally speaking, a municipal legislative body may ratify its void acts, or it may cure the defective enactment of an ordinance by a subsequent enactment, where the ordinance is within the municipal power to enact. Under these circumstances, a curative ordinance may validate condemnation proceedings; validate street work done without a proper contract; waive contract irregularities by adopting another contract; or ratify a grade change made by city officers without the authority of an ordinance. But it is a reasonable rule that to render subsequent proceedings evidence of the ratification of an ordinance, it should appear that the proceedings were taken with a full knowledge of the invalidity of the ordinance and of all steps, if any, taken thereunder.

Any defect in the publication of an ordinance is cured by its reenactment and republication.”

It would appear, however, that it might be best in this case to start over again with a new Planning and Zoning Board, and proceed from there.

OFFICIAL OPINION NO. 73-217

June 11, 1973

TO: W. J. Duclos
Nez Perce County Commissioner

FROM: W. Anthony Park

After considering the telephone conversation between us and after further consideration of the statutes, I am sorry to say that my advice to you must be somewhat different than our phone conversation. Your question related to how much time a county commissioner must spend in his courthouse office, and whether he can carry on other business.

The statutes would seem to cover this matter fully. Section 31-3105, *Idaho Code*, reads as follows:

"31-3105. Commissioners full time officers in certain counties – Meetings. – All county commissioners of counties receiving \$5,000.00 or more per annum shall devote their entire time to the performance of their office duties. In addition to the special days which now are or may hereafter be provided by law for meetings of the board of county commissioners the county commissioners shall, during one half (½) of each and every month, have designated office days on which days they shall be at their office at the county seat in session for all business which may be brought before them, which office days shall be designated by resolution, and a copy of such resolution shall be placed on file with the clerk of the board of county commissioners.

During the other half of each month the county commissioners of counties receiving \$5,000.00 or more per annum shall spend their time either at their office at the county seat during office hours or in the performance of their actual duties throughout the county: provided, that in counties whose county commissioners receive \$5,000.00 or more per annum, the county commissioners shall not be entitled to their hotel expenses incurred while at the county seat."

Also of importance is Section 59-1007, *Idaho Code*, which reads as follows:

"59-1007. Office hours. – Unless otherwise provided by law, every officer must keep his office open for transaction of business from eight o'clock a.m. until 5 o'clock p.m. each day except upon Saturdays, Sundays and holidays."

As you can see from Section 31-3105, *Idaho Code*, county commissioners earning more than \$5,000.00 per year are required to devote one half of their time during designated "office days" meeting in session for all business that may

be brought before them. During the other half of each month these county commissioners are required to "spend their time either in their office at the county seat during office hours or in the performance of their actual duties throughout the county." This is quite specific. When Section 59-1007, *Idaho Code*, is considered, it is apparent that county commissioners earning more than \$5,000.00 a year must devote their time, from 8:00 o'clock a.m. to 5:00 o'clock p.m., Monday through Friday, excepting holidays, in the performance of their official duties.

This is not to say that the county commissioners may not pursue other activities of a private nature after office hours or on holidays, Saturdays or Sundays.

It should be noticed that there was an attempt to change the law so that only in counties where the county commissioners earn \$10,000.00 or more would the commissioners be bound to devote their full time to county business. This bill, House Bill 292, 1973 Legislature, died in committee in the House of Representatives.

As you are aware, Nez Perce County Commissioners are now paid \$8,500.00; before Chapter 309 of the 1973 laws they were paid \$7,500. So in either case, Section 31-3105 would apply.

OFFICIAL OPINION NO. 73-218

June 11, 1973

TO: Thelma R. Kolodziej
Gem County Recorder

FROM: James C. Weaver

Your letter of May 22 has been referred to me for response. In answer thereto, I refer you to *Idaho Code* Section 50-1302, which states in pertinent part as follows:

Every owner proposing a subdivision, as defined above, shall cause the same to be surveyed and a plat made thereof which shall particularly and accurately describe and set forth all the streets, easements, public grounds, blocks or lots, and other essential information, and shall record said plat . . .

It is my opinion that the referred to Code section would require both sides of the plat to be copied and filed pursuant to 50-1310. This would be required, it seems to me, by the language of 50-1302 which requires an accurate description of dedications.

Lending weight to this opinion is the language of 50-1309 which reads in part as follows:

The owner or owners of the land included in said plat shall make a

certificate containing the correct description of the land, with the statement as to their intentions to include the same in the plat, *and make a dedication of all the streets and alleys shown on said plat*, which certificate shall be acknowledged before an officer duly authorized to take acknowledgements and *shall be indorsed on the plat* . . . [Emphasis added]

This sentence clearly makes the dedication a part of the plat, and, as part of the plat, is required under Section 50-1310 to be included in the transparency.

OFFICIAL OPINION NO. 73-219

June 14, 1973

TO: Ted C. Springer
Custer County Prosecuting Attorney

FROM: Warren Felton

You have asked whether Chapter 284, 1973 Idaho Session Laws which requires that the name and current address of a grantee must appear on a conveyance makes it a prerequisite that such name and current address appear, or the recorder may refuse to record the instrument.

First, any deed that did not name a grantee would be no deed at all. Without the name of the grantee, it is not a conveyance or deed. See 6 *Thompson on Real Property*, Sections 3163(2978), 3164(2979), 3165(2980), 3166(2981), pages 318-327. A deed must name a grantee who is in existence and capable of taking the property or it is not a transfer and would not have needed to be recorded under Sections 55-801 and 31-2402, *Idaho Code*.

On the other hand, it appears that the statute as amended does add an additional requirement, e.g., that of "current address." There are many cases where statutes have made requirements for conveyance such as the statutes of frauds (9-503-505, *Idaho Code*), statutes of uses, statute of enrollment, etc. where such statutes have made requirements which have to be met in order to convey property and such statutes have stood the test of time. 4 *Thompson on Real Property*, Section 2277(2208) page 820.

In some cases acknowledgment has been made an essential part of the execution of a deed prerequisite to passing title. 7 *Thompson on Real Property*, Section 3992(3746), page 419, note 14. As to statutes of frauds, see 5 *Thompson on Real Property*, Section 2809(2659), page 766.

Such a statute as the one under discussion would be the same as the statute of frauds — it would establish a rule of evidence. *Dunn v. Dunn*, 59 Idaho 473.

The statute is in mandatory terms, thus it would seem that a conveyance must now contain the "current address" of the grantee as well as a name in order to be a conveyance and according to Sections 55-801, 31-2402 and 31-2404, *Idaho Code*, the Recorder only needs to record instruments affecting title or possession of property, such as deeds, grants and transfers.

Thus Section 55-601, *Idaho Code*, as amended, does require "name and current address" as a prerequisite to recording and a document purporting to be a conveyance must contain both of them or it may be refused for recording.

OFFICIAL OPINION NO. 73-220

June 14, 1973

TO: Jack B. Moore, Chief
Liquor Law Enforcement Division
Department of Law Enforcement

FROM: James W. Blaine

Your request for an opinion as to whether or not the operation of a slot machine modified to pay a historical token each and every time a coin is introduced into the machine falls under gambling devices, Section 18-3801, *Idaho Code*.

In order for any device to come within the provision of Section 18-3801, *Idaho Code*, it is necessary that three things take place, namely: (1) consideration; (2) prize and (3) chance. The circumstance you pose in your letter of June 12, 1973, does not have each of these three elements present, since one historical token of the Cassia County Historical Society is returned each time the slot machine is played, thus eliminating the necessary element of "chance." Therefore, such machine would not be a gambling device and would not come within the terms of Title 18, Chapter 38 of the *Idaho Code*.

OFFICIAL OPINION NO. 73-221

June 21, 1973

TO: Herbert Nagel
Rathdrum City Attorney

FROM: Warren Felton

In regard to your phone call concerning the City of Rathdrum and the fact that they wish to contract with someone to log the city's land for them rather than to sell stumpage, we would suggest to you that in such a case the city falls under Section 50-341, *Idaho Code*. If it is anticipated that the amount the city will be obligated to pay to the logger is more than \$2,500.00, the city should let bids and go through the procedures spelled out in Section 50-341, *Idaho Code*.

In relation to Section 50-341B., *Idaho Code*, the section says that it does not apply to disbursement of funds to a city employee, agent or official or to the performance of personal services for the city. We believe that this exception does not apply to a contract to log and that such a contract is not "personal services" for the city. It has generally been agreed that in that section the words "personal services" relate to services by engineers, accountants, doctors, lawyers, architects

and such which are performed by the person himself, and not to general contracts, work or labor. We have so held several times such as September 6, 1972 (see copy of letter, enclosed). To hold that this exception to bidding included all work or labor would totally vitiate the section; thus, we have always construed it as restricted to professional services.

OFFICIAL OPINION NO. 73-222

June 21, 1973

TO: Robert Hay
Commissioner, Department of Insurance

FROM: James G. Reid

This office is in receipt of the January 30, 1973 letter from James C. Prince requesting an opinion as to what type of license (resident or non-resident) should be issued to an applicant for an agent's license.

Section 41-1025(1)(a) of the *Idaho Insurance Code* defines a resident for insurance agent purposes as: "If an individual is one domiciled and residing within Idaho." Section 41-1025 (2)(a) defines a non-resident agent or broker as: "If an individual is one domiciled or residing in a state other than Idaho, or in Canada."

To be qualified as a resident for the purpose of this section, an individual would have to be both domiciled and residing in Idaho. If both of these qualifications are not met, then the individual would not be defined by Section 41-1025(2)(a) as a non-resident. He is a non-resident if he either does not reside or is not domiciled in Idaho.

An individual who does not qualify as a resident under Section 41-1025(1)(a) of the *Idaho Insurance Code* in order to obtain a non-resident license would have to comply with the conditions set forth in Section 41-1066 which requires, among other things, the applicant to be qualified for, and hold a resident license in his home state. The applicant mentioned in the letter dated January 29, 1973, to Jim Reid from James Prince, did not meet this condition and therefore would not qualify for an insurance agent's non-resident license.

For a corporation to be qualified as a resident agent or broker the corporation must be one incorporated and existing under the laws of Idaho, or a foreign corporation if qualified to do business in Idaho, and if Idaho is the only state where it maintains the business and all shares of the corporation are owned by Idaho residents. Section 41-1025(1)(c), *Idaho Code*.

A non-resident agent or broker is a corporation that is incorporated under the laws of a state other than Idaho, and has one or more places of business outside the state. Section 41-1025(2)(c), *Idaho Code*. The two sections of the statute are congruous except in one situation; that being the case where a foreign corporation maintains a place of business only in Idaho, but shares are owned by non-residents as well as residents of Idaho. In such a case, a corporation would

not qualify for a resident's license, nor non-resident's license.

Courts that have dealt with similar situations have stated statutes should be reconciled so as to make the inconsistent provisions consistent and practical, *Hessel v. Lateral Sewer District*, 202 Kan. 499, 499 P.2d 496. The statutes should be construed so that the legislative intent is given effect. *Florek v. Sparks Flying Service, Inc.*, 83 Idaho 160, 359 P.2d 511.

Section 41-1025 was added to the *Idaho Code* by Chapter 164 in 1972 and the part in question reads:

"A 'resident' agent or broker . . . [i]f a corporation, is one incorporated and existing under the laws of Idaho [.] . . . A 'non-resident' agent or broker . . . [i]f a corporation, is one incorporated under the laws of a state other than Idaho, or of Canada."

Later, Section 41-1025(1)(c) was amended by Chapter 395 in 1972. The preamble to this amendment states in part:

"To provide that foreign corporations qualify to do business in a state who maintain offices in the state and all of whose shares are owned by Idaho residents are resident agents and brokers." [Emphasis added]

This part was added to 41-1025(1)(c) and that part of the statute that was changed was accented as is done with all parts of an existing statute that are amended in the Idaho Session Laws Book. However, 41-1025(2)(c) was inadvertently amended, the words:

"And has one or more places of business outside the state of Idaho"

being added. Because this part of the section was not in the preamble as being a part of the section to be amended, the part in question was not highlighted, and when this part of the section is in the statute a complication arises, I feel that there was no legislative intent to change that part of the statute and therefore that part should be ignored when determining the status of a non-resident corporate agent or broker. Misprints in a statute will be corrected or words omitted therefrom if the error is plainly indicated and the true meaning is obvious, in order to make the statute express the legislative intent. *State v. Witzel*, 79 Idaho 211, 312 P.2d 1044.

If the statute read, "A non-resident agent or broker is a corporation that is incorporated under the laws of a state other than Idaho," there would be no incongruous result where a foreign corporation has a share owned by non-residents as well as residents. Therefore, the last part of Section 41-1025(2)(c) which was obviously inadvertently added to the statute should be ignored in order that the statute may express true legislative intent.

OFFICIAL OPINION NO. 73-223

June 21, 1973

TO: Pete T. Cenarrusa
Secretary of State

FROM: W. Anthony Park

I have now examined the recall petitions deposited with you on June 16, 1973, by a group of Pocatello citizens seeking to initiate a new recall effort against Representative Patricia L. McDermott, District 34 in Bannock County.

It is my opinion that the form as submitted is not in substantial compliance with § 34-1703(2), *Idaho Code*, which prescribes the form of recall petitions for state legislators. The form which I examined lumps together certain of the supporting information required by the statute in one columnar heading. The information included at the head of the single column is the post office address, the legislative district, the county and the county precinct. (The form identifies the precinct in the columnar heading by the initials "E.P.," which are marked by an asterisk. At the bottom of the page, another asterisk explains that the initials stand for "Election Precinct.") The column itself contains the typewritten word "Yes," which apparently would already be on the petition when presented to the potential signators. It is my conclusion that the legislature intended that each signator to a recall petition be given an opportunity to write in the supporting information himself. (Attorney General's opinion, June 6, 1973.) The form as submitted obviously precludes each signator from writing in his or her own supporting information. Further, the grouping together of so much information in one column and requiring the potential signator to translate initials into words enhances the possibility of mistake or fraud.

For these reasons, I must conclude that the form violates legislative intent and is not in substantial compliance with § 34-1703(2), *Idaho Code*.

Although I am constrained to advise you to disapprove the subject form, I feel compelled to observe that it would not be difficult to prepare and submit a form of petition which would be in substantial compliance with the requirements of the law. For example, the petitioners in this matter initially submitted a form of petition which *was* in substantial compliance, and, had it been resubmitted, would have been approved this time. The statutory requirements are simple and the form should be simple. This one isn't.

Although, as you quite accurately point out in your transmittal letter that this state of a recall proceeding does not require anything more than an approval as to the form of the petition, you also asked for my comments regarding "any defect" which may appear on the submitted form. I presume that you are alluding to the signatures themselves and the way the supporting information was apparently included. Obviously, I cannot make any evaluation of the signatures and will not do so here. However, it appears that the word "Yes" had been typed in, apparently before the signators signed their names and residence addresses on the form. In this regard, I would caution petitioners against the

third party addition of *any* of the supporting information, which, as I mentioned above, should only be filled in by the signators themselves.

OFFICIAL OPINION NO. 73-224

June 22, 1973

TO: Stephen W. Boller
Blaine County Prosecuting Attorney

FROM: W. Anthony Park

You have requested my opinion regarding a tax sale of a small building or cabin and some furnishings, all owned by Artie O. Barker, to satisfy delinquent taxes. The sale was conducted by the Sheriff of Blaine County under enforcement procedures provided by Title 68, Chapter 13 of the *Idaho Code*. Barker's cabin was assessed and taxed as personal property because he does not own the underlying land. He leases the land from Mr. and Mrs. Gus Stertman. We understand that taxes were delinquent in the amount of \$18.82, that the property including furnishings was sold for about \$100.00, and that Mr. Barker values the cabin at \$2,000.00. You have asked for our opinion of the validity of the tax sale and the authority of the Board of County Commissioners to set the sale aside.

Under generally acceptable principles of law, a building such as the cabin involved here is real property. This is the case whether or not the building is owned by the person who owns the underlying land. We must consider here whether the statutory scheme in Idaho alters these general principles of law and in what respects, if at all.

For tax purposes in Idaho, some distinctions are made between real and personal property. For assessment purposes, real property is defined by I.C. §63-108 and personal property by I.C. §63-109. Real property includes improvements. I.C. §63-108. Improvements include buildings and structures. I.C. §63-110.

For many years, buildings not owned by the owner of the underlying land have been assessed as personal property in Idaho, pursuant to I.C. §63-1223. However, a close reading of I.C. §63-1223 indicates that only improvements on the following lands are to be assessed as personal property: (a) government (b) Indians (c) state (d) railroad right of way. The reason for this section is because the real estate on which such improvements are situated cannot be taxed. *Russett Potato Co. v. Board of Equalization*, 93 Idaho 501. Almost all improvements to which ownership is separated from ownership of the underlying land in Idaho are located on Federal, State, Indian, or railroad lands. Consequently, the practice of assessing as personal property all separately owned improvements is understandable. However, in situations such as the present, it appears incorrect.

The property was assessed as personal property. The taxpayer did not object to the assessment of his property as personal property, and it may be that the property was subject to a de facto assessment as personal property. It does not necessarily follow, however, that the property could be seized and sold as personal property. I.C. § 63-1304 very clearly limits execution of the warrant to the seizure and sale of "personal property." It also provides that such warrants shall be served and executed by the sheriff "in the manner provided by law for the sale of personal property upon execution issued out of the district court." Under a personal property distraint warrant the Tax Collector, acting through the sheriff, has seized and sold real property. I am of the opinion that the tax sale was not legal.

Mr. Barker has asked the Blaine County Board of Commissioners to set the sale aside. The officer responsible for execution and service of the warrant of distraint is the county sheriff. He probably acted at the specific direction of the Tax Collector, but it seems the responsibility for conducting a proper levy and sale is that of the sheriff. The Board of County Commissioners or the County Board of Equalization really have no responsibility in connection with the collection of taxes, the issue of distraint warrants, or the execution and service of such warrants. Consequently, I do not believe the Board of Commissioners or the Board of Equalization may set the sale aside.

I.C. § 63-2202 is not to the contrary. That statute provides in pertinent part:

The board of county commissioners may, at any time when in session, cancel taxes which for any lawful reason should not be collected, and may refund to any tax payer any money to which he may be entitled by reason of a double payment of taxes on any property for the same year, or the double assessment or erroneous assessment of property through error, and may refund to the purchaser of any property erroneously sold when it has been determined by the board of county commissioners that such sale is void on account of any irregularity of the taxing officers or that the property purchased has been erroneously sold or the sale thereof invalid, the amount paid by such purchaser to the county on the sale of any such property, with interest thereon from the date of such payment at the rate of six per cent per annum.

The statute is broadly a refund and cancellation statute authorizing the Board of County Commissioners to cancel taxes and to withdraw monies from the country treasury for refunds. In the absence of such a statute, reimbursements to the purchaser of an invalid tax title is generally not required. See the cases collected at 77 ALR 824, 116 ALR 1408. I do not believe, however, that the statute vests the Board of County Commissioners with quasi-judicial authority to review and overturn tax sales. The statute provides no procedure for review, nor has the statute ever been cited or otherwise employed for that purpose. It is significant that the principle case under this statute, *Shea v. Owyhee County*, 66 Idaho 159 (1945), required a refund after a tax sale was voided by the courts of Idaho, not by the Owyhee County Board of Commissioners. Suit had been filed in Owyhee County by the owner of the real property in question at the date of

the issuance of the tax deed to Shea. It was only after it had been judicially determined that the tax sale was void, that the Board of County Commissioners had before it the application of Shea for a refund and repayment. The statute does provide, however, that the purchaser has the right to repayment by the Board of County Commissioners for the purchase price of the property with interest at the rate of six per cent per annum.

Nothing herein should be interpreted as precluding the Board of County Commissioners from seeking to negotiate a settlement of this matter to the mutual satisfaction of the county, Mr. Barker and the purchasers. My opinion is to the effect that the Board of Commissioners cannot make a determination that the sale is void that is binding upon the purchaser.

OFFICIAL OPINION NO. 73-225

June 25, 1973

TO: Gary M. Haman
Kootenai County Prosecuting Attorney

FROM: W. Anthony Park

You have requested an Attorney General's opinion on the following questions:

1. Does *Idaho Code* § 63-105BB violate Article 7, Section 5 of the *Idaho State Constitution*, in that it creates nonuniform taxation?
2. Does this statute unconstitutionally delegate legislative authority to grant exemptions, there being absolutely no criteria by which such exemptions may be determined?

In answer to your first question, the power to exempt from taxation, as well as the power of taxation, is an essential attribute of sovereignty. In the absence of any express provision of the State Constitution granting tax exemption, or restricting or limiting the subjects with respect to which exemptions may be granted, it is vested in the legislature.

Article 7, Section 5 of the *Idaho Constitution* does not enumerate the types of exemptions that may be made by the legislature. Idaho does not limit the plenary power of the legislature to grant exemptions as it may see fit. *Williams v. Baldrich*, 48 Idaho 618, *John Hancock Mutual Life Insurance Co. vs. Howarth*, 68 Idaho 185, (1948).

In answer to your second question, the statute does not unconstitutionally delegate legislative authority. Under the language of § 63-105BB, *Idaho Code*, an exemption of real and personal property to the amount of \$15,000 of market value may be given only when the following two circumstances exist: (a) the property owner's ability to pay has been affected by unusual circumstances; (2) payment of the tax would constitute an undue hardship on the owner.

It is recognized that a legislature may delegate power to another officer or

agency of government, if it provides a standard or guide for the exercise of the delegated power. The requirement of a standard has been the subject of substantial litigation, and in general courts have required only that the legislature provide a reasonably definite standard. We cannot say that the standard outlined by the statute is so vague or indefinite as to be unconstitutional. Standards such as "public convenience and necessity" and "just and reasonable" have been upheld, and are no less definite than the standard provided by §63-105BB, *Idaho Code*. *Abbott vs. State Tax Commission*, 88 Idaho 200, *Ward v. Scott*, 11 New Jersey, 117, 93 A.2d 395 (1952), *Cooper, State Administrative Law*, Volume 1, page 61.

OFFICIAL OPINION NO. 73-226

June 25, 1973

TO: John Michael Brassey
Deputy Administrator
Uniform Consumer Credit Code

FROM: James G. Reid

In your letter of March 22, 1973, you inquire as to whether or not the following transactions constitute a home solicitation sale under Section 28-32-501, *Idaho Code* so as to invoke the various remedial sections of the UCCC dealing with home solicitation sales: 1. Seller sends a letter to a person at his residence indicating that the person has won a prize and that he should call the seller for further information. The person then calls the seller who tells the resident of the prize that he has won and asks if he can bring it to the buyers home, along with the product he is selling. The buyer agrees to allow the seller to come to his home. (2) The seller advertises his product in a newspaper of general circulation. The resident receives a newspaper at his home, reads the ad, calls the business, and seller comes to buyers home and a credit sale is consummated.

Section 28-32-501, *Idaho Code*, provides the definition for a home solicitation sale as it applies to those sales falling under the scope of the Uniform Consumer Credit Code and reads as follows:

Definition — "Home solicitation sale." — "Home solicitation sale" means a consumer credit sale of goods, other than farm equipment, or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include a sale made pursuant to a preexisting revolving charge account, or a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale. [1971, ch. 299, § 2.501, p.1116.]

The first sentence in the definition of a home solicitation sale generally states

that so long as the sale is consummated at the buyers residence, it would be a home solicitation sale. The second sentence of the definition provides the exceptions as to when a sale does not fall under the category of a home solicitation sale even though the sale was consummated or the purchase made at the buyers place of residence. Those exceptions are when a sale which is made pursuant to an existing revolving charge account, or when a sale is made pursuant to prior negotiations between the parties *at a business establishment or a fixed location where goods or services are offered or exhibited for sale.*

In both of your examples there is no question but that the sale involved was consummated at the buyers residence. Therefore, unless the two exceptions found in the second sentence of the definition of a home solicitation sale would apply to the transactions would necessarily be considered home solicitation sales. In both of your examples, there is no question but that sales were not made pursuant to any revolving charge account. Further, in order to qualify under the second exception found in Section 28-32-501, *Idaho Code*, it is necessary that the sale be made pursuant to prior negotiations between the parties at the business establishment where the goods are offered or exhibited for sale. In neither of your examples is either sale based upon prior negotiations at the seller's place of business but instead are based upon a prior negotiation by virtue of a telephone call and a newspaper ad.

Therefore, it is the opinion of this office that both of the transactions you inquire about do constitute home solicitation sales within the meaning of Section 28-32-501, *Idaho Code*.

OFFICIAL OPINION NO. 73-227

June 25, 1973

TO: Richard L. Cade
Director, Liquor Law Enforcement
Department of Law Enforcement

FROM: Jay F. Bates

On May 8, 1973, you requested a formal opinion as to the application of HB206, the text of which is found in Chapter 144 of the 1973 Session Laws, PP. 281-287, both inclusive. A copy of HB206 is attached as Exhibit "A" and by this reference incorporated herein.

To properly frame an opinion, it is necessary to set forth some applicable statutory laws. Necessarily the statutes, hereinafter cited, refer not only to state statutes but also the recognition of local units of government ordinances and regulations. No attempt is made, in this opinion, to analyze any local units of government ordinances or resolutions but the assumption is that they are *pari materia* except where local units of government do not, through local option, permit the sale of certain classes of alcoholic beverage.

The applicable state statutes are:

"23-105(c). "Wine," meaning any alcoholic beverage obtained by the fermentation of the natural sugar content of fruits (grapes, apples, etc.) or other agricultural products containing sugar (honey, milk, etc.)."

"23-1012. HOURS OF SALE. — It shall be unlawful and a misdemeanor for any person in any place licensed to sell beer or where beer is sold or dispensed to be consumed on the premises, whether conducted for pleasure or profit, to sell or permit to be consumed on the premises beer as the same is defined by law, between the hours of one (1) o'clock A.M. and seven (7) o'clock A.M."

"23-1303(c). "Retail wine license" means a license issued by the commissioner, authorizing a person to sell wine at retail."

"23-1303(f). "Retailer" means a person to whom a retail wine license has been issued."

"23-1306. LICENSES REQUIRED — APPLICATION — ISSUANCE OR REFUSAL. — Before any person shall manufacture, import into this state, possess for resale, or distribute or sell wine within the state of Idaho, he shall apply to the commissioner for a license to so do. . . . A separate retail wine license and wine distributor's license shall be required for each premise. . . ."

"23-1332. SALE BY BY-THE-DRINK LIQUOR LICENSEES. — Retailers holding valid licenses for the retail sale of liquor by the drink pursuant to chapter 9, title 23, Idaho Code, may sell wine for consumption on or off the licensed premises. Persons holding a valid wine by the drink license may sell wine for consumption on the premises only. Retailers who do not possess a valid license for the retail sale of liquor by the drink, or retailers who do not have a valid wine by the drink license, shall not permit consumption of wine on the licensed premises and may sell the wine only in its original unbroken container. Wine sold for consumption on the licensed premises may be sold only during hours that beer can be sold pursuant to the laws of this state. Wine sold by the retailer for consumption off the premises of the retailer may be sold only during the hours that beer may be sold pursuant to the laws of this state."

Regulation and control of traffic in alcoholic beverage, within the state or any political subdivision thereof, is deemed to be within the police power of the state and local units of government. To effect control of such traffic, alcoholic beverages are defined and regular hours and certain days of sale have been established during which alcoholic beverages may be sold.

For ease in understanding the term "alcoholic beverage", subsection (d) of Title 23, Chapter 1, Section 5 defines alcoholic beverage as any liquor containing more than 4% of alcohol by weight. Regulated or permitted sales of beer in this state do not fall within the classification of alcoholic beverage. Beer is therefore regulated by Title 23, Chapter 9, *Idaho Code*. Beer so defined is that having no more than 4% alcohol by weight.

Complications in regulating sales of alcoholic beverages and beer arose

because different hours and days of sale are established for beer as opposed to alcoholic beverages. Likewise, there is no uniformity of regulations by local units of government in the sale of beer.

The 1971 legislature enacted the county option *Kitchen and Table Wine Act*. (Title 23, Chapter 13, *Idaho Code*.) Wine is defined in the Act as an alcoholic beverage containing not more than 14% alcohol by weight. The sale of kitchen and table wine was left to county option and there are counties in this state that have not opted for the sale of kitchen or table wine.

Prior to the enactment of the Act, it was customary that the holder of a retail liquor by the drink license could sell wine by the drink for consumption on the premises notwithstanding what percentage of alcohol by weight was involved. In practical terms, however, this meant that fortified wine was sold by the drink by the retail liquor licensee.

The Act provided among other things that in those counties opting, a retail wine license is necessary to authorize a person or retailer to sell wine at retail for consumption on or off licensed premises. It also defines a "retailer" as one who holds a retail wine license. Section 32 of the Act (original and as amended) provides "*retailers* holding valid licenses for the retail sale of liquor by the drink pursuant to Chapter 9, Title 23, *Idaho Code*, may sell wine for consumption on or off the licensed premises". [Emphasis mine.] The question is, by the use of the term "retailers" did the legislature intend that a retailer possess a retail liquor by the drink license, a retail wine by the drink license, and a retail wine license? Confusion may arise because the legislature provided the same hours of sale for kitchen and table wine as for beer. Consequently, if a retail liquor by the drink licensee, not holding a retail wine by the drink license or retail wine license, could sell kitchen and table wine during the permissible hours of beer sale, Sunday sales would be allowable on such premises and doubt would be cast upon the right of a county to opt for or against adoption of the wine act.

It is a canon of legislative construction to find against an implied repeal of existing legislation. I am constrained to advise that the legislature did not intend to repeal existing legislation by the enactment of H.B. 206. Holders of a retail liquor by the drink license may continue to sell wine for consumption on the premises notwithstanding the alcohol by weight in such beverage. Such sales can only occur during those hours and days permitted for alcoholic beverages per se. In other words, the holder of a retail liquor by the drink license *may not* sell kitchen and table wine on Sunday nor on proscribed days and hours.

If a holder of a retail liquor by the drink license intends to sell wine for *consumption off the premises* during permissible days and hours, *he must also possess a retail wine license*. On the other hand, the *holder of a retail wine license not possessing a retail liquor by the drink license, may only sell kitchen and table wine for consumption off the premises* during permissible hours of beer sale.

One other area needs treatment, i.e., retail wine by the drink other than the sale of fortified wines. There are wine shops, not retail liquor by the drink shops,

that sell wine by the drink for consumption on the premises. To make any such sales there must exist a valid wine by the drink license for that shop and such sales may occur *only* in those counties that have opted the Act.

OFFICIAL OPINION NO. 73-228

June 25, 1973

TO: Dr. Lee Stokes
Director of Air & Water Programs
Environmental Services

FROM: Matthew J. Mullaney, Jr.

You have requested our opinion of the mandatory or permissive character of the legislative charge in I.C. § 39-3603(C):

In allocating state grants under this act, the Idaho board of health (now the Board of Environmental and Community Services) shall give consideration to the:

1. Public benefits to be derived by the construction;
2. Ultimate cost of constructing and maintaining the works;
3. Public interest and public necessity for the works;
4. Adequacy of the provisions made or proposed by the municipality for assuring proper and efficient operation and maintenance of the treatment works after the completion of construction thereof;
5. The applicant's readiness to start construction, including financing and planning; and
6. The applicant's financial need.

You are concerned whether the applicant's readiness to start construction and its financial need are permissible criteria under new guidelines issued by the Environmental Protection Agency.

Words of a statute must be given their usual, plain and ordinary meaning and words in common use should be given the same meaning in a statute as they have among the great mass of people who are expected to read, uphold and obey the statute. *Nagel v. Hammond*, 90 Idaho 96.

The word "shall" is:

... used to express a command or exhortation ... used in laws, regulations, or directives to express what is mandatory ... *Webster's Seventh New Collegiate Dictionary*.

... as used in statutes ... the word is generally imperative or mandatory. *Black's Law Dictionary, Revised Fourth Edition*.

The use of mandatory language in the statute, i.e., "shall give consideration", expresses a legislative intent that the Board give consideration to at least the six

criteria specifically stated in the statute. The statute in no way inhibits the Board in assigning differing values to each criteria. However, an attempt to dilute consideration of any of the criteria (such as assigning a criteria only 1 point on a 1000 point scale) would fail as frustrating the legislative intent. The Board cannot do indirectly what it cannot do directly.

Therefore, the Board is bound by I.C. § 39-3603(C) to give reasonable consideration to each and all the criteria established in that statute.

OFFICIAL OPINION NO. 73-229

June 26, 1973

TO: Robert Hay
Commissioner
Department of Insurance

FROM: James G. Reid

W. W. Roberts, Chief Deputy Commissioner of Insurance, requested an opinion as to whether mass merchandising of Idaho was in conflict with *Idaho Code*, Section 41-1317(1). This Code section states:

"No insurer, whether an authorized insurer or an unauthorized insurer, shall make available through any rating plan or form, property, casualty or surety insurance to any firm, corporation, or association of individuals, any preferred rate or premium based upon any fictitious grouping of such firm, corporation, or individuals. For the purposes of this section a 'fictitious' group is one in which members of such group do not have a common insurable interest as to the subject of the insurance and the risk or risks insured or to be insured."

This statute would permit insurance companies to make available property, casualty or surety insurance at a patterned rate based on the grouping of risks by way of membership, nonmembership, license, employment agreement or any other method or means if as a result of such grouping, the individual risks within the group develop patterned characteristics over similar risks written on an individual basis for persons not in the group and to the public generally. If the grouping does not accomplish this result, it would be a fictitious grouping and prohibited under the statutes.

Insurance companies to make available rating plans or forms which offer reduced premiums and more desirable insurance coverage to those who qualify on their groupings would have the burden of demonstrating that the requirements to qualify for the favored treatment will reduce the hazards or costs incurred in writing and servicing the risk as against similar risks that do not qualify under the group requirements.

For example, if an insurer offered to write casualty insurance policies for employees of a corporation, at a reduction over what would be charged to the

public generally for similar policies simply because they were employees of that specific corporation; this would, under Section 41-1317(1), constitute a fictitious group. However, if this discount was conditional on the corporation agreeing to collect the premium from their employees, this might reduce the cost to the insurer of the underwriting group sufficiently to justify the preferred rate. Mass merchandising, therefore, would be legal if there existed a reasonable common insurable interest which would differentiate lower rates charged to the individuals under a given plan from rates charged other individuals not under the plan. There must be proper economic justification given for lower rates charged when mass merchandising is used.

Furthermore, Section 41-1317(1), *Idaho Code*, prohibits a distinction in premium or preference rate based upon a fictitious group. This statutory prohibition would therefore seem to be inoperative when the premium distinction is based upon another factor; e.g., risk or cost. For example, if the foundation or the principle component for premium differential is the reduced cost, rather than the fictitious group, then mass merchandising of property, casualty or surety insurance would be legal, as such a distinction is not prohibited.

Therefore, in order for mass merchandising to be illegal under Section 41-1317(1) it has to be based on a fictitious group, and that group must not have a common insurable interest that would lower the rates.

OFFICIAL OPINION NO. 73-230

June 27, 1973

TO: Pete T. Cenarrusa
Secretary of State

FROM: W. Anthony Park

I have now examined the proposed form of recall petitions which your office has prepared as a suggested and preapproved form for those who wish to initiate recalls against public officials.

In my opinion, the proposed form is in substantial compliance with § 34-1703, *Idaho Code*, and that anyone who used such a form in any recall effort would also be in compliance as to the form of his petition.

OFFICIAL OPINION NO. 73-231

June 28, 1973

TO: Dr. James A. Bax
Director
Department of Environmental & Community Services

FROM: Matthew J. Mullaney, Jr.

The recent Idaho Supreme Court opinion, *Williams v. State*, 95 Idaho 5, gives rise to a need to review the procedures by which the Department of Environmental and Community Services makes its rules and regulations available to the public.

The Administrative Procedure Act, as interpreted in *Williams*, requires that state agencies do the following:

- (1) Compile, index and publish all agency rules. 67-5205(a);
- (2) File a certified copy of each agency rule in the agency's central office. 67-5204(a);
- (3) Maintain a permanent register of agency rules which shall be open to public inspection. 67-5204(a);
- (4) Furnish all state, district and county law libraries with complete sets of the agencies rules and regulations. *Williams v. State, supra*;
- (5) Adopt rules of practice and procedure to include both formal and informal procedures. 67-5202(a)(1);

In regard to other agency actions, e.g., preliminary and final orders, decisions and opinions, the A.P.A. requires that the agency:

- (6) Make final orders, decisions and opinions available for public inspection. 67-5202(a)(3);
- (7) "attach to all preliminary orders instructions concerning the available administrative reviews of these orders." *Williams, supra* at 207;

Compliance schedules and orders may be published somewhat differently from usual rules and regulations. Actual knowledge of a rule or order precludes a party from attacking the effectiveness of the rule or order because of failure to publish. Since each industry or operation will have actual notice of its compliance schedule and order by mail, and because of the hybrid nature of a compliance order, we do not believe it is necessary to do (4) above. You may do so, nonetheless, if you desire. We do recommend you do (1), (2), (3) and (6) above with the *Board approved* compliance orders and schedules. You should also mail a copy of the *Board approved* compliance order and schedule to the industry or operation affected, by certified mail, return receipt requested.

OFFICIAL OPINION NO. 73-232

June 29, 1973

TO: Glen A. Coughlan
 Legal Counsel
 West Mountain Sewer and Water District

FROM: Matthew J. Mullaney, Jr.

The Attorney General has given me for response your letter of June 7, 1973, wherein you solicit our views of the election laws to establish a sewer and water district under Title 42, Chapter 32 of the *Idaho Code*.

A "qualified elector" within a proposed water and sewer district is defined in Section 42-3202, *Idaho Code*:

A 'qualified elector' of a district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district. * * * No registration shall be required in any election held pursuant to this act, but each voter shall be required to execute an oath of election attesting his qualification.

Section 42-3207, *Idaho Code*, discussing qualifications to vote in the election to organize the district, provides in pertinent part:

Such election shall be held and conducted as nearly as may be in the same manner as general elections in this state. There shall be no special registration for such election but for the purpose of determining qualifications of electors, the judges shall be permitted to use the last official registry lists of electors residing in the district and each elector before being permitted to vote shall take an oath that he is a taxpayer and bona fide resident of the proposed district.

The statutes are clear on their face. I would conclude that no person may participate in a water and sewer district election unless he affirmed or attested that he is a qualified elector of the state of Idaho; that he has been a bona fide resident of the district for more than thirty days prior to the day of the election; and that he is a taxpayer within the district.

The obvious practical problem is that the land within the proposed district on the west side of Cascade Lake is used as recreational property. A substantial majority of the property owners are residents of other areas outside of the proposed district. Conceding that these persons would be very interested in the outcome of the election, one cannot be a bona fide resident of both Ada County and Valley County. My construction of the statute would be that those who are other than permanent residents of the proposed district are not qualified to vote in the election.

Your second question asks, in essence, whether as few as four or five qualified electors may cast a deciding vote which affects the property of many

non-qualified property owners in the district. A simple majority of total votes cast will determine the outcome of an election to establish a sewer and water district. I find no quorum or "minimum turnout" provided in the *Idaho Code*.

The petition of organization to the court must contain 10% of the taxpayers of the district without regard to the taxpayers qualification to vote, *Idaho Code*, § 42-3204. This permits taxpayers of the county having recreational property there to have some direct or indirect influence upon organization of the district.

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