FORTY-FOURTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

of

IDAHO

For the period beginning July 1, 1976
and ending June 30, 1978

WAYNE L. KIDWELL
Attorney General

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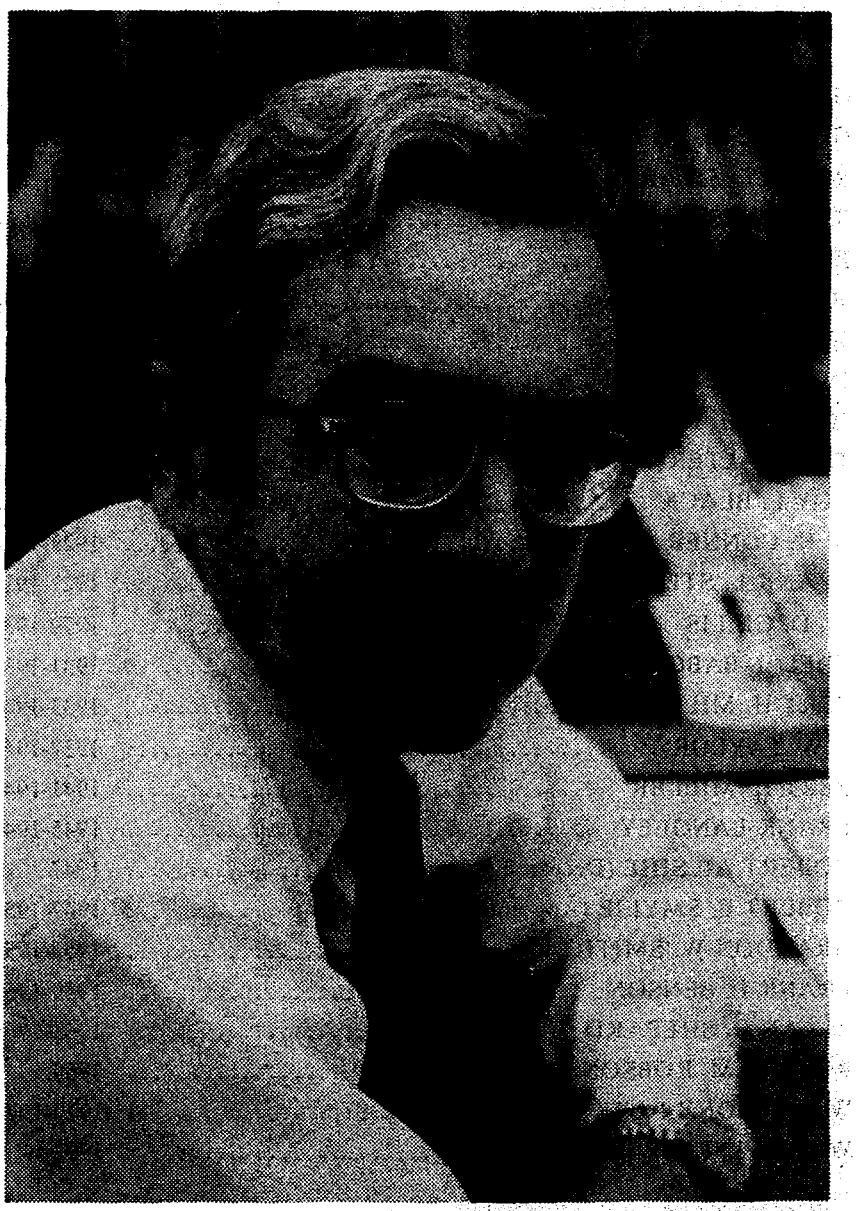

Wayne L. Kidwell
Attorney General

PREFACE

The Attorney General of Idaho is required by law to report the business and condition of his office biennially to the Governor. This volume contains the Biennial Report from July 1, 1976 to June 30, 1978 as well as all of the official opinions issued by the Attorney General during the period of January, 1977 thru December 1977.

In Idaho, the Office of Attorney General is created by Article IV, Section 1, *Idaho Constitution*, in the Executive Department of State government. The term of this office is elective, for a period of four (4) years, coinciding with the term of the Governor.

The Attorney General serves as the legal counsel for the State of Idaho, its departments, and agencies. He is charged with representing the State in every lawsuit in which the State is a party or has an interest. The duties of the Attorney General are enumerated at Section 67-1401, *Idaho Code*. Authority for issuing official opinions is found at Section 67-1401(6), *Idaho Code*. This authority reads as follows:

> To give his opinion in writing, without fee, to the legislature or either house thereof, and to the governor, secretary of state, treasurer, auditor, and the trustees or commissioners of state institutions, when required, upon any question of law relating to their respective offices. It shall be his duty to keep a record of all written opinions rendered by his office and such opinions shall be compiled annually and made available for public inspection. All costs incurred in the preparation of said opinions shall be borne by the office of the attorney general. A copy of the opinions shall be furnished to the Supreme Court and to the state librarian.

In addition to those officials entitled to official opinions, as noted above, there are those officers — state and local — who seek counsel and guidance in the proper interpretation and administration of Idaho laws. Although cities and counties retain their own counsel, it has nevertheless been the policy of this office to insure that, whenever possible, such requests for information are handled by members of the staff through unofficial advisory letters which present the personal opinion of the staff member researching the particular question.

There are also many thousands of inquiries received regularly from the general public and answered by letter or telephone on an informal basis. However, it must be submitted that, except for consumer protection advice and referrals, it is not within the province of the Office of the Attorney General to give counsel or advice to private citizens relative to their personal affairs, and such persons are routinely advised to seek private counsel of their own choice.

In Idaho, the Legislature has granted the Attorney General supportive criminal law enforcement powers. Section 67-1401(5), *Idaho Code*, requires the Attorney General to exercise supervisory powers over prosecuting attorneys in all matters pertaining to the duties of their offices. In addition to this general authority, the Attorney General is authorized or required by several specific

statutes to prosecute criminal offenders. The Attorney General also represents the State in all criminal appeals to the Supreme Court.

The material contained in this volume represents many hours of conscientious work by attorney deputies and assistants, investigators, secretaries, and other staff members. Their loyalty and devotion to the State of Idaho and to this office are to be greatly commended.

WAYNE L. KIDWELL
Attorney General
State of Idaho

CONSUMER PROTECTION/ BUSINESS REGULATION DIVISION

Consumer Protection cases have increased significantly in recent years. In fiscal 1977, 1238 files were opened, and 1090 files were closed. In fiscal 1978, 1335 files were opened and 1098 files were closed. Files are opened on the basis of written complaints against a seller of goods or services. Complaints against business establishments have fallen into the following categories:

Agricultural Products	1%
Clothing	2%
Construction and Home Improvements	9%
Credit	3%
Education	1%
Food Products	3%
Health Services and Products	2%
Home Furnishings	8%
Jewelry	1%
Mail Order Sales	6%
Miscellaneous	13%
Mobile Homes	6%
Motor Vehicles	15%
Oil and Gas	1%
Public Accommodations and Restaurants	2%
Publications	5%
Real Estate and Rentals	7%
Recreation	2%
Referred to Other Agencies	8%
Retail Store Sales	4%
Travel	1%

Administrative action on the above complaints included office counseling, telephone and written inquiries, field investigations, and office mediation sessions with the firms involved. The Division is also more extensively utilizing statutory discovery processes, such as Investigative Demand Orders and investigative hearings. While most cases are resolved on an informal basis, the Division has relied more frequently upon Assurances of Voluntary Compliance, which are court-approved consent orders. Assurances of Voluntary Compliance have been filed at a rate of approximately one per month. Lawsuits have been filed approximately every other month in major matters which could not be resolved with Assurances of Voluntary Compliance. In addition, some cases have been referred to local prosecutors for criminal prosecution, and the Division has personally participated in some criminal prosecutions.

The Attorney General's Office installed an in-WATS line, which allows consumers throughout the State to dial the central office toll free. This has had a considerable impact on increasing the proportion of complaints that come from areas other than the Treasure Valley. Additionally, the Division has opened a branch office in Moscow, which is operated in cooperation with the University of Idaho School of Law. The office is staffed by one paid part-time law student, and by several volunteer law students.

In addition to consumer actions, the Division has been extensively involved in providing legal services to some of the departments of State government and some of the self-governing agencies that are involved in business regulation. The Division has Assistant Attorneys General assigned to the Department of Finance, Department of Insurance, and the Department of Labor and Industrial Services. Additionally, the Division confers on a regular basis with the Department of Agriculture, the Bureau of Occupational Licenses, the Endowment Fund Investment Board, and the Corporation Division, Secretary of State's Office. The Division is actively involved in providing legal representation to many of the self-governing agencies, such as the Board of Architectural Examiners, the Board of Chiropractic Examiners, the Board of Cosmetology, the Dairy Products Commission, the Hearing Aid Dealers and Fitters Board, the Board of Medicine, the Board of Morticians, the Board of Pharmacy, the Potato Commission, the Wheat Commission, the Real Estate Commission, and the Board of Veterinary Medicine. Legal representation for the above agencies has included, in addition to general legal advice, the writing of legal opinions and memoranda, presence at many board hearings, and various license revocation hearings or license application appeals.

Significant business regulation lawsuits have included a successful injunctive action filed against the Crane Company to require compliance with the Idaho corporate takeover law in connection with a 10 percent purchase of the stock of Morrison-Knudson Company; and the defense of an action filed against the State of Idaho in U.S. District Court in Dallas, Texas, by the Great Western United Corporation, which had initiated a corporate take-over of the Sunshine Mining Corporation. The district court ruled the Idaho corporate take-over statute unconstitutional, finding that it was unduly restrictive on interstate commerce and preempted by the federal Williams Act. The case is on appeal in the Fifth Circuit. In addition, the Division is defending an antitrust action brought by Superturf, Inc., against Boise State University in connection with the purchase of artificial turf for Bronco Stadium.

CRIMINAL DIVISION

The Criminal Division, since July, 1976, has been faced with a mounting case load, both in the areas of criminal appeals and prosecutor assistance cases (those in which trial assistance is provided to local prosecuting attorneys). In addition, the Division has been active in major special litigation projects.

SPECIAL LITIGATION:

1. *Hofmeister v. Frost:* A federal civil rights action for damages was filed against a special prosecuting attorney early in 1976. It was alleged that the special prosecutor, and others, had deprived the plaintiff of certain constitutional rights. Several complex motions have been briefed and argued and a lengthy deposition of the plaintiff has been taken.

2. *Idaho Assn. of Naturopathic Physicians et al v. David Matthews et al.*: A group of "naturopaths" filed suit in federal courts across the country against thirty states, including Idaho, and several counties in each, seeking a declaratory judgment establishing a right to practice in certain areas of medicine. The cases have been consolidated in the United States District Court for Maryland for pretrial motions and discovery. The action is ongoing.

3. *Obscenity cases:* A nuisance action was filed against two adult bookstores in Garden City resulting in a declaration that a number of items sold there were obscene under current statutory standards. The case is on appeal.

CRIMINAL APPEALS:

More than 144 criminal appeals have been processed or are in process during the reporting period. In addition, almost as many criminal appeals were disposed of other than on the merits.

Several major legal questions have been involved in these criminal appeals.

State v. Creech and *State v. Lindquist* brought into question the constitutionality of the death penalty in Idaho. The State successfully argued that although the mandatory statute was unconstitutional the deficiency could be corrected by engrafting the procedures required by the Constitution onto the sentencing process. Rehearings have been granted in these cases and additional litigation may be expected before the question is finally resolved.

State v. Maxfield, an appeal by the State, established that naturopaths do not have the right to practice medicine without being licensed to do so.

The related case of *State v. Kellogg* established the constitutionality of the statute prohibiting unlicensed persons from dispensing prescription drugs.

A series of significant cases involving juvenile justice has been argued. In *State v. Wolf & Brooks*, the Supreme Court heard arguments on the validity of juvenile court waiver of jurisdiction over two juveniles charged with first degree murder. At issue is the question of whether juveniles under age 16 may be tried as adults.

In *State v. Harwood*, the Court held that juvenile offenders held to answer as adults must appeal before trial in order to question the propriety of waiver of juvenile court jurisdiction.

State v. Stockwell established that a prosecuting attorney may refile a felony criminal charge in order to correct an erroneous determination of probable cause. Stockwell was charged with murder in the second

degree but was held for trial on the lesser charge of manslaughter after a magistrate concluded at preliminary hearing that the evidence was not sufficient to sustain the murder charge. The prosecutor then dismissed the manslaughter charge and refiled the murder charge.

PROSECUTOR ASSISTANCE:

The Criminal Division has tried a number of criminal cases or assisted at trial at the request of local prosecutors. The cases include:

State v. Weirich, Madison County, pharmacy law violations charged.

State v. Hoye, Kootenai County, a charge of illegally dispensing a prescription drug.

State v. Harrigfeld, Fremont County, manufacturing controlled substances.

State v. Goff, Payette County, forcible entry.

State v. Banta, Bonneville County, involuntary manslaughter.

State v. Smith, Payette County, lewd conduct with minor.

State v. McGarr, Washington County, selling beer to minors.

State v. Briggs, Ada County, issuing insufficient funds check.

State v. Madrid, Payette County, obtaining welfare funds under false pretenses.

State v. Kevin, Elmore County, DWI.

State v. Ruzika, Gem County, felony DWI.

State v. Carlock, Gem County, no account check.

State v. Spies, Elmore County, assault with deadly weapon.

Other major matters are under investigation which may result in additional criminal prosecutions.

OTHER MATTERS:

The Division, in 1977, prepared new death penalty legislation which was enacted by the legislature to make Idaho death sentencing law conform with federal constitutional requirements.

In 1978, the penal portions of a new pharmacy statute were drafted and enacted.

In addition, various members of the Division have regularly served as consultants on legislative matters relating to criminal law.

In January, 1977, the Criminal Division conducted a well-attended training seminar for prosecuting attorneys.

Members of the Division have answered hundreds of telephoned and written inquiries from prosecutors and other officials seeking advice on complex or unusual legal questions.

EDUCATION

The Office of the Attorney General provides legal counsel to the State Board of Education and Board of Regents of the University of Idaho and the following divisions thereof:

Department of Education
Division of Vocational Education
Division of Vocational Rehabilitation
State Library
State Historical Society
Professional Standards Commission
Eastern Idaho Vocational Technical School

The legal services provided by this office to the University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College and the State School for the Deaf and Blind at Gooding, depends on the nature of the work to be done. The University of Idaho and Idaho State University have either staff counsel or retained counsel. There has been a marked increase in legal services provided to Boise State University in the last 18 months.

The Office of the Attorney General also provides advice, on request, to North Idaho College and College of Southern Idaho, as well as the various public school districts. Numerous litigation and administrative hearings are handled through this section for the above entities on a continuing basi throughout the year.

NATURAL RESOURCES DIVISION

In the last two years the Natural Resources Division has participated as a party or as amicus in a large amount of extremely significant Supreme Court litigation. The matters concerned water rights, citizens rights under the Carey Act, the authority of the federal government to appropriate water to federal reservations, the authority of the State to regulate mining activities on federally owned lands, Idaho's rights to a proportionate share in the anadromous fisheries of the Columbia River Basin, Indian law, and several other areas pertinent to

this Division. In the state courts attorneys from this Division have actively enforced State statutes and regulations having to do with air and water pollution, land reclamation, stream channel alteration, the Lake Protection Act, water resource regulations, and several other areas to which this report does not give time nor space adequate for coverage. It should also be noted that the Natural Resources Division provides administrative support to its respective agencies as well as to the Board of Land Commissioners. In doing so many man-hours are spent consulting with the counseling representatives from the various administrative agencies under this Department's supervision. Attached is a partial case list of the legal matters with which this department has been concerned over the past two years.

During the past two years the Natural Resources Division has effectively consolidated its supervisory role over the attorneys in the Departments of Fish & Game and Water Resources and the Division of Environment for the Department of Health & Welfare, as well as pursuing its continuing responsibilities to the Department of Lands, Department of Parks & Recreation and the State Board of Land Commissioners. The Division has been involved in several cases of great importance to the State of Idaho:

1. Harriman Ranch gift: The Division, in cooperation with the Office of the Governor completed the dissolution of the Island Park Land & Cattle Co. in order to finally effectuate the gift of the Harriman Ranch property to the State of Idaho.

2. *Idaho v. Oregon & Washington* (Steelhead case): This case was pursued through unproductive negotiation to culminate in a hearing in April, 1978, before the Special Master appointed by the United States Supreme Court at which the defendant states presented evidence in support of their affirmative defenses. It is expected that the Special Master will make his decision by early Fall, and we will then know whether Idaho will be permitted to further pursue this litigation.

3. *Idaho v. Andrus et al* (Heyburn Park): At the direction of the Land Board a Complaint for declaratory judgment was filed to litigate the issue of the State's leasing practices in Heyburn Park in northern Idaho. After denying a motion for dismissal by the United States the federal district court in Boise ordered that the leaseholders join with the Attorney General's Office of Idaho and the Indians join with the United States in order to consolidate the issues for the litigation. Presently this office is preparing a motion and briefs to support a summary judgment in Idaho's favor.

4. *Idaho v. Click*: The Division has continued to pursue the interests of the State in requiring the reclamation of the land involved in the case of *Idaho v. Click*. Further pleadings have been filed to enjoin the defendants from further activities on the land and to require that they reclaim the land or pay damages to the State for their activities.

5. *Soderman v. Kackley*: The Assistant Attorney General for the Department of Water Resources pursued to a successful conclusion the appeal in this litigation. The Supreme Court in the Spring of 1978 returned a decision which substantially affirmed the Department's position and limited the authority of the United States to make claims on State water running across federal lands. It is widely accepted that this decision by a state Supreme Court could have wide ranging effects on federal reservations within appropriation doctrine stage.

6. The Division of Environment of the Department of Health & Welfare was engaged in the case of *United States v. Twin Falls*, in which the issue had to do with the discharge of effluent into the Snake River in excess of federal standards. Idaho has maintained an active role in litigation of this matter in order to protect its interests and to achieve a settlement which is acceptable to this State as well as the EPA.

7. The Division of Environment has also been involved in the case of the *Panhandle Health Dist. (I) v. Bd. of Health & Welfare*, a litigation which brings into question the comparative roles of the health districts and the Department, and the responsibility of the Department in reviewing regulatory decisions by the health districts. The matter is presently being negotiated and time has been extended in which to file an answer in order to accommodate the administrative action which is currently ongoing.

These are only a few of the multitude of cases which have been handled through this Division on a continuing basis throughout the last two years. There is an ever increasing stream of litigation in the environmental and water resources area along with the other departments represented by this Division.

EXTRADITIONS

Due to the increased mobility of people, there continues to be a significant incease in the number of extraditions processed through the Attorney General's Office, where Idaho is either the demanding or asylum jurisdiction. Although no running count is kept on numbers, this office now processes an average of six extraditions per week, either incoming or outgoing. Most of these matters of interstate renditions are routine. Approximately ten percent raise issues of law which require research. With few exceptions, the process runs smoothly and efficiently. Prosecuting attorneys contact this office on a continuing basis for assistance in extradition problems.

HEALTH AND WELFARE DIVISION

The Health and Welfare Division provides legal services to the Department of Health and Welfare in all areas other than environmental questions. This

division includes the seven regional offices located throughout the State in Coeur d'Alene, Lewiston, Caldwell, Boise, Twin Falls, Pocatello and Idaho Falls.

This division represents the Department in all administrative hearings, court proceedings and appeals, in all courts of this State and in all courts of the United States, in the area of medical and financial assistance under the welfare programs. In the areas of child protection, youth rehabilitation, terminations, and criminal fraud, the division has expanded its role to give greater assistance to the county prosecutors. Assistance in these areas now includes original prosecutions, prosecutor assistance and training seminars for Department employees and prosecutors. Extensive legal services are provided in the areas of mental health, mental retardation, Medicaid, employment law, child support enforcement, adoptions, guardianships, civil recoveries, foster care, liens, probates and eligibility.

The division provides legal counsel to the Director and Administrators of the Department of Health and Welfare. Extensive activity is devoted to the Administrative Procedure Act in promulgating rules and regulations for the Department.

Other legal representation includes State Hospital South, State Hospital North, Idaho State School and Hospital, and the Youth Services Center.

In addition to administrative hearings, the following cases have been instituted or decided during the reporting period:

Litvin v. State of Idaho, et al. — recovery of contracted salary for educational leave with pay.

Doe v. Klein, et al. — challenging the validity of legislation restricting medical assistance for elective abortions. U.S. Supreme Court reversed and remanded U.S. District Court decision.

Truscan v. Califano, et al. — challenging federal and state provider reimbursement regulations.

In Re Canyon Care Center — facility's license revocation.

Moon v. Klein, et al. — challenging denial of financial assistance.

Idaho Association of Naturopathic Physicians v. U.S. Food & Drug Administration, et al. — determining the scope of Medicaid.

Hofmeister v. Klein, et al. — amendment of death certificate.

The following cases challenge provider reimbursement regulations and audit exceptions taken by the Department of Health and Welfare:

Valley Vista Convalescent Center v. Department of Health and Welfare

New Horizons Group Home v. Department of Health and Welfare

Northwest Health Care, Inc. v. Department of Health and Welfare

TAXATION

Idaho Code, § 63-3066 directs the Attorney General to act as legal counsel and advisor to the State Tax Commission. There are presently assigned to the State Tax Commission as counsel one Deputy and two Assistant Attorneys General. These attorneys have the primary responsibility of acting as counsel for the Idaho State Tax Commission and for representing the interests of that Commission before the courts. The office includes a para-legal tax auditor who is on the Tax Commission's payroll and secretarial support also provided by the Tax Commission. In addition to the duties listed above, the attorneys advise and assist the Tax Commission in the process of resolving administrative tax appeals filed with the Tax Commission.

In matters involving litigation, the office appeared on behalf of the State Tax Commission before the Idaho Supreme Court in several cases. Important cases include:

> *Magnusen v. State Tax Commission*, 97 Idaho 917, was argued and decided during the period. The case was decided favorably to the State Tax Commission, the Court ruling that an assessment of Idaho income taxes could be made within one year following the report of final adjustment by the Internal Revenue Service even though the three year statute of limitations normally applicable had otherwise expired.
>
> *ASARCO v. State Tax Commission* is a major case involving controversial questions about the apportionment of income for income tax purposes.

During the period three separate cases involving the Idaho Transfer and Inheritance Tax Act were submitted to the Court and decided.

In *West v. State Tax Commission* the Supreme Court declared that statutorily prescribed actuarial tables of life expectancy used for determining the value of life estates were unconstitutional upon the ground that the tables no longer reflected current experience and, therefore, denied due process of law.

In *Stein v. State Tax Commission* the Supreme Court ruled that the market value of so-called "flower bonds" used for the payment of federal estate tax liabilities was the open market value on the date of death and not the greater value at which the bond could be redeemed with the federal government for the purposes of paying the inheritance tax.

In addition to the cases listed above, the office has petitioned for and was granted the opportunity to appear as amicus curiae in the case of *First American*

Title Co. v. Ada County Assessor. The Supreme Court's ruling in the case was adverse to the position of the State Tax Commission. The Supreme Court exempted title insurance companies from personal property taxation on their title plants even though the company may be only an agent and not itself an insurance underwriter paying the premium tax.

During the period of this report, the office has had three cases in the United States Court of Appeal for the Ninth Circuit. *Brooks & Graham v. Nez Perce County; Harmon v. Ingles; Multistate Tax Commission & Eugene F. Corrigan v. Sperry Rand Corp.*

In addition to the foregoing matters, the office during the period of this report has represented the State Tax Commission in more than fifty different lawsuits in the various district courts through the state of Idaho. Further, at any given time ten to fifteen matters were pending before the Idaho Board of Tax Appeals.

In administrative proceedings before the State Tax Commission, attorneys participated in more than one hundred informal conferences with taxpayers and several formal hearings before the Tax Commission in addition to a number of miscellaneous matters including hearings on regulations and orders to show cause before the Commission.

Finally, attorneys also fill the duties of house counsel for the State Tax Commission, advising the Commission and its staff on a variety of matters such as the leasing of office space and employment practices.

PUBLIC UTILITIES COMMISSION

Pursuant to § 21-204, *Idaho Code*, the Attorney General of the State of Idaho, by and through those Deputy and Assistant Attorneys General assigned to the Idaho Public Utilities Commission, represents and appears for the Commission and the people of the State of Idaho in actions before the Commission and in other cases relevant to Idaho utilities.

In addition, the Commission's legal staff provides multiple functions with the gamut of Commission operations and responsibility. These include providing the Commissioners and Commission staff with legal opinions and interpretations of statutory authority and duty; the presentation of the staff's direct case in motor carrier and utility cases and the preparation of cross-examination on applicant's and intervenor's direct cases before the Commission; recommendations regarding the impact of Federal Regulatory Commission cases which involve or affect utilities under the Commission's jurisdiction; the preparation of proposed orders for the Commission's consideration in individual cases; the formulation of provisions for Commission orders when requested; and the responsibility of researching, briefing, and arguing cases when Commission orders are appealed to the state or federal courts.

The Idaho Public Utilities Commission legal staff has appeared and actively participated in 180 formal utility cases and over 500 formal transportation cases during this two year period. These cases involve rates, authority to provide service, and complaint actions. In addition, the legal staff has been involved in 22 Supreme Court appeals over the last two years.

The rapidity of rate filings, their relative size and magnitude, the requirements of fair and reasonable rate design, the considerations involved in applications for new generation capacity, the interest of promoting conservation, the need for dependable power supply, and the ability of the utilities to meet their financial and service obligations have created complex regulatory questions and cases for the entire Commission and the legal staff. Almost every major Commission rate decision of the last three years has been appealed or is on appeal presently to the Idaho Supreme Court by either the affected utility or its customers.

OTHER DEPARTMENTS, ENTITIES & SELF GOVERNING AGENCIES

The Office of Attorney General provides legal services for the Department of Administration, the Department of Correction, the Department of Transportation, the Idaho Human Rights Commission, and the Idaho Personnel Commission on a continuing basis. These services are provided by attorneys housed both in the central office and in the agencies. Upon request, this office represents any self-governing agencies desiring to use our services.

This office also provides supportive legal services to the cities and counties upon request.

DISTRICT COURT — PENDING

4818 Pocatello School District No. 25, et al. vs. D.F. Engelking

4855 Eldon L. Hutchins and Reynold L. Allgood vs. Gordon C. Trombley, et al.

4856 Eldon L. Hutchins and Reynold L. Allgood vs. Gordon C. Trombley, et al.

4968 Tharon Rawson, individually and as guardian ad litem for her minor children, Seth Rawson, Cindy Rawson, heirs of John R. Rawson

4990 State of Idaho vs. American Campgrounds, a Washington corporation

5089 State of Idaho, ex rel State Board of Land Commissioners, and Gordon C. Trombley, Commissioner of Public Lands vs. Frank N. Rawlings

5093 Laura Dunbar, as guardian ad litem for Rickina Rossiter and Glen Raymond Rossiter, Jr., her minor children heirs of Glen Raymond Rossiter, deceased vs. United Steelworkers of America, an unincorporated association and the State of Idaho

5094 Bernice Johnson, individually and as guardian ad litem for Michael Wayne Johnson, Ruth Ellen Johnson and John Russell Johnson, her minor children and Christine Johnson and Donald Johnson, heirs of Wayne Lyle Johnson, deceased vs. United Steelworkers of America

5121 Master Distributors, Inc., an Idaho corporation vs. Ronald M. Treat and W. Anthony Park

5207 Glenn I. Wiley, et al. vs. State Board of Land Commissioners and Idaho Department of Public Lands

5207 Crowther Brothers Milling Co., Ltd., et al. vs. Mt. Nebo Goods, Inc., State of Idaho, et al.

5314 State of Idaho vs. Lory Pontone, aka Jason Williams and Robert Loya

5388 Jones vs. Board of Medicine (remanded from Supreme Court)

5390 Gold Fork Concrete Products vs. A & R Construction, State of Idaho

5414 State of Idaho vs. Ornamental Industries

5460 State of Idaho vs. Golden Villa Spas, Inc.

5469 State of Idaho vs. Cecil Bilboa

5472 Carl C. Bowles vs. D. Erickson, et al.

100 State of Idaho vs. Don J. and Joy E. Averitt

101 State of Idaho vs. Snake River Estates, Inc., et al.

103 Richard Fermin Gavica, et al. vs. Harold E. Hanson, et al.

111 Sierra Life Insurance Company, Inc. vs. Air Idaho, Inc., United States of America, State of Idaho, Twin Falls Industrial Development Corp.

114 State of Idaho vs. Anthony Jolley

115 V-1 Oil Company, et al. vs. State Tax Commission, et al.

118 Kenneth Brown, et al., Plaintiffs vs. Lakeview Association, et al., Defendants, and Glenn I. Wiley, et al., Plaintiffs vs. State Board of Land Commissioners and Idaho Department of Public Lands

122 State of Idaho vs. Click

123 State of Idaho vs. Boise Project Board of Control

125 State of Idaho vs. Kenneth L. Clark

126 State of Idaho vs. Leon E. and Norma G. Taylor

134 State of Idaho, et al. vs. Water Resources Board, et al.

141 C. E. Bradley, C. J. Pugh, et al., vs. Idaho Personnel Commission

149 Glen Dyer vs. State of Idaho

159 State of Idaho vs. R & R Appliance

167 State of Idaho vs. Scott Wallace

169 State of Idaho vs. D. H. McCann

171 State of Idaho vs. G. A. Wilmore

173 State of Idaho vs. L. D. Baker

175 State of Idaho vs. E. C. Baum

179 Bennett vs. Randall, Elmore County and State of Idaho

181 State of Idaho vs. Naturelle Products

183 State of Idaho vs. Warm Springs Reservations

184 State of Idaho vs. Liberty Loan Corporation

185 Combe Brothers vs. Aldape, State of Idaho

190 Thomas D. Griffith vs. Eliason, Oliver, Smith & Woods

191 State of Idaho vs. Wells, Marden and Patricia

196 State of Idaho vs. Danielson and Howland

198 State of Idaho vs. Remington and Angell

204 Ralph Young vs. State of Idaho

205 Ida Rae Robbins vs. State of Idaho

208 State of Idaho vs. Aura Industries, Inc.

210 State of Idaho vs. Vail Prefab Homes

217 State of Idaho vs. Dutchman's Discount Meats

224 State of Idaho vs. Willy

225 State of Idaho vs. Miller

226 Grindstone Butte vs. State, et al.

231 Wayne Kidwell and Gordon Trombley vs. Reforestation

233 Heckman Ranches vs. State of Idaho

235 Heyburn Leaseholders vs. Board of Land Commissioners

242 State of Idaho vs. Willow Bay Marina

244 State of Idaho vs. Power Pac Generator, et al.

245 Pomme Terre vs. State of Idaho

255 Thomas D. Griffith vs. Shosone County Commissioners, et al.

257 Fitzsimmons vs. State of Idaho

258 Hansen v. Jefferson County

259 ESA Credit Union vs. State of Idaho

260 State of Idaho vs. Hughes

261 Dickerson, et al. vs. Crutcher, et al.

262 Ted Boyd vs. Board of Examiners

263 State of Idaho vs. D. R. Bauer

264 State of Idaho vs. City of Spirit Lake

265 State of Idaho vs. F. R. Hamilton

266 Spragues' vs. State

269 Rickel vs. Board of Barber Examiners

277 U. S. Marketing, et al. vs. Garden City

279 Dr. K. L. Sanders vs. Wayne Kidwell, et al.

281 State of Idaho vs. Vail Prefab Homes

282 Prock vs. Rose and May

283 State of Idaho vs. Atlanta Water Corporation

DISTRICT COURT — CLOSED

4673 Coeur d'Alene Wildlife vs. Beauty Bay

4942 State of Idaho vs. Spokane International Railroad Company, a Washington corporation, and Union Pacific Railroad Company, a Utah corporation

5042 M.T. Jerome and Raymond Wilson vs. State of Idaho

5061 State of Idaho vs. Master Distributors, et al.

5073 W. Anthony Park, Attorney General, and the State of Idaho, ex rel State Board of Land Commissioners and Gordon C. Trombley vs. Owen Simpson

5130 State of Idaho vs. Factory Productions, et al.

5173 Heckman Ranches, et al. vs. State of Idaho, et al.

5208 State of Idaho vs. Wells Barney, et al.

5245 Milas Adkins vs. Idaho State Commission for Pardons and Paroles, and State of Idaho

5254 Agnes House vs. State of Idaho

5257 Ronald G. Sever vs. State of Idaho

5259 Sandy vs. State of Idaho

5263 Ronald G. Sever vs. State of Idaho

5264 Dennis "Jake" Jacobs vs. State of Idaho

5266 State of Idaho, Department of Agriculture vs. Miller National Insurance Company

5281 State of Idaho vs. Magic Valley Foods

5283 State of Idaho vs. The World of Solorama

5285 Phillips, et al. vs. State of Idaho

5295 James Moore vs. Don Erickson

5307 Hans C. Peterson vs. State of Idaho

5323 Robert Atwood vs. State of Idaho, et al.

5336 State of Idaho vs. Jerry Roark, d/b/a Autocraft

5342 James Pride vs. Donald Erickson

5343 Jeffrey P. Lewellyn vs. State Commission for Pardons and Parole

5344 Randall K. Watkins vs. State Commission for Pardons and Parole

5345 Randall K. Watkins vs. State Commission for Pardons and Parole

5375 Lon S. Jarvis and Gerald Jarvis vs. Devil's Bedstead Ranch, et al.

5379 Glen Bailey and Keith Larson vs. Four Wind Service, Inc.

5391 Eli Krommenhoek vs. T. Thompson, State of Idaho, et al.

5409 McDonald, et ux vs. Maxwell, et ux and Maxwell, et ux (Defendant) vs. State of Idaho and Western Construction

5410 Duke Parkening, et al. vs. Idaho State Board of Land Commissioners, et al. (See #150)

5412 State of Idaho vs. Macco Metal Buildings

5413 State of Idaho vs. Jaguar Chemical Company

5423 Richard Funderburgh vs. State of Idaho

5425 Danny R. Powers vs. State of Idaho

5456 Gary L. Crisp vs. Donald Erickson

5462 State of Idaho vs. Beneficial Hearing Aid Service

5468 State of Idaho vs. Coeur d'Alene Sailing Club

5470 Nishitani vs. Boise Valley Traction

5476 Christopher Ray Bearshield vs. State of Idaho

5478 William J. Hughes vs. R. L. Anderson, Warden

5504 Guy Donovan Cooper vs. State of Idaho

5505 Delbert L. Crawford vs. Anderson, Munch, et al.

5506 Gary Greene vs. R. L. Anderson and Maynard Ross

5514 Gary Greene vs. Ross, Maynard

5517 Thomas W. George vs. State of Idaho

5518 Andy W. Clark vs. State of Idaho

5521 William Prince vs. State of Idaho

5522 Mark Steinbach vs. State of Idaho

5523 Samuel J. Taylor vs. Donald R. Erickson

5527 Gary Greene vs. State of Idaho

5539 John G. Hocker vs. Donald Erickson

5556 Carl Faulkner vs. Donald Erickson

5557 Wess Tuttle vs. Donald Erickson

109 James W. Adams vs. John Bender, Commissioner of Department of Law Enforcement, State of Idaho

110 Idaho County vs. State of Idaho

113 State of Idaho vs. George E. Stroisch

120 Associated Students of Boise State University, et al. vs. Idaho State Board of Education

124 Mark B. Clark vs. Daniel M. Meehl, Magistrate

127 Pete T. Cenarrusa vs. Cecil D. Andrus

130 Kenneth E. Malone vs. Idaho State Horse Racing Commission

135 State of Idaho, et al. vs. Old Channel Placers, Inc., et al.

140 Farmers Union Ditch Co., et al. vs. State of Idaho, Department of Parks and Recreation

144 Robert J. Glenn vs. State of Idaho, Liquor Dispensary

145 Citizens for Better Government vs. State of Idaho, et al.

146 Wallace vs. the Heirs of Dale C. Wallace and the State of Idaho

147 John M. Tamplin vs. Judge Dar Cogswell

148 Elizabeth C. Allen vs. Honorable D. Carey

150 Duke K. Parkening vs. Idaho State Board of Land Commissioners (see #5410)

153 Grand Canyon Dories, Inc. vs. Idaho Outfitters and Guides Board

155 Twin Falls City vs. Evel Knievel, et al.

156 Thomas D. Griffith vs. State of Idaho, et al.

157 State of Idaho vs. Gibson Products, et al.

160 Lori Spear vs. Marjorie Ruth Moon, Treasurer of the State of Idaho

162 State of Idaho vs. Jim Leese and D. High

163 State of Idaho vs. Del Roy Holm and Glenda Green

164 State of Idaho vs. M. S. Black and S. D. Riggers

165 State of Idaho vs. Helen Branson and W. A. Klundt

166 State of Idaho vs. R. W. Brink and Bonnie Favor

168 State of Idaho vs. D. C. Miner

170 State of Idaho vs. J. J. Jeppeson

172 State of Idaho vs. K. Stephenson and H. Hanks

174 State of Idaho vs. M. K. Roberts and D. R. Brown

176 State of Idaho vs. F. E. Scouten

177 State of Idaho vs. Ralph Olmstead and B. Crowthers

182 Larry L. Jacobsen vs. Attorney General, et al.

186 State of Idaho vs. Dan Emery

187 State of Idaho vs. Westerberg and Lewis

188 State of Idaho vs. Peters and Bonallo

189 John M. Tamplin vs. Judge Dar Cogswell, et al.

192 State of Idaho vs. Stakes and Mason

193 State of Idaho vs. Gillis and Draper

194 State of Idaho vs. Onweiler and Ennis

195 State of Idaho vs. Larry Craig

197 State of Idaho vs. Warren Leigh

199 State of Idaho vs. Larsen and Hoskins

200 State of Idaho vs. Jon Walker

203 Anderson vs. State of Idaho

206 State of Idaho vs. Lowery-Miller Company

207 State of Idaho vs. Frenchman Homeowners Assn.

209 State of Idaho vs. Farwest Steel

211 State of Idaho vs. Acumen, Inc.

212 State of Idaho vs. O-L-D, Inc.

213 State of Idaho vs. Dial-a-Move, Inc.

214 State of Idaho vs. Bell Mountain

215 State of Idaho vs. George Enterprises

220 E.D.S. Federal Corporation vs. Bartlett Brown

221 State of Idaho vs. Niks and Naks Adult Bookstore

222 State of Idaho vs. U.S. Marketing

228 State of Idaho vs. Hunt Brothers

232 State of Idaho vs. Coeur d'Alene Sailing Club

239 Turk vs. Booker and State of Idaho

240 State of Idaho vs. Jay L. Depew

243 People of the State of Idaho vs. Donald J. Wilkins

246 State of Idaho vs. Owyhee Dairy, Inc.

247 State of Idaho vs. Stowell

248 State of Idaho vs. E. Beverly and Associates

250 State of Idaho vs. Thames and Swenson

252 State of Idaho vs. Carl W. Martin

253 ASBSU, et al. vs. Board of Education, et al.

254 Blue Cross of Idaho vs. Idaho Department of Administration, Division of Purchasing

256 Albert Baraby vs. Shoshone County Commissioners, et al.

267 Mullins vs. State Board of Education

278 State of Idaho vs. Crane Company

IDAHO SUPREME COURT — PENDING

5061 State of Idaho vs. Master Distributors, et al.

5254 Agnes House vs. State of Idaho

5281 Lawrence C. Thomas vs. State of Idaho

5400 State of Idaho vs. Louis E. Phillips

5426 State of Idaho vs. Janella Wagenius

5451 State of Idaho vs. Craig S. Devoe

5494 State of Idaho vs. Jerry L. Hobson

5519 State of Idaho vs. Phillip Lewis Lindquist

5531 State of Idaho vs. Thomas Eugene Creech

5533 State of Idaho vs. James W. Adams

5538 State of Idaho vs. Dianne Owens

5543 State of Idaho vs. Dale Kerry Blackburn

5544 State of Idaho vs. Michael Hightower

5552 State of Idaho vs. Lester Daniel Smoot

5554 State of Idaho vs. Jack Harold Kraft

119 Parkening vs. State Land Board

131 Osterloh vs. State of Idaho

137 Andrus vs. Cenarrusa

158 Moon vs. Investment Board

202 High and Lazarus vs. Ward

221 State of Idaho vs. Niks and Naks Adult Bookstore

222 State of Idaho vs. U.S. Marketing

233 Heckman Ranches vs. State of Idaho

251 State of Idaho vs. Spokane International Railroad

275 Blue Cross vs. Department of Administration

280 The People of the State of Idaho, ex rel Gordon S. Nielsen, State of Idaho vs. Donald J. Wilkins

5560 State v. Stroisch

5563 State v. Tisdel

5569 State v. McCoy

5571 State v. Griffiths

5574 Idaho Assn. of Naturopathic Physicians, Inc. et al., v. U.S. Food and Drug Adm. et al.

5575 State v. Pierce

5576 State v. Terry

5578 State v. Adair

5580 State v. Sharp

5590 State v. Morris

5591 State v. Watson

5597 State v. Gumm

5598 State v. Flummer

5600 State v. Kellogg

5602 State v. Moore

5603 State v. McNary

5606 State v. Paul Gowin

5609 State v. Lander, Seufert & Seufert

5611 State v. W. Clayton

5613 State v. Rice

5615 State v. Murphy

5616 State v. Olson

5623 State v. Larken

5624 State v. Dalrymple

5626 State v. Warden

5627 State v. Tipton

5629 State v. Dalley

5630 State v. McKenney

5631 State v. Monroe

5632 State v. Greene

5633 State v. Anderson

5634 In the Matter of Virginia Dunmire

5636 State v. Rauch

5640 State v. Wolfe

5643 State v. Horn

5645 State v. Curley

5646 State v. Martin

5647 State v. Fuchs

5648 State v. Thacker

5650 State v. Ellis

5652 State v. Stewart

5655 State v. Wilson

5657 State v. West

5662 State v. Cobb

5663 State v. Powers

5665 Wolf v. State

5666 Brooks v. State

5667 State vs. Werneth

5668 State v. Powers

5670 State v. McCormick

5671 State v. Needs

5673 State v. Wrenn & Humphrey

5675 State v. Garcia

5676 State v. Brewster

5677 State v. Breakey

5678 State v. Allan

5679 State v. Charlton

5680 State v. Holder

5681 State v. Hayes

5684 State v. Lucio

5685 State v. Cotton

5687 State v. Kingsley

5689 State v. Rehmeier

5690 State v. McClellan

5692 State v. Johnson

5693 State v. Schanacroplous

5694 State v. Otto

5695 State v. Machen

5696 State v. Adair

5698 State v. Peterman

5700 State v. Smith & Moller

5702 State v. Ehrmantrout

5703 Reimer v. State

5705 State v. Miyoshi

5708 Bender v. One 1955 Willys Jeep

5710 State v. Biggs

5711 State v. Dekker

5712 State v. Simmons

5713 State v. Gomez

5716 State v. Newton

5719 State v. Ferguson

5720 Taylor v. State

5721 State v. Rawson

5722 State v. Garcia

5724 State v. Akers

5725 State v. Sheahan

5726 State v. Phillips

5727 State v. Hart

5728 State v. Griffith

5729 Caesar v. State

5730 State v. Armstrong

5731 State v. Reynolds

5732 State v. Mee

5733 State v. Roles

5734 State v. Roberts

5737 State v. Humphrey

5738 State v. Clayton

5739 State v. Avery

5740 State v. Algar & Quanstrom

5743 State v. Cianelli

5744 State v. Christensen

5745 State v. Lyle

5746 State v. Lopez

5747 Spencer v. Anderson

5748 State v. Vetsch

5749 State v. Hoye

5751 State v. Jennings

5754 State v. Cootz

IDAHO SUPREME COURT — CLOSED

4861 State of Idaho vs. Click

5051 Roger Alan Morris vs. State of Idaho

5067 State of Idaho vs. Harley Carringer and Harold Bales

5081 Harley Carringer vs. State of Idaho

5186 State of Idaho vs. Tom Watt (a child under 18 years of age)

5248 State of Idaho vs. Richard Elisondo

5252 State of Idaho vs. Maria Lopez

5256 State of Idaho vs. Dennis L. Brown

5262 State of Idaho vs. Jean Goodrich

5277 State of Idaho vs. Dennis C. Griffith

5304 Alfred F. Mellinger vs. State of Idaho

5310 Harold Whitman and Dale Bryant vs. State of Idaho

5318 State of Idaho vs. Michael Leslie Beer

5320 State of Idaho vs. Russell Lee White

5322 State of Idaho vs. Barret Phillip Krull

5325 State of Idaho vs. George T. Warner

5350 State of Idaho vs. Paul W. Gowin

5351 State of Idaho vs. Edward L. Herr

5359 State of Idaho vs. Gary Paul Warden

5360 State of Idaho vs. Delbert Crawford

5363 Terry L. Wilcox vs. State of Idaho

5368 State of Idaho vs. James Pride

5371 State of Idaho vs. Danny J. Ward

5377 Gary Westberg vs. State Commission for Pardons and Paroles, et al.

5388 Jones vs. Board of Medicine (remanded to District Ct.)

5402 Daniel G. Goodrick vs. State of Idaho

5428 State of Idaho vs. Ernest Chapman

5430 State of Idaho vs. Edward W. Chauncey

5437 State of Idaho vs. Roger Reese

5438 State of Idaho vs. William M. Prince

5440 State of Idaho vs. Cyrus Maxfield

5442 State of Idaho vs. Bobby L. Beason

5445 State of Idaho vs. Michael A. Hutchison

5448 State of Idaho vs. Annette Douglas

5449 State of Idaho vs. Dianne C. (David) Coffee

5457 State of Idaho vs. Ernest Cottrell aka Ernest Cottress

5458 State of Idaho vs. Lee Sistrunk and Larry Prince; and Ernest Cottrell aka Ernest Cottress

5466 Guy Donovan Cooper vs. State of Idaho

5467 State of Idaho vs. Steven Bailey

5471 State of Idaho vs. Louis Kevin Allen

5473 State of Idaho vs. Michael Floyd Colyer

5474 State of Idaho vs. Dale Eugene Lawrence

5475 James M. S. Carlile vs. Donald Erickson, et al.

5480 State of Idaho vs. Dallas Ray Stevens

5481 State of Idaho vs. Gary Thomas Landers

5482 State of Idaho vs. Michael Jerome Stockwell

5484 State of Idaho vs. John F. Nagel

5487 State of Idaho vs. James Wymore

5488 State of Idaho vs. Jose Perez and Cirilo Morin Mata aka Chino

5489 State of Idaho vs. Armando Coronado

5493 State of Idaho vs. Gilbert Chapa

5497 Roy Allen Gibbs vs. The Honorable Russell C. Shaud

5498 State of Idaho vs. Alan Erwin aka "Hap" Erwin

5499 State of Idaho vs. Jesus Gonzalez Birrueta aka Jesus Gonzalez

5501 State of Idaho vs. Phillip W. Gowin

5509 State of Idaho vs. Edwin Bruce Crook

5510 State of Idaho vs. Lee Sistrunk

5511 State of Idaho vs. Tomasa Zarate and Frank Zarate

5512 State of Idaho vs. Deo R. Holtry

5515 State of Idaho vs. Kermit Armstrong and Clinton N. Watson

5516 State of Idaho vs. Patrick Kerrigan

5520 State of Idaho vs. Marcelina Jayo

5524 State of Idaho vs. Johnny Thacker

5525 State of Idaho vs. William Matthew Miller

5526 State of Idaho vs. Dale Eugene Lawrence

5530 State of Idaho vs. Guy Earl Ditmars

5532 State of Idaho vs. Bob Parker aka Raymond Jaynes and Tommy Petterson

5534 State of Idaho vs. Samuel Wallace

5535 State of Idaho vs. Deana Wallace

5536 State of Idaho vs. Robert Edward Buss

5537 State of Idaho vs. John Wesley Warden

5540 State of Idaho vs. Arthur Ely Maki

5541 State of Idaho vs. Larry A. Ruth

5542 State of Idaho vs. Randy S. Nalder

5545 Thomas George and Carl Bowles; James Cherinwchan vs. State Board of Correction, State of Idaho

5546 State of Idaho vs. Richard DeJean

5547 State of Idaho vs. Alan Leroy Staggie

5548 State of Idaho vs. Melvin Eugene Ellis

5550 State of Idaho vs. Carl Lee Wilson

5553 State of Idaho vs. Sterling W. Jones and Gloria Jean Jones

5555 State of Idaho vs. Roscoe A. Kellogg

5558 State of Idaho vs. Lloyd Clawson

106 Moon v. Investment Board

108 Pete Oneida vs. James Cunningham (District Judge), et al., James Lystrup, et al vs. Idaho State Board of Education

116 Brown v. Rowett

154 Earnest & Griselda Ruffener vs. Russell C. Shaud

180 Paul W. Gowin vs. Donald Erickson, et al

230 State of Idaho vs. E.R.W. Fox

270 Mark B. Clark vs. Daniel M. Meehl

5559 State v. Webb

5561 Andersen v. Bengston

5562 State v. Totten

5564 Balla v. State

5565 Schwartzmiller v. State

5566 State v. Mummert

5567 Sima v. State

5568 State v. Allgood & Grimes

5570 State v. Palmer

5572 Nickerson v. I.S.C.I.

5573 Rufener v. Shaud

5577 Walton v. State

5579 State v. Thompson

5581 State v. Jung

5582 State v. Woolf

5583 State v. Jones

5584 State v. Eastman

5585 Hatfield v. Erickson

5586 Belknap v. State

5587 State v. Crook

5588 State v. Kincaid

5589 State v. Pfenning

5592 State v. Peterson

5593 State v. Richardson

5594 State v. Latham

5595 State v. Ramsey

5596 Jocobsen v. State

5599 Hightower v. Erickson

5601 State v. White

5604 Gerhardt v. State

5605 State v. Daugherty

5607 State v. Post

5608 State v. Cook

5610 State v. Lee

5612 Cherniwchan v. State

5614 State v. Jagers

5617 State v. Wilson

5618 State v. Thom

5619 State v. Harwood

5620 State v. Belknap

5621 State v. Eastman

5622 State v. Wilstead

5625 State v. Weimer

5628 State v. Chapple

5635 State v. Banda

5637 State v. Thomas

5638 State v. Kelchner

5639 State v. Grumbine

5641 State v. Adams

5642 State v. Woytko

5644 State v. Bradley

5649 State v. Schevers

5651 State v. Hunt

5653 State v. Graham

5654 State v. Ruffcorn & Byerly

5656 State v. Phillips

5658 State v. Goodine & Napier

5659 State v. Winter

5660 State v. Winter

5661 State v. Caswell

5664 Kohler v. Rasmussen & Hargraves

5669 State v. Watson

5672 State v. Moyer

5674 State v. Harris

5682 State v. Thacker

5683 In re Hazel Krummacher

5686 State v. Salinas

5688 State v. Ryder

5691 State v. Chant

5699 Clayton v. Lamm

5706 State v. Faught

5707 State v. Hill

5709 State v. Litz

5714 State v. Balderas

5715 State v. Curtis

5717 Smiraldi v. State

5718 State v. Hengen

5723 State v. Brummond

5736 Struve v. Wilcox

5741 State v. Woodbridge

5750 State v. White

UNITED STATES DISTRICT COURT — PENDING

5104 State of Idaho vs. United States of America, U.S. Bureau of Reclamation and Boise Project Board of Control

5209 Bobby Beason vs. Raymond May

5251 Bobby L. Beason vs. Richard L. Anderson

5272 Gary Russell Anspaugh vs. Donald Erickson

5275 Grand Targhee Resort vs. State of Idaho, et al.

5324 Carl Cletus Bowles vs. Donald L. Erickson, et al.

5386 State of Idaho vs. Chevron Chemical Corporation, et al.

5492 Carl C. Bowles, et al vs. D. W. Kidwell (Wayne L. Kidwell), et al

105 Michael J. Rineer vs. J. Ray Cox, Richard M. Chastain, Blaine R. Evans, Emily McDermott, David W. Murray, the Idaho Personnel Commission

112 Louise Ackley vs. John Barnes, BSU and Idaho State Board of Education

119 Duke K. Parkening, et al. vs. Idaho State Board of Land Commissioners

139 United States of America vs. 17.3 Acres of Land, et al.

152 Scholes vs. Barnes

178 Charles Miller vs. Andrus, et al.

219 Great Western vs. Wayne L. Kidwell, et al.

227 U.S.A. vs. 0.33 Acres of Land

229 U.S.A. vs. 895 Acres of Land

234 State of Idaho vs. Andrus (Heyburn Park)

237 Wyoming vs. Andrus

249 State of Idaho vs. U.S. Corps of Engineers

268 Hunt Petroleum vs. Evans, et al. (Bear Lake)

UNITED STATES DISTRICT COURT — CLOSED

5047 In the Matter of Glenn W. Turner Enterprises Litigation (41 Attorneys General)

5162 Idaho Wilderness School, Inc., a corporation, American Guides Association and Loren L. Smith vs. Outfitters and Guides Board of the State of Idaho

5232 Everett Bowers vs. Donald Erickson and Buck Elliott

5249 William R. Padgett vs. James E. Risch

5284 W. Anthony Park vs. Steven Meikel, et al.

5347 Idaho Potato Commission vs. Washington Potato Commission

5358 Ruben Garza Musquiz vs. Richard L. Anderson

5372 Idaho Wilderness School vs. Outfitters and Guides Board

5398 Bobby L. Beason vs. James Miller

5407 Idaho Citizens to Repeal vs. State Land Board

5418 The Idaho Citizens for the Repeal of the Forest Practice Act and Jack A. Williams, President of the Organization vs. State of Idaho and Cecil D. Andrus, Governor of the State of Idaho

5419 Kootenai County Christian Posse Comitatus and Richard G. Butler, Marshall of Posse vs. State of Idaho and Cecil D. Andrus, Governor of the State of Idaho

5463 Jeff Cook vs. Donald Erickson, et al.

5491 Paul W. Gowin, et al. vs. Wayne L. Kidwell

5513 Willie Wright vs. R. L. Anderson, Warden

5549 Victor Guzman vs. R. L. Anderson, Warden

102 John Carlyle Durham vs. James M. Cunningham

104 Paul and Phillip Gowin vs. Wayne L. Kidwell, Attorney General, John H. Maynard, District Judge and Merlyn Clark, Prosecuting Attorney

107 Donald D. Hausmann v. Elmer Schenk, et al.

117 Robert D. Sparrow vs. Wayne Kidwell, et al.

129 Gerald W. Olson, et al. vs. John W. Kraft

131 Fred and Carolyn Osterloh vs. The State of Idaho, et al.

132 State of Idaho, on relation of Marjorie Ruth Moon, State Treasurer vs. State Board of Examiners

136 U.S.A. vs. Challis Sand and Gravel

138 U.S.A. vs. 362.1 Acres of Land, et al.

142 Fred Stewart, et al. vs. United States of America

151 American Party of Idaho vs. Cecil D. Andrus, et al.

161 McCarthy, et al. vs. Andrus, et al.

201 Gowin vs. Mossman

218 Williams vs. State of Idaho

223 Terteling and Sons vs. U.S.A., et al.

238 Thurman A. Bowman vs. State of Idaho, et al.

272 U.S.A., ex rel Thurman A. Bowman vs. State of Idaho

UNITED STATES SUPREME COURT — PENDING

236 State of Idaho vs. Oregon and Washington

276 Moon vs. Board of Examiners

UNITED STATES SUPREME COURT — CLOSED

5353 State of Idaho vs. State of Washington and State of Oregon

274 American Party, et al. vs. Andrus

UNITED STATES COURT OF APPEALS — CLOSED

5358 Ruben Garza Musquiz vs. Richard L. Anderson

NINTH CIRCUIT COURT OF APPEALS — CLOSED

143 Paul W. and Phillip W. Gowin vs. Roy E. Mossman, et al.

273 Moon vs. State Board of Examiners, et al.

UTAH SUPREME COURT — CLOSED

133 Robert D. Sparrow vs. Leo O'Connell

AMICUS CURIAE — PENDING

Jones vs. General Mills, et al.

Kleppe vs. Sierra Club

State of Wyoming vs. Hoffman

Cooper v. Fitzharris

Andrus vs. Charlestone Stone Products, Inc.

Wyoming vs. Andrus (Woolgrowers)

Alaska, Maneluk Association vs. Andrus

State of Utah vs. Thomas S. Kleppe

128 Robert P. Whalen, Commissioner of Health, State of New York vs. Richard Roe, an infant, et al. (amicus for Board of Pharmacy)

AMICUS CURIAE — CLOSED

216 Ray Marshall vs. Barlow's, Inc.

State of Oregon vs. Corvallis Sand and Gravel

Rosebud Sioux vs. Kniep

UNITED STATES COURT OF CLAIMS — PENDING

139 U.S.A. vs. 17.3 Acres (Houser, et al. vs. U.S.A.)

CRIMINAL PROSECUTOR ASSISTANCE (DIST. CT.) — PENDING

5752 State v. Spies

5753 State v. Nelson & Bradley

CRIMINAL PROSECUTOR ASSISTANCE: (DIST. CT.) — CLOSED

5701 In Matter of Thomas E. Martin

5704 State v. Robinett

5735 State v. Ruzika

5742 State v. Carlock

HABEAS CORPUS — 1978 — PENDING

Petition of Douglas H. Rice*

Petition of Bobby Lee Beason*

Petition of Dale E. Lawrence*

Petition of Douglas H. Rice*

Petition of Harley Carringer*

Petition of Dale E. Lawrence*

Petition of Dale E. Lawrence*

Petition of Randy W. Trost
District Court of the Seventh Judicial District, Co. of Freemont

Petition of Gunderson*

Petition of Irwin Kelly*

Petition of Walter D. Balla*

Petition of Douglas Rice*

Petition of Dale E. Lawrence*

Petition of Russel E. Shouse*

Petition of Bobby L. Beason*

Petition of Peppi D. Flores*

Petition of Jack L. Morris, Dave A. Bass, Jim L. Masker, John A. Reynolds*

Petition of Guy D. Cooper*

**District Court of the Fourth Judicial District*

CIVIL — 1978 — PENDING

Daulton R. Abernathy vs. Donald Erickson, Richard L. Anderson, Maynard Ross, U.S. District Court

Phillip L. Lindquist, Ronald Lee Macik vs. Donald Erickson, Richard Anderson, Dr. David Sanford, U.S. District Court

Walter Balla vs. Donald R. Erickson, U.S. District Court

Phillip L. Lindquist, Dean Schwartzmiller, Richard A. Coffman, Kermit Nielsen vs. Idaho State Board of Corrections; John Bengtson, George Bennett, Dr. M. Moser, Don Erickson, Richard Anderson, Dr. David Sanford, U.S. District Court

John Early Clayton vs. Don R. Erickson, et al., U.S. District Court

Clyde Allen Courtney vs. Donald Erickson, et al., U.S. District Court

CIVIL — 1977 — PENDING

Bobby Lynn Beason vs. May, Andrus & Anderson, Federal Court

Carl Cletus Bowles vs. D. R. Erickson, R. L. Anderson, U.S. District Court

Carl Cletus Bowles, Robert Wilcox and William J. Hughes vs. D. W. Kidwell, D. R. Erickson, Richard Anderson, U.S. District Court

Carl Cletus Bowle vs. D. R. Erickson, et al., Carl C. Bowles vs. D. W. Kidwell, et al., U.S. District Court

James Roe vs. Jerry Wilda, U.S. District Court

Walter Dale Balla vs. State of Idaho, Fourth Judicial District

HABEAS CORPUS — 1976 — PENDING
July 1 — December 31

Petition of Harold D. McClellan, Supreme Court

Petition of Carl Bowles, Fourth Judicial District

Petition of Carl Bowles, Fourth Judicial District

CIVIL

Bobby L. Beason vs. James Miller, U.S. District Court

Carl Cletus Bowles vs. Richard L. Anderson, U.S. District Court

HABEAS CORPUS — 1978 — CLOSED

Petition of Clark R. Elmore*

Petition of Ronald L. Macik*

Petition of Dennis Johnson*

Petition of Larry Goodine*

Petition of William H. Clayton*

Petition of Kevin Bucholz*

Petition of Jerome N. Miller*

Petition of Ivan P. Decker*

Petition of Larry Jay Renchen*

Petition of Lonny Cope*

Petition of Harold D. McCellan, William Junior Hughes, Jerry M. Morris, Larry John Ortega and Albert Sanchotena*

Petition of Douglas Faulkner*

Petition of Andy Aranda*

Petition of Dixson Douglas Curley*

Petition of Phillip L. Lindquist*

Petition of Bruce C. Tuttle*

Petition of Donald Ray Spivey
Petition of James D. Forde
Petition of John E. Clayton*

Petition of Daulton Abernathy*

Petition of Jerry Kolsky*

Petition of Gary Wayne Arndt*

Petition of Jerry Morris*

Petition of John Machen*

Petition of John Collins*

Petition of Jack L. Morris*

Petition of Robert F. Ellis*

Petition of Verle W. Hatfield*

**District Court of the Fourth Judicial District*

CIVIL — 1978 — CLOSED

Theodore M. Boyd vs. Idaho State Board of Examiners; Idaho State Board of Corrections; and Idaho State Auditor*

John Machen vs. Don Erickson, Richard L. Anderson and Maynard Ross, U.S. District Court

John Salazar, Armando Coronado, Ramiro Garcia vs. Josef Munch, U.S. District Court

**District Court of the Fourth Judicial District*

1977 — CLOSED

Al Harris vs. Donald R. Erickson, Fourth Judicial District (Complaint)

Harold D. McClellan vs. The State of Idaho, Supreme Court (Denial of Petition for Writ of Mandate)

The State of Idaho vs. Monty Paul Belknap, Supreme Court (Stipulation to Waive Oral Arguments)

Robert G. Williams vs. The State of Idaho, Fourth Judicial District (Answer and Demand for Jury Trial)

David Breier vs. The State of Idaho, Claude Spinazza and Randy Walker (Personal Injuries)

Harold Petty and Mary Petty vs. Steven F. Ware, James Miller, David P. Pennick, Jerry L. Birch, Rex Braden, John Bryant and the State of Idaho (Case 3L-10674)

Dean A. Schwartzmiller vs. Lt. Larry Wright, Richard L. Anderson, Fourth Judicial District (Petition for Writ of Prohibition)

Victor VanDurme vs. Idaho Personnel Commission (Order of Dismissal)

Petition of Paul Rexford Sears, Jr.*

Petition of Dean A. Schwartzmiller*

Petition of Dean A. Schwartzmiller*

Petition of Charles Sharp*

Petition of Gary Shatto*

Petition of Russel E. Shouse*

Petition of Donald Ray Spivey*

Petition of Randy C. Thompson & Gary H. Shatto*

Petition of Randy C. Thompson*

Petition of Bruce Clyde Tuttle*

Petition of Carl C. Bowles*

**District Court of the Fourth Judicial District*

CIVIL

Mrs. Jeniel Cates vs. Coy T. Brown, Officer, Idaho State Correctional Institution; Paul Wurschmidt, Officer, Idaho State Correctional Institution (U.S. District Court)

Ruben Garza Musquiz vs. Richard L. Anderson (U.S. District Court)

Lance G. Rehmeier vs. R. L. Anderson (U.S. District Court)

Lance G. Rehmeier, Charles Sharp, Christopher Bearshield, Albert Denegal, Gilbert Musquiz vs. Idaho State Board of Corrections; John Bengtson, et al. (U.S. District Court)

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Robert L. Biggs AKA Richard D. Percefull AKA Danny Lesner vs. State of Idaho, Commission for Pardons and Parole, Samuel J. Kaufman, Ralph O. Marshall, State of Illinois Pardons and Parole Board, Peter A. Kotsos, W. V. Kauffman, Jr. (U.S. District Court)

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Petition of Dale E. Bryant*

Petition of John S. Dayley*

Petition of Roger A. Floyd*

Petition of Robert Gerhardt*

Petition of Thomas George*

Petition of Paul W. Gowin*

Petition of Gary Greene*

Petition of Louie B. Hayes*

Petition of Alfonso M. Hernandez*

Petition of Todd Imeson*

Petition of Jody Lee Kitchen*

Petition of Ronald Lake*

Petition of Dale Eugene Lawrence*

Petition of Eugene Lewis*

Petition of Donald C. Mott*

Petition of Paul Sears*

Petition of Samuel J. Taylor*

Petition of Samuel J. Taylor, Donald C. Mott, and Geno Roderick*

Petition of Johannes J. Wolfe*

Petition of Robert Biggs AKA Richard Percefull*

Petition of Gary Shatto*

Petition of Dale E. Bryant*

Petition of James Foote*

Petition of Baldemar Gomez*

Petition of Gary A. Greene*

Petition of Alfonso M. Hernandez*

Petition of Mark Howington*

Petition of Eddie James, Jr.*

Petition of Stephen Jon Kingsley*

Petition of Jody Lee Kitchen*

Petition of Karen Krassen, Francine Jones and Debbie Evans*

Petition of Dale E. Lawrence*

Petition of John Machen*

Petition of Marvin C. Nordgaarden*

**District Court of the Fourth Judicial District*

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July 1 — December 31

Petition of Anthony L. Nickerson*

Petition of William J. Hughes*

Petition of Wesley Tuttle*

Petition of Carl Faulkner*

Petition of Dan Poindexter*

Petition of Samuel J. Taylor*

Petition of John G. Hocker*

Petition of Earnest Contrillo*

Petition of Gary Greene*

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Petition of Michael J. Heister*

Petition of Kelly Nelson*

Petition of Thomas George*

Petition of Delbert Crawford*

**District Court of the Fourth Judicial District*

CIVIL

Erickson vs. Elisondo (U.S. District Court)

Goggins, et al. vs. Munch (U.S. District Court)

Jack Harold Kraft vs. Harold L. Christman (U.S. District Court)

Schwartzmiller vs. Winters, Keeton & Hopfinger (U.S. District Court)

Moody vs. Daggett (Supreme Court of the U.S.)

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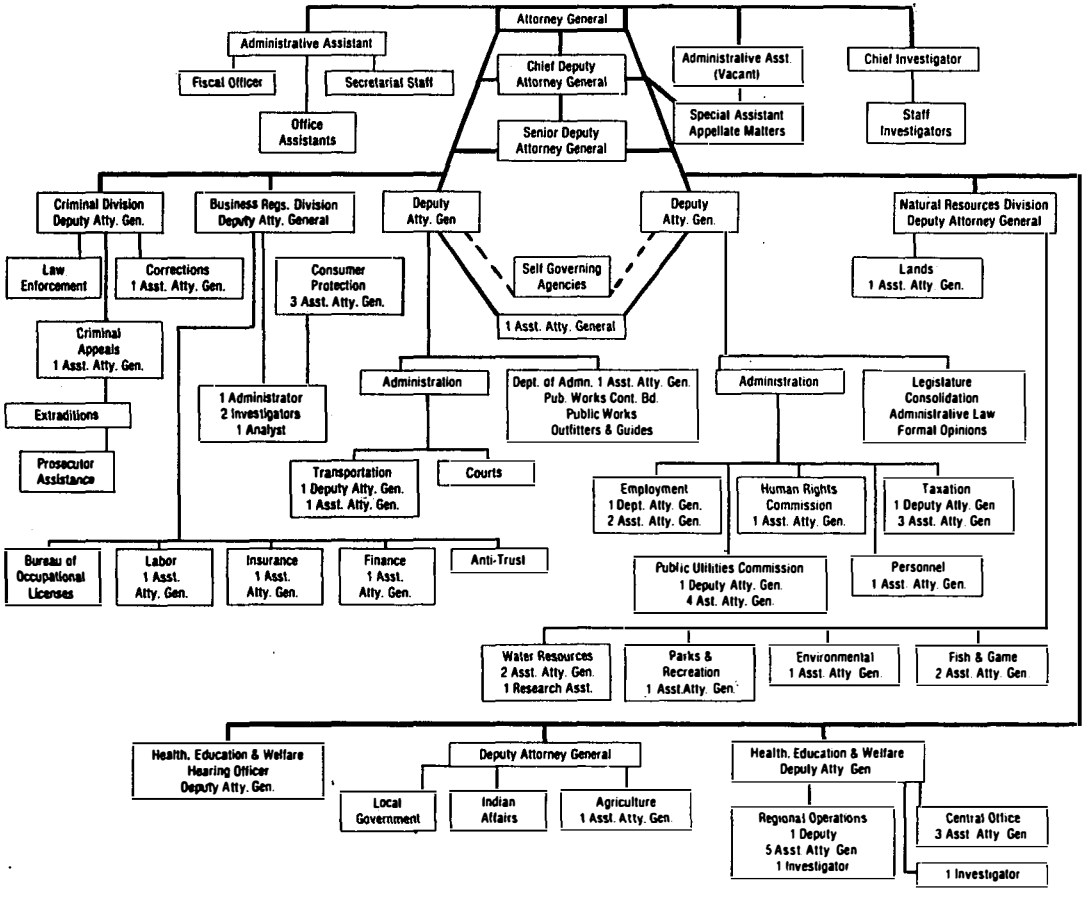
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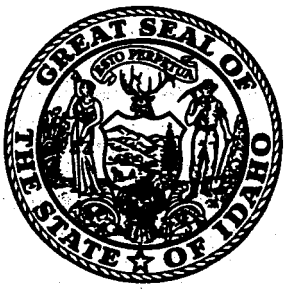
ATTORNEY GENERAL'S OPINIONS for the year 1977



WAYNE L. KIDWELL
Attorney General

ATTORNEY GENERAL OPINION NO. 77-1

TO: The Honorable John V. Evans
Lieutenant Governor of Idaho
Statehouse
Boise, Idaho 83720
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

". . ., I would appreciate the preparation of a formal Attorney General's opinion on the Constitutional authority and procedure for nomination and appointment of a Lieutenant Governor to succeed the office upon my vacating the same."

CONCLUSION:

The question presented anticipates the imminent resignation of the office of Governor of Idaho so as to assume the post of United States Secretary of the Interior. The Idaho Constitution provides, "In case of the * * * resignation [of the Governor], the powers, duties and emoluments of the office for the residue of the term * * * shall devolve upon the lieutenant governor." This section, read in tandem with the next section of the *Idaho Constitution* regarding temporary performance of the duties of lieutenant governor by the president pro tempore of the Senate until the vacancy in the office of lieutenant governor is filled, together with the Article 4, §6, power of the governor to appoint state officers would seem to clearly imply a succession by the lieutenant governor to *the office* of governor, thus creating a vacancy in the lieutenant governor's office. There is not only logic, but also case law to support such a conclusion. However, there is substantial case law interpreting constitutional provisions virtually identical in wording to Idaho's which conclude that under such circumstances the lieutenant governor *never* truly succeeds to the office of governor, is merely an acting, ex officio governor throughout the remaining term, and vacates his underlying office at the peril of not only losing the right to that office but also the right to act as governor.

With such indecision in the decided law regarding the nature of the right of holding the office of governor by the person designated by the Constitution to perform the duties of the same we feel ill advised in recommending to the incumbent Lieutenant Governor a course of action which, if we are wrong, could be fatal not only to his elected office, but also to any person he attempted to appoint to perform lieutenant governor duties after the Governor has resigned.

RECOMMENDATION:

We, therefore, recommend that the following constitutional questions be presented to the Idaho Supreme Court for its immediate consideration, by way of extraordinary writ:

1. When the Governor resigns does the Lieutenant Governor become Governor de jure or de facto, or is he merely acting governor or governor ex officio?

2. Upon resignation of the Governor is there a "vacancy" created in the office of Lieutenant Governor, or does the Lieutenant Governor remain as such while also assuming the duties, powers and emoluments of Governor?

3. While performing the duties of Governor is the Lieutenant Governor entitled to the Governor's salary, and if so, is he also entitled to the salary as Lieutenant Governor?

4. After the Governor has resigned does the Lieutenant Governor perform only the duties of Governor, or is he also required to perform his duties as Lieutenant Governor whenever physically possible?

5. When physically impossible for the Lieutenant Governor to perform his duties as such due to performing the duties of Governor, either part or full time as interpreted by the Court, does the president pro tempore of the Senate perform the duties of Lieutenant Governor on a part-time basis, full time basis, or does he only act until the "vacancy" in the office of Lieutenant Governor is filled by appointment by the Governor?

6. After the Governor has resigned and the duties, powers and emoluments of the office of Governor have devolved upon the Lieutenant Governor, may the Lieutenant Governor safely resign his office so as to create a vacancy therein, or will such a resignation act to destroy the foundation upon which the *Idaho Constitution* allows him to act as Governor?

We conclude that these questions are beyond the scope of this office due to the numerous conflicting case law interpreting similar constitutional provisions. Only the Idaho Supreme Court can provide the final, definitive answers.

ANALYSIS:

Clearly, in Idaho the governor has the power to appoint someone to fill a true "vacancy" in the office of Lieutenant Governor. Article 4, § 6, *Idaho Constitution.* Since the lieutenant governor is not one of the enumerated state officers listed therein, such appointment falls under that portion of Article 4, § 6, which requires the Governor to "nominate and, by and with the consent of the senate, appoint all officers whose offices are established by the constitution, * * *, and whose appointment * * * is not otherwise provided for." Though certain constitutional officers are later listed in the constitutional provisions and, apparently, may be appointed without senatorial consent, the lieutenant governor is not among those listed. That being so, the provisions of Section 50-904 and 50-914, *Idaho Code*, relating to appointments, which by 1968 constitutional amendment must be followed for appointment of those enumerated constitutional officers, are inapplicable to appointing a person to fill a vacancy in the office of Lieutenant Governor, and any person so appointed to fill a true "vacancy" in that office would hold office until the expiration of the remaining elective term. *Moon v. Masters*, 73 Idaho 146, 247 P.2d 158 (1952); *Budge v. Gifford*, 25 Idaho 521, 144 P. 333 (1914).

The threshhold problem, however, remains that of determining when a "vacancy" has occurred in the office of Lieutenant Governor. Idaho's constitutional succession provisions relating to filling the office of Governor when that person resigns, dies or is otherwise disqualified must be carefully scrutinized. With the expected and impending resignation of the incumbent Governor, it is apparent that, upon such resignation, Article 4, § 12, *Idaho Constitution*, comes into effect. That section provides:

> In case of the * * * resignation [of the governor], the powers, duties and emoluments of the office for the residue of the term * * * shall devolve upon the lieutenant governor.

Note well that said section *does not* provide that the lieutenant governor shall succeed to the office of Governor, but merely that the powers, duties and emoluments of the office shall "devolve" upon him. As will be noted later herein, most of the courts treat this act of devolution not as creating a true "vacancy" in the office of lieutenant governor, but, rather, as acting to create a situation whereby the lieutenant governor must, by law, act as governor while still holding the office, together with its responsibilities, of lieutenant governor. To resolve the obvious dilemma thus created of one person attempting to perform the duties of two important executive offices simultaneously, these same courts hold that the next person in line of succession, in Idaho's case the president pro tempore of the Senate [Article 4, § 13, *Idaho Constitution*] shall assume the duties of lieutenant governor whenever his gubernatorial duties interfere with his exercise of his duties as lieutenant governor. Idaho has a specific constitutional provision covering such a contingency. Article 4, § 13, *Idaho Constitution* provides:

> * * * [W]hen he [the lieutenant governor] shall hold the office of governor, then the president pro tempore of the Senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

Yet, as noted above, most courts hold that resignation of a governor does not create a "vacancy" in the office of lieutenant governor when that person assumes the devolved duties as governor. The term "disability" is apropos to such a situation inasmuch as the lieutenant governor is unable, at some times, to be in two places at once — to perform the duties of both offices simultaneously, but, what constitutes a "removal" of the "disability"? Must the lieutenant governor and president pro tempore of the Senate constantly be in communication so as to know from one minute to the next who is to do what at any given point in time? This is the gist of the holdings of the majority of case law on the subject, yet adherence to such construction produces an absurd result. At some point in this "chain of succession" it must be realized that state government is, when a governor resigns, short one very vital person. It matters not whether we consider that we are not lacking a lieutenant governor, because the pro tempore acts to fill that office during the "disability" period, or whether we are without a pro tempore. In either event we are short one key person. And the very exigencies and complexities of modern state government can hardly allow a state to limp along with such a shortage. Such absurdity may well be "the law" as presently interpreted by the courts of many states, including neighboring states with

constitutional provisions quite similar or virtually identical to those of Idaho. However, logic, and the law, should allow the conclusion to be reached that a permanent "devolution" upon death or resignation of the Governor results in a true succession by the lieutenant governor to the office of Governor, thus creating a "vacancy" in the office of Lieutenant Governor which may be filled by gubernatorial appointment. Yet, the cases do not on the whole so hold. In fact, there is case law to the effect that a person who did have the gubernatorial duties devolve on him by resignation of the incumbent governor lost the right to act as governor when he resigned the underlying office which gave him the constitutional right to perform the duties of governor. The primary New Jersey case which so holds is discussed herein. There is no clear-cut answer to the question posed which may be analyzed and resolved with legal exactness. the logical result which would result in the greatest efficiency and continuity of state government may well not be the legal result. This is one of those perplexing situations where the Attorney General must seek resort to the Idaho Supreme Court for a final legal resolution of the dilemma which is tailored to the *Idaho Constitution* and the needs of the Idaho people.

The Oregon Supreme Court, in *Chadwick v. Earhart*, 11 Or. 389, 4 P. 1180 (1884), considered whether, when under the *Oregon Constitution* "the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office." [4 P. at 1180.] They considered:

> In the first place, it is not shown how an office can be vacant, and yet there be a person, not the deputy or *locum tenens* of another, empowered by law to discharge the duties of the office, and who does in fact, discharge them. It is not explained how, in such a case, the duties can be separated from the office so that he who discharges them does not become an incumbent of the office of governor without being governor. It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given a public office, and one who, duly empowered, discharges its duties, and we have an incumbent in that office. Such is the case here. The secretary of state, by force of the function cast upon him, becomes governor, and consequently entitled to the salary appertaining to the office. *Id.* at 1181.

Thus, in Oregon, it was decided long ago that the next-in-line for the office of governor upon a resignation, death or disability of the incumbent thereof became fully vested with the office itself, not merely an ex officio, or acting, governor. The Oregon constitutional provision regarding devolution, however, is not exactly identical to Idaho's. Next, in *Olcott v. Hoff*, 92 Or. 462, 181 P. 466 (1919), the Oregon Supreme Court again considered its constitutional devolution section and posed:

> The vital question we are asked to decide is whether the petitioner, Mr. Olcott, holds the office of governor in fact, and, if so, for how long, or whether he has only the right to discharge the duties of that office during the remainder of his term as secretary of state. 181 P. at 466.

The relevant portions of the Oregon Constitution provided: "In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state." Article 5, § 8, *Oregon Constitution.* As pondered with regard to the U.S. Constitution, what does the phrase "the same" modify — "duties" -- or "the office"? The Court proceeded to review in detail numerous cases from other jurisdictions which held that the lieutenant governor, under such circumstances is merely an "acting governor" and does not "hold" the office of governor, then stated:

> It will be noted that in all of the [constitutional] sections quoted it is not the office, but the powers and duties of the office, which devolve upon his successor in the event of the death of the governor. *Id.* at 470.

Justice Johns, writing for the Court in an opinion in which five of the seven justices concurred, stated:

> Mr. Olcott is governor in fact and has the right and title to the office itself, with the accompanying right and authority to perform the duties and receive the emoluments of the office. As to whether he could resign as secretary of state, and as governor appoint another to that position and still continue to hold the office of governor, we do not feel legally justified in going beyond anything said in this opinion. *That is less a public and more a personal question for Mr. Olcott.* [Emphasis supplied.] *Id.* at 472.

Three justices believed that the Court should have taken the next logical step and hold that Olcott could, in fact, resign as secretary of state and appoint a successor to that office in his capacity as governor. Chief Justice McBride felt:

> There can be little question that Mr. Olcott is entitled to hold both the office of governor and secretary of state, and draw the salaries of both. It is creditable to him that he does not wish to do the first and will not do the second. In the infancy of the state, when its business was insignificant and its revenues small, one person could well perform the duties of both governor and secretary of state, but with the enormous expansion of state business [by 1919] each of the three constitutional officers finds in his own department all the business which he can attend to, and more. *Id.* at 474.

The Chief Justice concluded:

> For the reasons expressed by Justice JOHNS, as well as those urged herein, I am of the opinion that this court should declare the petitioner is governor in fact and not acting governor; that he is entitled to the salary of governor; that he holds the office for the remainder of the term of the late Governor Withycombe, and that he may resign the office of secretary of state and still hold the office of governor. *Id.* at 475.

Justice Harris concluded similarly, with Justice Benson concurring:

> In brief, I take the view that Ben W. Olcott is governor in truth as distinguished from governor ex officio, that he is entitled to hold the office of governor and is entitled to the salary of that office until his successor is elected; . . . I think, too, that the logic of the holding in *Chadwick v. Earhart* inevitably leads to the conclusion that the petitioner can resign as secretary of state and continue to occupy the office of governor. *Id.* at 479.

The question remains as to whether this decision was reached through interpreting the nuances of words and the proper modification of certain words by yet other words, or whether it was a decision which attempted to reach a practical, effective approach to a complex problem by not giving undue influence to technical terms and rules of construction.

Third in the important trilogy of Oregon cases is *State ex rel. O'Hare v. Appling*, 215 Or. 303, 334 P.2d 482 (1959), which posed the question of an implied resignation when the secretary of state became *elected* governor, and the time of such implied resignation. The Court noted with approval these general principles:

> The doctrine of implied resignation is thus stated in 100 A.L.R. 1170:
>
> "* * * if the holding of two offices by the same person, at the same time, is inhibited by the Constitution or statute, a forbidden incompatibility is created similar in its effect to that of common law, and, as in the case of the latter, it is well settled by an overwhelming array of authority that the acceptance of a second office of the kind prohibited operates, ipso facto, to absolutely vacate the first office."
>
> The multitude of decisions from all over the United States and England cited in the extensive annotation begining at 100 A.L.R. 1162 fully bears out the foregoing statement that this doctrine has the support of "an overwhelming array of authority." . . . The quoted language of the Supreme Court of Maine in *Stubbs v. Lee*, 64 Me. 195, 198:
>
> "Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable as well as one indispensable for the protection of the public." 334 P.2d at 486.

The Court went on to conclude that the offices of Secretary of State and

Governor were incompatible. Likewise, it should be concluded that, in Idaho, the offices of Lieutenant Governor and Governor are incompatible.

In *Merriam v. Clinch*, 6 Blatchf. 5, Fed. Cas. No. 9,460 (S.D.N.Y. 1867, upon the death of a collector of customs it was claimed that certain emoluments belonged to his estate. In holding to the contrary, the Court considered Article 2, § 6, *United States Constitution*, under which due to death, resignation, or inability to discharge "the powers of the said office [of president], the same shall devolve upon the vice president," and noted:

> Three times since the adoption of the constitution, the president has died, and, under the provisions referred to, the powers and duties of the office of president have devolved upon the vice president. All branches of the government have, under such circumstances, recognized the vice president *as holding the office of president*, as authorized to assume its title, and as entitled to its emoluments. The vice president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and vice president were elected. . . . It has never been supposed that, under the provision of the constitution, the vice president, in acting as president, acted as the servant, or agent, or locum tenens of the deceased president, or in any other capacity than as holding the office of president fully, for the time being, by virtue of express authority emanating from the United States. [Emphasis supplied.] 17 Fed. Cas. at p. 70.

As will be seen from the analysis of the Oregon cases, where the state's Constitution uses similar phraseology to the United States Constitution, the conclusion as to what the person upon whom executive duties devolve succeeds to may turn upon the interpretation of what the words "the same" modify. Isolating the key phrase "the powers of the said office, the same shall devolve", it is critical to the concept and nature of succession whether "the same" modifies "the powers" — signifying a status of merely acting temporarily as the executive — or whether "the same" modifies "office" — signifying a true succession by the second-in-command to the full status of the executive for the remainder of the executive's term. This dilemma, when coupled with substantial conflicting case law not only from other neighboring states with constitutional devolution sections virtually identical to Idaho's, but also from other jurisdictions, creates a circumstance where legal advice on the question presented herein becomes futile when rendered by any other than the Idaho Supreme Court.

A leading case which takes a position contrary to Oregon's is *State v. Heller*, 63 N.J. Law. 105, 42 A. 155, 57 L.R.A. 312 (1899). In *Heller*, New Jersey Governor Griggs resigned before the expiration of his term and Vorhees, then president of the state Senate, qualified as his successor. Later, before the expiration of the term for which Griggs had been elected, Vorhees resigned as a member of the state Senate. Immediately, the speaker of the House qualified as governor, contending that the resignation of Vorhees, as state senator,

terminated his right to officiate as governor. Vorhees, however, claimed that, having been the successor of Griggs as governor at the time of Griggs' resignation, he thereby became governor de jure for the remainder of the unexpired gubernatorial term, regardless of the expiration of his term as state senator. The New Jersey Constitution, substantially like Idaho's, provided that: "In case of the * * * resignation * * * from the office of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the Senate, and in case of his * * * resignation * * * then upon the speaker of the House of Assembly * * *." In the Idaho Constitution the first devolution is on the lieutenant governor, then upon the president pro tempore of the state Senate. The New Jersey court ruled:

> In construing this clause of the constitution it must be borne in mind that it was carefully drawn by learned jurists, who knew how to express with exactness and precision the purpose they had in view. The provision is that, in case of the resignation of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the senate, and not that the president of the senate shall thereby become governor, and hold the title and the office until another governor is elected. *If the framers of the fundamental law had intended to transfer the president of the senate to the executive chair, and thereby to vacate his office, it is reasonable to believe that they would have said so in no uncertain language.* The language used is not ambiguous. It declares that the powers, duties and emoluments of the office shall devolve on the president of the senate; *it does not confer upon him the title of the office.* The president of the senate exercises the powers of the governor; the president of the senate performs the duties of the governor; the president of the senate receives the emoluments of that office. *He is still president of the senate, with the added duties required of the chief executive of the state imposed upon him. There is no language in the constitution from which it can reasonably be inferred that his office of president of the senate was to be vacated.* He retains his office of senator; and as president of the senate, and not as governor, he exercises the added powers and performs the superimposed duties. [Emphasis supplied.] 42 A. at 157.

Further considering the nature of the constitutional grant of power when a governor resigns, the New Jersey Supreme Court held:

> In my judgment, the framers of the Constitution meant simply what they said — that in case the governor resigned the president of the Senate, as such should have the powers and perform the duties of the office. *Foster M. Vorhees did not become governor upon the resignation of Governor Griggs. He still continued to be a senator and president of the Senate. He could not resign the office of governor, which he never held. When he resigned and vacated the office of senator, he ceased*

> *to be the president of the Senate, and could no longer exercise the functions pertaining to the executive department. Therefore upon his resignation as senator the powers, duties and emoluments of the office [of governor] devolved upon David O. Watkins, the speaker of the House of Assembly.* He is de jure the speaker of the House, and of right as such speaker exercises the executive powers. He is not governor de jure or de facto in the constitutional sense of that term. [Emphasis supplied.] *Id.* at 158.

Next, the Colorado Supreme Court in *People ex rel. Parks v. Cornforth*, 34 Col. 107, 81 P. 871 (1905), was presented with this factual setting: In 1905 Governor Peabody resigned and Lieutenant Governor McDonald qualified as governor and acted as such. Cornforth, president pro tempore of the state Senate qualified and acted as lieutenant governor during the same period but was replaced as president pro tempore later in 1905 by Parks, though Cornforth remained a senator. The question was whether the right of Cornforth to act as lieutenant governor ended with the election of Parks as president pro tempore. Construing Article 4, § 13 and Article 4, § 14, *Colorado Constitution*, which are virtually identical to Article 4, § 12 and Article 4, § 13, *Idaho Constitution*, regarding assuming the duties of governor and lieutenant governor upon death, resignation, or diability, the Colorado Supreme Court analyzed:

> The same language is used in devolving duties on the president pro tem. [although the word "devolve" does not appear in the Colorado or Idaho Constitutions regarding the pro tem. assuming lt. governor duties] in the event the lieutenant governor is unable to perform his duties through those of the governor devolving upon him from some permanent cause as in this case, resignation of the governor. If the framers of our constitution had intended that the president pro tem. of the Senate should become lieutenant governor de jure in the contingency under consideration, they could easily have said so. They have not so provided. They have simply said that if for some permanent cause the lieutenant governor fails to discharge his official duties they shall be performed while such condition obtains by the president pro tem. of the Senate as such. 81 P. at 872-873.

The Court, after considering several cases from other jurisdictions, concluded that the duty to act as lieutenant governor appertained to the holder of the office of president pro tempore of the state senate, and did not create a de jure vested right in the holder of that office at such time as the governor died and the lieutenant governor had the gubernatorial duties devolve upon him. Thus, the newly elected pro tempore was entitled to assume, when necessary, the duties of lieutenant governor whenever the same could not be performed by the lieutenant governor while acting as governor.

The neighboring state of Washington has also had occasion to consider the question of devolution of duties upon the lieutenant governor, in *State ex rel.*

Murphy v. McBride, 29 Wash. 335, 70 P. 25 (1902). In 1900, Rogers was elected governor and McBride was elected lieutenant governor. Rogers died in late 1901. As stated:

> The first question presented is, does the death of the governor cause a vacancy in that office, which may be filled by an election for the unexpired term, and, if not, does the office of lieutenant governor become vacant when the incumbent assumes the duties of governor? 70 P. at 25.

As in the Idaho and Montana Constitutions, the "succession" provision of Washington's Constitution provided that the duties of the office of governor "devolve upon the lieutenant governor" upon resignation, death or disability of the governor. The Court noted:

> This provision of the constitution of this state is in effect the same as the provision of the constitution of the United States with reference to the succession of the vice president to the office of president of the United States. Upon the death or disability of the president, it has uniformly been held that the vice president holds the office of president until a successor to a deceased president comes to assume the office. *Merriam v. Clinch*, 6 Blatchf. 9, Fed. Cas. No. 9,460. In that it was said: "It has never been supposed that, under the provision of the constitution, the vice president, in acting as president, acted as the servant or agent or locum tenens of the deceased president, or in any other capacity other than as holding the office of president fully, for the time being, by virtue of express authority emanating from the United States." *Id.* at 25-26.

Next, the Court considered one of the Oregon cases, then concluded:

> It is a well settled rule that an office is not vacant so long as it is supplied, in the manner provided by the constitution or laws, with an incumbent who is legally authorized to exercise the power and perform the duties which pertain to it. [Citations omitted.] The constitution having provided that in case of the death of the governor the duties of the office devolve upon the lieutenant governor, there is no vacancy in the office of governor . . . What is said above applies equally to the lieutenant governor. *When the lieutenant governor, by virtue of his office and of the command of the constitution, assumed the duties of governor on the death of Gov. Rogers, the office of lieutenant governor did not thereby become vacant, but the officer remained lieutenant governor, intrusted with the powers and duties of governor.* [Emphasis supplied; citations omitted.] It is argued, however, that since it is made the duty of the lieutenant governor, under the constitution, to be presiding officer of the state senate (section 16, art. 3), and as such to approve all bills passed by that body, he must, as governor, review and approve or reject bills which as lieutenant governor

> he has already approved. These duties are, no doubt, inconsistent; but this argument, we think, is fully met by another provision of the constitution, which provides, at section 10, art. 2, in substance that when the lieutenant governor shall act as governor the senate shall choose a temporary president. *The lieutenant governor, therefore, when the duties of governor devolve upon him, is relieved of the duties of presiding officer of the senate.* [*Emphasis supplied.*] *Id.* at 26.

In yet another neighboring state, Montana, that state's Supreme Court was called upon, in *State ex rel. Lamey v. Mitchell*, 97 Mont. 252, 34 P.2d 369 (1934), to consider whether the following facts led to the creation of vacancies in executive offices of the State. At the 1932 general election, Erickson was elected governor and Cooney was elected lieutenant governor. In March, 1933, Erickson resigned as governor. The Court framed the sole question presented for review as follows: "Is there a vacancy in either the office of Governor or Lieutenant Governor?" [34 P.2d at 370.] Article 7, § 4, *Montana Constitution*, which when the word "treason" is added is *identical* to Article 4, § 12, *Idaho Constitution*, provided for devolvement of the powers, duties and emoluments of the office of governor on the lieutenant governor when the governor resigned or otherwise could not perform the duties of office. The Montana Court held:

> It will thus be seen that when the Governor resigns or is permanently removed from office, there is no vacancy in the office of Governor in the sense that there is no one left with power to discharge the duties imposed upon the Governor... The framers of the Constitution never intended that there should be any interim in which the affairs of the state should not be executed, for they said in explicit language that on the happening of any of the contingencies mentioned in section 14, supra, the powers, duties, and emoluments of the office were to be immediately transferred to the Lieutenant Governor, who is then given a mandate to discharge the duties of the office for the residue of the term for which the Governor was elected. He, as Lieutenant Governor, *acts as Governor* and is empowered to perform the duties of that office. [Emphasis supplied.]
>
> There can be no vacancy in an office when there is a person clothed with authority to perform its duties. In *State ex rel. Chenoweth v. Action*, 31 Mont. 37, 77 P. 299, 300, the court, speaking through Mr. Commissioner Callaway, said: "The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event." 34 P.2d at 370-371.

The Court next noted:

> It is urged that upon the happening of any of the contingencies in section 14, supra, the Lieutenant Governor by exercising the powers and duties of the Governor acts also as Lieutenant Governor, and that he cannot hold two offices. This argument is answered by section 15 of article 7 of the [Montana] Constitution [exactly identical with Article 4, § 13, *Idaho Constitution*] . . .
>
> The argument is also answered in the case of *State ex rel. Murphy v. McBride*, supra, [29 Wash. 335, 70 P. 25 (1902), quoting therefrom the explanation and acceptance of the inconsistent duties as constitutionally authorized and resolved by temporary action of the temporary president of the state senate.]
>
> When the framers of the Constitution provided for the election of a Governor and a Lieutenant Governor as members of the executive department of the state (section 1, art. 7), but conferred upon the latter no executive power or authority other than in the contingencies mentioned in section 14, supra, they manifested the intention that the people elect two qualified heads of that department — the one action, the other his lieutenant, ready at a moment's notice to assume the duties of the office should his superior officer, for any reason, either temporarily or permanently, become unable to perform them. This to the end that the important functions of state government should not falter or halt for an instant. *Id.* at 371-372.

Concerning the concept of a vacancy occurring when the duties of governor devolved upon the lieutenant governor by constitutional action, the Court concluded:

> Neither do we think that upon resignation, death, or permanent removal of the Governor there is a vacancy in the office of Lieutenant Governor. In any such event he, as Lieutenant Governor, shoulders immediately the duties of Governor, and while "he holds the office of Governor," the president pro tempore of the senate performs the duties which theretofore devolved upon the Lieutenant Governor. When the duties, powers and emoluments of the office of Governor devolve upon the Lieutenant Governor, it cannot be said that he vacates his office of Lieutenant Governor, and, *unless he does so*, there is no vacancy in his office. [Emphasis supplied; code citation omitted.] His assumption of the duties of the office of Governor does not create, and neither can he make, a vacancy, as he is discharging the functions of Governor and by the mandate of the Constitution, *and that by reason of being Lieutenant Governor*. [Emphasis supplied.] If the framers of

> the Constitution had intended that there be a vacancy in the office of Lieutenant Governor upon the resignation, death or permanent removal of the Governor, they could have easily said so. They chose, however, to say that upon the happening of either of those contingencies the Lieutenant Governor should *assume the duties of the office* and discharge them for the residue of the term. [Emphasis supplied.] *Id.* at 372.

Note that, on the one hand, the Court, by stating "unless he does so" implies that the lieutenant governor *could* resign his office when the Governor's duties devolved upon him under the Constitution and, thus, create a "vacancy" in the office of Lieutenant Governor, yet, on the other hand notes that he only has the right to act as governor "by reason of being Lieutenant Governor". This exact issue has been considered by New Jersey's highest court as has previously been discussed. In concluding its line of reasoning about the lack of vacancy in the office of lieutenant governor the Court stated:

> It would be idle to say that upon the resignation of the Governor there was thereby created a vacancy in the office of Lieutenant Governor, in view of the specific language of sections 14 and 15, supra. If that be true, then the Lieutenant Governor, upon assuming the powers and duties of the Governor, would be entitled to appoint a Lieutenant Governor. In this manner he could divest the people of their representative chosen by the Legislature, namely the president pro tempore, to preside during the absence of the Lieutenant Governor. In our opinion this was never contemplated and never intended by the framers of the Constitution, or the people who adopted it. *Id.* at 372.

Under a constitutional provision similar to Idaho's, the Arizona secretary of state assumed the duties of governor. The germane question presented to the Court in *State ex rel. De Concini v. Garvey*, 67 Ariz. 304, 195 P.2d 153 (1948), was: "upon the death of Governor Osborne did the respondent become vested with the *office* of governor for the remainder of the term?" [195 P.2d at 154.] it was held:

> The framers of our constitution never intended that there should be any interim in which the affairs of state were not executed for they said in explicit language that upon the happening of *any* of the contingencies mentioned in section 6, article 5, supra, [*Arizona Constitution*] the powers and duties of the office of governor were to be immediately transferred to the secretary of state who was then given a mandate to discharge the duties of the office for the residue of the term for which the governor was elected. He, as secretary of state, acts as governor and is empowered to perform all the duties of that office, and his official acts performed as acting governor are valid. [Citation omitted.]
>
> We have observed that the prevailing view is that an inferior

> officer does not vacate his office and become governor de jure and de facto where the several constitutions provide merely that the duties and powers of the office devolve upon him. *Id.* at 155-156.

The Court concluded:

> The respondent took an oath to perform the duties of secretary of state. His duties embrace the responsibility to act as governor in case any of the contingencies provided for in the constitutional provision arise. [Citation omitted.]
>
> We, therefore, hold that respondent Garvey is not governor de jure or de facto but merely ex officio or acting governor invested by constitutional mandate with all of the powers and duties of that high office, which devolve upon him by virtue of the fact that he is secretary of state. Respondent, however, is entitled to physical possession of the office space and facilities provided for the chief executive of the state, but as no provision has been made that the emoluments of the office of governor inure to the secretary of state when acting as governor he is entitled only to the compensation provided for the secretary of state. *Id.* at 157-158.

Since Idaho's constitutional provision provides that the lieutenant governor is entitled to "the powers, duties *and emoluments*" of the office of governor, it seems clear that the lieutenant governor would acceed to the governor's salary whenever he assumed the role of that chief executive, regardless of whether it was determined that he held the office de facto or de jure, or merely ex officio or as acting governor. The question of whether the lieutenant governor remains further entitled to the emoluments, including salary, of *that* office while the gubernatorial duties have devolved upon him is still an open one. As noted herein, courts have gone both ways on the issue, some holding that the person may draw both salaries even where there is an express constitutional prohibition against an officer of state government being paid more than one salary. Only the courts may provide the definitive anwer for Idaho to that dilemma.

In *State ex rel. Chatterton v. Grant*, 12 Wyo. 1, 73 P. 470 (1903), Chatterton, Wyoming secretary of state, became acting governor upon the death of the incumbent governor by virtue of that state's constitution. He continued also to perform the duties of secretary of state. He sued to recover salary as secretary of state and also as governor. The Wyoming Supreme Court permitted him to recover both salaries, holding, in effect, that he was performing, with constitutional sanction, the duties of both offices, and ruled:

> It certainly cannot be held that the offices of Governor and Secretary of State are incompatible, in the sense that the same person, if Secretary of State, cannot legally act in the dual capacity and perform the duties of each office, upon the death, disability, or resignation of the Governor, since the

> Constitution and statutes expressly require it. No question of compatibility is involved. 73 P. at 472.

In Nevada, in *State ex rel. Hardin v. Sadler*, 23 Nev. 356, 47 P. 450 (1897), the Nevada Constitution provided for devolution of powers and duties of the office of governor upon the lieutenant governor for the residue of the term or until any disability should cease. Construing this provision, the Nevada Supreme Court ruled:

> If a vacancy occurs in the office of governor, the powers and duties of the office devolve upon the lieutenant governor. But there is no vacancy created thereby in the office of lieutenant governor. The officer remains lieutenant governor, but invested with the powers and duties of governor. 47 P. at 450.

Though the Nevada Court chose to use the term "vacancy" regarding the status occurring in the office of governor, it would appear that the better reasoned conclusion, supported by most case law, is that no true "vacancy" does occur in the governor's office through death, resignation, disability, or the like, inasmuch as the Constitution calls for mandatory, automatic succession in such cases. Thus, in no instant of time can a true "vacancy" be deemed to have occurred so long as there remains a constitutionally designated and qualified officer able to assume the powers, duties and emoluments of the office of governor.

In yet another Nevada Supreme Court case, *State ex rel. Sadler v. La Grave*, 23 Nev. 216 45 P. 243, 35 L.R.A. 233 (1896), the Nevada state comptroller contended that when the powers and duties of the office of governor devolved upon the lieutenant governor by virtue of that state's Constitution (similar to Idaho's), no change occurs in the position of that officer, who remains lieutenant governor, exercising the powers and duties of the governor, but not entitled to the salary attached to the office. The Nevada Supreme Court held that the lieutenant governor while acting governor was entitled to the salary attached to the office of governor. Concurring, Chief Justice Bigelow noted:

> I concur in the judgment, but do not wish to be understood thereby as holding that, upon the death of the governor, the lieutenant governor becomes "governor" in the full sense of the term. Justice Belknap's opinion might possibly be so construed. 45 P. at 245.

In *Furtrell v. Oldham*, 107 Ark. 386, 155 S.W. 501, Ann. Cas. 1915A, 571 (1913), as stated by the Court:

> The case turns on the question whether, on the resignation of the Governor, the then incumbent of the office of president of the senate succeeded to the vacated office, or whether merely as such president of the senate the powers, duties, and emoluments of the office of Governor devolved upon him while he remained president. 155 S.W. at 503.

As will be seen from the style of the question the constitutional provision in Arkansas relating to devolution when a governor leaves office is virtually identical to that of Idaho, except that their president of the senate is apparently not also termed lieutenant governor, as is the case in Idaho. The Court concluded:

> If the framers of the Constitution had intended to provide for the devolution of the office of Governor, in case of vacancy by resignation, or otherwise, upon the president of the senate, that intention could easily have been expressed in appropriate words. But they chose other tems which clearly observe the distinction between the course of succession of the office itself and the mere devolution of the duties and emoluments of the office for the time being, and deliberately adopted the latter as the best means of having the government administered until the people themselves can elect a governor. *Id.* at 505.

In the case of *People ex rel. Lynch v. Budd*, 114 Cal. 168, 45 P. 1060 (1896), the lieutenant governor died during his term and the governor appointed a successor. Both parties conceded that the vacancy caused by the death of the incumbent was one which the governor had the power to fill. Construing California's constitutional provision relating to "vacancies" in the offices of governor and lieutenant governor, the Court noted:

> It will be seen that in case of a vacancy in the office of governor the vacancy is not to be filled, but the powers and duties devolve upon the lieutenant governor, *who does not cease to be lieutenant governor.* [Emphasis supplied.] Under such circumstances it would hardly be contended that when the powers and duties of the governor devolve upon the lieutenant governor the latter thereby becomes governor, and can thereby appoint a lieutenant governor. Nor do I think it could be contended that when the president pro tempore of the senate acts as governor he could appoint a person to fill the vacancy in the office of lieutenant governor. If he could, he would then appoint himself out of office, and it would be his duty to do so.
>
> But it is conceded by the parties that upon the death of the lieutenant governor the governor may fill the vacancy by appointment. This is unmistakably within the language of section 8, art. 5 [*California Constitution*] . . . 45 P. at 1060.

Though considering whether a deputy was authorized to assume the duties of the superintendent of the state insurance department during the absence and inability of the superintendent, the New York appellate court in *People ex rel. Church v. Hopkins*, 55 N.Y. 74 (1873), considered precedent in that state's executive branch noting:

> But there are precedents which, though not judicial, I regard as entitled to be considered as decisive of the question under consideration. [The New York constitutional provision for

> powers and duties of governor devolving upon the lieutenant governor were set out.] On the 11th day of February, 1828, the office of Governor became vacant by the death of De Witt Clinton, the then incumbent of the office, and its powers and duties, under the above provision of the Constitution, devolved upon Nathanial Pitcher, then lieutenant governor. The question arose whether he was to be regarded, in the exercise of the powers and performance of his duties so vested in him, as acting governor, or in the performance of the contingent duties of lieutenant governor, and, as a consequence, whether he was entitled to the salary of the former office, or the compensation given to the lieutenant governor for his services as such. It was held by William L. Marcy, then comptroller, that he was to be regarded as the acting governor, and entitled to the salary given by law to that officer. The same questions, under the same provision, again arose in 1829, upon the resignation of the office of governor by Martin Van Buren, and the powers and duties of the office devolving upon Enos T. Throop, then lieutenant governor, and were decided in the same way by Silas Wright, then comptroller. It will be seen that these questions were identical with that in the present case. We surely shall not go far astray in following the precedents established by these able jurists, wise statesmen and rigid economists. 55 N.Y. at 80-81.

All justices concurred.

It should be readily apparent from the foregoing cases that though several states have considered situations similar to that which Idaho faces, under similar constitutional provisions, there is no consistent underlying thread tying all the cases together into a uniform pattern. The interpretations of various aspects of the devolution problem are so diverse that it is perilous for any but a court to tread in the area. As a consequence of the lack of uniform interpretation this is one situation where the Attorney General believes that discretion and duty both require submission of the basic question and its numerous side issues to the Idaho Supreme Court in the first instance.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 4, §§ 6, 12 & 13.

2. *Idaho Code*, Sections 50-904 & 50-914.

3. Idaho Cases: *Moon v. Masters*, 73 Idaho 146, 247 P.2d 158 (1952); *Budge v. Gifford*, 26 Idaho 521, 144 P. 333 (1914).

4. *United States Constitution*, Article 2, § 6.

5. Other cases: *Merriam v. Clinch*, 6 Blatchf. 5 Fed. Cas. No. 9,460 (S.D. N.Y. 1867); *State ex rel. De Concini v. Garvey*, 67 Ariz. 304, 195 P.2d 153 (1948);

Furtell v. Oldham, 107 Ark. 386, 155 S.W. Ann. Cas. 1915A, 571 (1913); *People ex rel. Lynch v. Budd*, 114 Cal. 168, 45 P. 1060 (1896); *People ex rel. Parks v. Cornforth*, 34 Col. 107, 81 P. 871 (1905); *State ex rel. Lamey v. Mitchell*, 97 Mont. 252, 34 P.2d 369 (1934); *State ex rel. Hardin v. Sadler*, 23 Nev. 356, 47 P. 450 (1897); *State ex rel. Sadler v. La Grave*, 23 Nev. 216, 45 P. 243 35 L.R.A. 233 (1896); *State v. Heller*, 63 N.J. Law. 105, 42 A. 155, 57, L.R.A. 312 (1899); *People ex rel. Church v. Hopkins*, 55 N.Y. 74 (1873); *State ex rel O'Hara v. Appling*, 215 Or. 303, 334 P.2d 482 (1959); *Olcott v. Hoff*, 92 Or. 462, 181 P. 466 (1919); *Chadwick v. Earhart*, 11 Or. 389, 4 P. 1180 (1884); *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 P. 25 (1902); *State ex rel. Chatterton v. Grant*, 12 Wyo. 1, 73 P. 470 (1903).

DATED this 4th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PETER E. HEISER, JR.
Chief Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-2

TO: Bartlett R. Brown
Director, Idaho Department of Labor
and Industrial Services
317 Main Street, Room 400
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Can the Director of the Department of Labor and Industrial Services, by the authority of Idaho Code § 39-4009, require the certification of personnel to supervise the installation of plumbing, heating, and electrical systems in mobile homes manufactured in Idaho, or is the course of action in conflict with HUD Procedural and Enforcement Regulations 3282.11(c), 40 FR No. 244, _____ CFR _____ (1976), which regulation provides that the Federal regulations shall be the exclusive system for enforcement of the Federal mobile home safety standards?

2. If Idaho Code § 39-4009 cannot be enforced by the Department because it

is preempted by the Federal regulations, can the Department, through its electrical laws, Idaho Code § 54-1001 *et seq*, and its plumbing laws, Idaho Code § 39-2701 *et seq*, require that all plumbing and electrical installations in mobile homes manufactured in Idaho be done by licensed journeyman plumbers and electricians?

CONCLUSIONS:

1. The Director of the Department of Labor and Industrial Services may, by the authority of Idaho Code § 39-4009, require the certification of personnel to supervise the installation of plumbing, heating and electrical systems in mobile homes manufactured in Idaho, as this requirement is not a "system for enforcement of the Federal standards or of identical state standards" and as such is not barred by the preemption section contained in § 3282.11(c) of the Federal Mobile Home Procedural and Enforcement Regulations.

2. If it were found that in fact Idaho Code § 39-4009 could not be enforced because it was preempted by Federal regulations, then the Department could, through its electrical laws, Idaho Code § 54-1001 *et seq*, and its plumbing laws, Idaho Code § 39-2701 *et seq*, require that all plumbing and electrical installations in mobile homes manufactured in Idaho be done by licensed plumbers and electricians.

ANALYSIS:

The questions that you raise pose a question of preemption — whether Federal laws and regulations governing the enforcement of mobile home construction and safety standards preclude the enforcement of pre-existing state laws regarding mobile homes. To resolve this question an examination of the applicable state and Federal law is necessary.

In the 1971 legislative session, the Idaho Legislature enacted a law relating to mobile homes and recreational vehicles, which law was codified as Idaho Code § 39-4001 *et seq*. Contained in this new law, as Idaho Code § 39-4009, was a requirement that, at all times that a mobile home or recreational vehicle plant is manufacturing plumbing, heating, or electrical systems, or such systems are being installed in mobile homes or recreational vehicles, this shall be done under the supervision of individuals certified by the director of the Department of Labor and Industrial Services as qualified to supervise the installation of plumbing, heating or electrical systems in mobile homes or recreational vehicles.

On August 22, 1974, as Public Law 93-383, 42 U.S.C. § 5401 *et seq*, Congress passed the National Mobile Home Construction and Safety Standards Act of 1974. This law contained, *inter alia*, a section providing for supremacy of Federal standards in cases of conflict. This section, 604(d), reads as follows:

> "(w)henever a Federal mobile home construction and safety standard established under this title is in effect, no state or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any mobile

> home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal Mobile Home Construction and Safety Standard."

A basically identical provision can be found in the Federal Mobile Home Procedural and Enforcement Regulations, § 3282.11(a). Thus, though the intent of Congress was that state and federal standards be identical as to aspects of mobile home construction and safety covered by the Federal rules, there was no indication that a state could not enforce standards regarding aspects of mobile home construction and safety which were *not* covered by the Federal rules. In fact, the Act, in § 623(a), specifically authorizes a state to promulgate or enforce standards regarding mobile homes in such a situation. It reads:

> "(n)othing in this title shall prevent any state agency or court from asserting jurisdiction under state law over any mobile home construction or safety issue with respect to which no Federal mobile home construction or safety standard has been established pursuant to the provisions of section 604."

The "standards" to which reference is made above are the Federal Mobile Home Construction and Safety Standards, codified in 24 CFR § 280.1 *et seq* (1976). They provide, *inter alia*, for certain requirements and standards regarding plumbing and electrical installations. The subpart of these regulations dealing with electrical installations in mobile homes, § 280.801 *et seq* provides that in addition to the requirements and standards set out therein, all other applicable provisions of the National Electrical Code shall be followed if they are not in conflict with the Federal standards.

The general laws of the state of Idaho dealing with electrical safety, Idaho Code § 54-1001 *et seq*, provide that as a matter of policy, all electrical installations in Idaho shall be done substantially in accord with the National Electrical Code of 1971, as amended. (*see* Idaho Code § 54-1001). The electrical law also requires that all electrical installations in Idaho be done by or under the supervision of a licensed journeyman electrician (*see* Idaho Code § 54-1003A(2)).

As discussed above, the journeyman licensing requirement was relaxed by Idaho Code § 39-4009 with regard to electrical installations in mobile homes. The certified supervisor requirement was designed to serve two purposes here:

1. to see that the provisions of the National Electrical Code, covering aspects of mobile home electrical installation not covered by the Federal standards, are complied with.

2. As an alternative to I.C. § 54-1003A(2), which requires that all electrical installations in Idaho be done by or under the supervision of a licensed journeyman electrician. It was felt that some familiarity with the National Electrical Code should be required, regarding those sections relating to electrical installations in mobile homes, but that the comprehensive code familiarity and experience required of a journeyman could be waived.

Similarly, the plumbing laws of the State of Idaho provide that all plumbing installations shall be done in a manner substantially in accord with the Uniform Plumbing Code. I.C. § 39-2701. Furthermore, the plumbing laws require that all plumbing installations be done by appropriately licensed journeymen. I.C. §§ 30-2715, 39-2716.

The standards for plumbing installations in mobile homes are set out in 24 CFR § 280.601 *et seq.* Unlike the section of the Federal Standards dealing with electrical installations, there is no section specifically providing that consistent provisions of the Uniform Plumbing Code may also be enforced. However, in light of the broad statutory authorization in § 623(a) of the Act, which permits a state to enforce consistent additional standards, it is clear that such a course of action would be permissable.

As with electrical installations, the certified supervisor requirement relating to plumbing installations was designed to serve two purposes:

1. To ensure that applicable provisions of the Uniform Plumbing Code, covering aspects of mobile home plumbing installations not covered by the Federal standards, are being complied with.

2. As an alternative to the journeyman licensing requirement.

Given the fact that there are sections in the Federal act and regulations dealing with the questions of preemption and supremacy of Federal legislation, it is necessary to examine some pertinent case law to determine the extent to which Federal and State government agencies may regulate the same area.

It is clear that where congress exercises its commerce power to regulate a particular field, and state regulation is in conflict, either expressly or impliedly, then the state regulation becomes inoperative and the Federal statute exclusive in its application. *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942). By the same token, state action is permitted when the Federal statute does not cover the particular point regulated. *See Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939); *Eichholtz v. Comm'n*, 306 U.S. 268, 274 (1939); *Savage v. Jones*, 225 U.S. 501 (1912); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). Finally, it has been held that Congress may attach an *express* preemption clause to regulatory legislation, thereby prohibiting any concurrent or subsequent action by states or their political subdivisions in that area of regulation. *Chemical Specialties Mfrs. Ass'n v. Clark*, 482 F.2d 325 (5th Cir. 1973). However, where there is a preemption section in a statute, especially one dealing with the area of state police power, it shall be construed narrowly and preemption will not be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2nd Cir. 1969) (citations omitted).

At this point, then, we must examine the Idaho provision relating to certified supervisors, Idaho Code § 39-4009, in light of provisions of the Federal laws and regulations dealing with preemption, with due regard for the above cited court cases.

The principal section in the Mobile Home Procedural and Enforcement Regulations which might arguably raise a question of preemption is § 3282.11(c). It reads as follows:

> " . . . (t)hese regulations establish the exclusive system for enforcement of the Federal standards. No state may establish or keep in effect, through a building code enforcement system or otherwise, procedures or requirements which constitute systems for enforcement of the Federal Standards or of identical State Standards which are outside the system established in these regulations . . . "

It must be noted at this point that the Federal regulations do not contain a requirement as to certified supervisors. The question then becomes one of statutory interpretation: is the certified supervisor requirement of Idaho Code § 39-4009 a " . . . system of enforcement of the Federal standards or of identical state standards . . . " and as such preempted by § 3282.11(c)?

As discussed earlier in this Opinion, the requirement of certified supervisors for plumbing and electrical installations is designed to:

1. ensure that plumbing and electrical installations in mobile homes are being done in conformance with applicable provisions of the Uniform Plumbing Code and National Electrical Code (i.e. those provisions applicable to mobile homes which cover aspects of mobile home electrical and plumbing systems not covered by the Federal standards).

2. act as a substitute requirement to the provisions in the plumbing and electrical laws requiring all such work in Idaho to be done by or under the supervision of appropriately licensed journeymen.

As such, the requirement is not a "system of enforcement of the Federal standards." What aspect of the supervisor's job will deal with enforcement, will be directed towards the enforcement of the uniform laws dealing with plumbing and electrical installations, rather than with enforcement of the Federal standards or of identical state standards, and on that basis can be justified legally notwithstanding § 3282.11(c) of the Federal Mobile Home Procedural and Enforcement Regulations. Therefore, it is the opinion of this office that the Idaho Department of Labor and Industrial Services may continue to enforce the requirement in Idaho Code § 39-4009 for certification of individuals to supervise plumbing, heating, and electrical installation in mobile homes manufactured in Idaho.

As a result of the above opinion, it is not essential to reach your second question, which is whether, if the certified supervisor requirement could not be enforced by the Department, the Department could require that all plumbing and electrical work on mobile homes manufactured in Idaho be done by appropriately licensed journeymen. For your reference, however, this question will be answered anyway as if the certified supervisor requirement was not in existence.

From a reading of the electrical laws, Idaho Code § 54-1001 *et seq*, and the plumbing laws, Idaho Code § 39-2701 *et seq*, it is obvious that the journeyman licensing laws, found in Idaho Code §§ 54-1003A(2) and 39-2715, respectively, impose a requirement independent of any state or federal law or regulation dealing with mobile home manufacture or construction. Rather than being a system of enforcement of mobile home standards, as would be prohibited by Regulation 3282.11(c), the Journeyman licensing laws serve a much broader purpose: that of ensuring that all plumbing and electrical work is done by qualified, experienced and competent personnel. This would be not less the case in the mobile home area than in any other type of plumbing and electrical installations.

Idaho Code § 39-4009, in imposing the certified supervisor requirement, does not require that such supervisors be licensed journeymen or electricians. However, it is the opinion of this office that, if at some point in the future Idaho Code § 39-4009 were removed from the Idaho laws, that the Idaho Department of Labor and Industrial Services could, by the authority of its plumbing and electrical laws, require that all plumbing and electrical installations in mobile homes manufactured in Idaho be done by licensed journeymen.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 39-4009, 39-2701 *et seq*, 54-1001 *et seq*, 54-1003A(2), 39-2715, 39-2716.

2. *Other authorities:*

(a) *Federal statutes and regulations:* 40 FR No. 244, _____ CFR _____ (1976) §§ 3282.11(c), 3282.11(a); 24 CFR §§ 280.801 *et seq*, 280.601 *et seq*; Pub. Law 93-383, 42 U.S.C. 5401 *et seq*, §§ 604(d), 623(a).

(b) *Federal cases: Cloverleaf Co. v. Patterson*, 315 US 148 (1942); *Welch Co. v. New Hampshire*, 306 US 79, 85 (1939); *Eichholz v. Comm'n*, 306 US 268, 274 (1939); *Savage v. Jones*, 225 US 501 (1912); *Florida Lime & Avocado Growers v. Paul*, 373 US 132, 142 (1962); *Chemical Specialties Mfrs. Ass'n v. Clark*, 482 F.2d 325 (5th Cir. 1973); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2nd Cir. 1969) (citations omitted).

(c) National Electrical Code (N.F.P.A. 1975); Uniform Plumbing Code (I.C.B.O. 1976).

DATED this 5th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THOMAS H. SWINEHART
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-3

TO: Honorable Jack Kennevick
State Representative
1 Mesa Vista Drive
Boise, Idaho 83705

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Can the Idaho Department of Labor and Industrial Services require the installation of Idaho insignia on recreational vehicles manufactured in Idaho, which are being exported from Idaho, and are not being offered for rent, lease or sale in the state?

CONCLUSION:

The Idaho Department of Labor and Industrial Services may, through reciprocal agreements entered into with other states and approved by the Attorney General's office, conduct inspection of recreational vehicles during manufacture in Idaho, and affix an insignia showing compliance with applicable codes and regulations, even if the vehicle itself is not offered for rent, lease or sale in Idaho, provided that the state of ultimate destination for sale is one with which Idaho has a valid reciprocal agreement regarding plan approvals and inspection. The Department may not require an Idaho insignia to be affixed to units exported if the state of ultimate destination is not one with which the Department has a valid reciprocal agreement.

ANALYSIS:

You indicate in your letter requesting this opinion that your question is posed with regard to reciprocal agreements for inspection and plan approvals of recreational vehicles which the Idaho Department of Labor and Industrial Services has entered into with the states of Arizona and Washington.

As you note in your letter, the validity of these agreements was upheld by Idaho Attorney General Opinion No. 76-43, issued by this office on August 4, 1976. Contained in the agreements approved by the Attorney General is the following clause:

> "... the states party to this agreement shall require the insignias or labels of the state of manufacture and the state in which such unit is sold, shall be attached in a conspicuous place to each recreational vehicle and the appropriate fee therefore shall be paid to the respective states by the manufacturer."

The above provision is the means by which the agreeing states have effected a reciprocal recognition of the other state's plan approvals and inspections.

The purpose and effect of such a reciprocal agreement is to permit a state where recreational vehicles are manufactured to do the on-site monitoring and inspection of the manufacturing process, rather than having representatives of the state of ultimate sale travel to the state of manufacture to do the inspection. The insignia attached to the vehicle by the state of manufacture is in effect a representation that the plans for said vehicle have been reviewed and approved and that the unit was inspected during manufacture.

In the 1971 Idaho legislative session, a bill was passed regarding mobile homes and recreational vehicles, and this bill was codified as I.C. § 39-4001 *et seq.* Included in that act was a section (I.C. § 39-4007) which gave the Director of the Department of Labor and Industrial Services two choices regarding the treatment of recreational vehicles manufactured outside of the State of Idaho and imported into the state:

1. He may make a determination that the laws and regulations of the manufacturing state relating to recreational vehicles are at least as stringent as those in Idaho, and may thereafter provide that a unit manufactured in that state will be deemed to have complied with Idaho's requirements. The Attorney General's office, in its previous Opinion No. 76-43, interpreted this section as authorizing an agreement whereby the manufacturing state would do plan approval and inspection and the state of ultimate sale would accept this as evidence of compliance with its law.

2. To have inspectors certified by the State of Idaho perform actual inspections during the manufacturing process, to determine compliance with Idaho's codes and regulations.

As can clearly be seen, it is to the advantage of all involved parties for the state of Idaho to enter into reciprocal agreements for plan approval and inspection with other states. The buyer ultimately benefits because the reduced cost of inspection at least theoretically reduces the retail price of the unit. The manufacturer benefits because he will know that he will be able to market his unit in any state which has a reciprocal agreement with his state of manufacture, without having to wait for inspection and design approval by the selling state. The dealer will similarly benefit by the shortening of the approval time. By definition, though, a reciprocal agreement contemplates duties as well as rights on both sides. Therefore, under such agreements, the state of Idaho agrees to perform the same functions for the agreeing state as are being performed for Idaho.

You are correct in your reading of SCR 143 that it only requires the affixing of an Idaho insignia if the recreational vehicle is offered for rent, lease or sale in the State of Idaho. Furthermore, Attorney General Opinion No. 74-11, issued by this office on July 23, 1973, provides that the insignia requirement of I.C. § 39-4005 can be enforced by the State of Idaho only with regard to those units offered for rent, lease or sale within the state. However, with regard to the present situation, it should be noted that the State of Idaho, as a party to a reciprocal agreement entered into pursuant to I.C. § 39-4007, is not requiring that an insignia be affixed to a vehicle being exported from the state. It is merely

agreeing to perform the functions of plan approval and inspections for units for the state with which it has the reciprocal agreement and which will ultimately sell the unit. It is the state of ultimate sale, rather than the state of Idaho, which is requiring that the Idaho insignia be attached before importation into that state.

Therefore, it is the opinion of this office that the Idaho Department of Labor and Industrial Services may, through reciprocal agreements entered into with other states and approved by this office, inspect recreational vehicles manufactured in the state of Idaho and attach a Department insignia of compliance, even as to those vehicles which are to be exported from the state, provided that the state of ultimate destination is one with which the state of Idaho has a valid reciprocal agreement regarding plan approval and inspection. The Department may not require such an insignia to be affixed to a vehicle to be exported if the state of ultimate sale is not one with which the Department has a valid reciprocal agreement.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 39-4005, 39-4007.

2. *Other Idaho Authority:* SCR 143, 1976 Idaho Session Laws; Idaho Attorney General Opinions 74-11, 76-43.

DATED this 7th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THOMAS H. SWINEHART
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-4

TO: Kenneth Paul Adler
Prosecuting Attorney
Adams County
P.O. Box 586
Council, Idaho 83612

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. May a county pay moving and settlement expenses to a medical doctor as an inducement to settling and practicing in that county?

2. May a county guarantee a minimum monthly income to a new doctor for a fixed number of months during his initial settlement in the county?

3. If the county cannot, through its commissioners, do any of the above, may a community hospital board duly constituted pursuant to *Idaho Code* § 31-3605 do the same?

CONCLUSIONS:

1. Under existing Idaho law a county may not pay moving and settlement expenses to a medical doctor as an inducement to settle and practice in the county unless the physician will be — or is — an employee of that county.

2. Under existing Idaho law a county may not guarantee a minimum monthly income to a new physician for a fixed number of months solely as an inducement to establish practice in that county.

3. The conclusions reached in this opinion extend also to community hospital boards duly constituted pursuant to § 31-3601, *et seq.*, *Idaho Code.*

ANALYSIS:

Governmental subdivisions within the State of Idaho have considerable flexibility in managing their fiscal affairs. As the State continues to grow, these duties become more complex. Local fiscal control is not unbridled, however, for parameters have been established within our legal system. The underlying requirement for governmental expenditure at the local level is precisely expressed in the State's constitution as follows:

> "No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to or in aid of any individual, association, or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." Art. 8, § 4, *Idaho Constitution.*

This language requires that taxpayers' dollars be spent for governmental purposes only. Subsidy of private enterprise or interest through expenditure of tax dollars is not permitted by the *Idaho Constitution.*

Although the intent of the constitution is clear, its application may on occasion create confusion, for governmental expenditures usually result in some form of benefits to private individuals and interests. For example, when a county

employs a contractor to construct a public building, the contractor benefits from the agreement he has made. But this type of transaction does not fall within the prohibition of Art. 8, § 4, *Idaho Constitution*. In order to distinguish proscribed activities from those which are allowable, the courts have fashioned guidelines and tests for the spending of public money.

The test normally applied is the "public purpose" doctrine. If a "public purpose" exists, the expenditure is legal even though benefits may also accrue within the private sector. The doctrine has been explained by the Supreme Court of New Jersey as follows:

> "Generally, 'public purpose' connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government." *Roe v. Kervick*, 199 A.2d 834 (N.J. 1964).

The Supreme Court of Arizona recently addressed the public purpose doctrine in *Town of Gila Bend v. Walled Lake Door Company*, 490 P.2d 551 (Ariz. 1971), saying:

> "Public funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." 490 P.2d at 555.

Under these definitions, county expeditures, in order to be legal, must benefit the community as a whole and, *in addition*, must be related directly to the function of government. In short, a showing that the community as a whole may be benefited in some manner is not in itself enough to satisfy the "public purpose" test.

The "public purpose" doctrine was applied by the Idaho Supreme Court in *Village of Moyie Springs, Idaho v. Aurora Manufacturing Company*, 353 P.2d 767 (Idaho 1960). In that case, the Court held that a city could not constitutionally promote industrial development by providing the industry with monetary assistance. The Court said:

> "The proprietary powers of municipal corporations in this state are limited to functions and purposes which are municipal and public in character as distinguished from those which are private in character and engaged in for private profit." 353 P.2d at 773.

The argument that the expenditure would benefit the public through employment, taxes and other indirect benefits was rejected by the Court, which said:

> "We do not agree that an incidental or indirect benefit to the public can transform a private industrial enterprise into a public one, or imbue it with a public purpose." 353 P.2d at 773.

When the public purpose doctrine as explained in *Moyie Springs, supra*, is applied to the factual situation confronted by this opinion, it becomes quickly apparent that such payments cannot legally be made. True, many persons in the county will surely benefit if a physician is present there, but the expenditure is in no way related to the functions of county government. Any money expended benefits the private practitioner directly, and the only benefit to the county accrues indirectly through medical services rendered to residents of that county. The only consideration that the county receives for the payment is establishment of a physician's practice within the boundaries of the county. Residents within the county, of course, benefit when a doctor is readily available, but they still must pay for any services which they receive through this private practice.

No case has been found directly on this point. However, similar cases have been found in several jurisdictions. For example, in *Foster v. North Carolina Medical Care Commission*, 195 S.E.2d 517 (N.C. 1973), public funds were being spent to finance the construction of a hospital which would be operated privately upon its completion. The Court held that this was not an expenditure for public purpose and was, therefore, unconstitutional.

In *Hamilton v. City of Anniston*, 27 S.2d 857 (Ala. 1946), the Supreme Court of Alabama was faced with a city's plan to provide office space in a city hospital for use by private practitioners. The space would be used, among other things, in the physicians' private practice. Although it appeared that the hospital — and thus the city — would benefit from these transactions, the Court struck down the proposal because it was not a "public purpose".

Review of several treatises on municipal and county expenditures reveals no case permitting subsidies to private physicians. In fact, in addition to the instances already noted, Courts, applying the public purpose doctrine, have disapproved local aid to fraternal organizations, benefits to industry for locating in the area, aid to private water companies, assistance to private concerns developing natural resources, aid to navigation companies, steamship lines, railroads and many other such entities. See McQuillan, *Municipal Corporations*, (3rd Ed.) § 39.26.

For a general discussion of the public purpose doctrine in the area of local government expenditures and its application in specific situations, see McQuillan, *Municipal Corporations* (3rd Ed.) § 39.19, *et seq.*; *Antieau's Local Government Law, County Law*, Vol. 4, § 43.03; 56 Am. Jur. 2d Municipal Corporations, §§ 588-591; 64 C.J.S. Municipal Corporations §§ 1835-1845.

We must conclude from the relevant authorities that the payment of moving expenses and guaranteed monetary income to a physican for an inducement to locate in the county is a direct subsidy to the physician which cannot be found legal through the public purpose doctrine. Although the public purpose doctrine is dispositive of this issue, we think the expenditure would also be highly suspect under the equal protection clause of the *United States Constitution*. One reason for this is that under such a policy, one profession is assisted whereas other professions are not. Here, the payment is made only to a member of the medical profession. The reason given is that the community needs a doctor, and this is a

laudable reason. But if such a policy is instituted, any person whose trade or profession does not yet exist in the county could demand public subsidy while he seeks to establish his practice. The demand could be made by such diverse groups as dentists, psychologists, building contractors, taxidermists, and, perhaps, even by lawyers. Another ground for holding such a policy constitutionally suspect under the equal protection clause is that an individual in the medical profession receives county assistance whereas another physician in the county may receive no assistance whatever. For instance, a doctor locating in the county after the first physician is confronted by competition that is subsidized by the county.

This opinion concludes that payments to a physician by a county as an inducement to moving there are not in compliance with constitutional mandates. It does not say or imply that payments to private physicians by county government are necessarily improper. Many instances may arise which make such payments appropriate. The most common situation would be where the physician is employed by the county on a full or part-time basis. In this case, he could certainly be reimbursed for his services to the county whether he has, in addition, a private practice or not. [Of course, any payments made must be commensurate with the services received, and they must be made in good faith and not as a round about method of establishing a public subsidy]. The crucial distinction here is between payments made for services rendered by the physician to the county as opposed to payments made as a direct subsidy to the physician with no employment involved. It is the latter situation which is constitutionally wrong.

After reviewing the statutory authority for county hospital boards found in § 31-3601, *Idaho Code*, we believe that the conclusions reached in this opinion apply also to any payments which may be made by county hospital boards. Under Title 31, hospital boards are created by the board of county commissioners to administer county hospitals. As creatures of county government, their actions are subject to the provisions of Art. 8, § 4, *Idaho Constitution* either through that section's use of the word "county" or its use of the words "other subdivision".

In the final analysis, this opinion concludes that payments may be made to private practitioners for services which benefit the public and are related in some manner to the functions of county government. If the payment is made solely as an inducement to the private practitioner to locate in the county, it fails to meet the "public purpose" test established by judicial decisions, and is therefore in controvention of Art. 8, § 4, *Idaho Constitution.*

AUTHORITIES CONSIDERED:

1. Art. 8 § 4, *Idaho Constitution.*

2. *Village of Moyie Springs, Idaho v. Aurora Manufacturing Company*, 353 P.2d 767 (Idaho 1960).

3. *Roe v. Kervick*, 199 A.2d 834 (N.J. 1964).

4. *Foster v. North Carolina Medical Care Commission*, 195 S.E.2d 517 (N.C. 1973).

5. *Hamilton v. City of Anniston*, 27 S.2d 857 (Ala. 1946).

6. *Town of Gila Bend v. Walled Lake Door Company*, 490 P.2d 551 (Ariz. 1971).

7. McQuillan, *Municipal Corporations*, (3rd Ed.) § 39.19, *et seq.*

8. Antieaus, *Local Government Law, County Law*, Vol. 4 § 43.03.

9. 56 Am. Jur. 2d Municipal Corporations, §§ 588-591.

10. 64 C.J.S. Municipal Corporations, §§ 1835-1845.

DATED this 10th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-5

TO: Jack Warberg, Member
Idaho State Board of Hearing Aid Dealers & Fitters
239 Main Avenue West
Twin Falls, Idaho 83301

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Are hearing aid dealers and fitters entitled to legally use the term "Certified Hearing Aid Audiologist," when they have passed the necessary requirements of the National Hearing Aid Society?

CONCLUSION:

Yes, provided the term is accompanied by language which indicates that the

certification is conferred by the National Hearing Aid Society. A phrase such as "Hearing Aid Audiologist Certified by the National Hearing Aid Society" would be proper.

ANALYSIS:

In 1951, the Society of Hearing Audiologists adopted a plan for accrediting hearing aid specialists and granted the title "Certified Hearing Aid Audiologist" to those members who met its standards. The National Hearing Aid Society was formed in 1965 when the Council of State Hearing Aid Association merged with the Society of Hearing Aid Audiologists. The National Hearing Aid Society has continued the certification program of its predecessor.

Idaho's Hearing Aid Dealers and Fitters Act, *Idaho Code* Title 54, Chapter 29 was adopted in 1971, It clearly authorizes and intends licensees to use audiology in their business. *Idaho Code* § 54-2901(f) defines the "Practice of fitting and dealing in hearing aids" as:

> The selection, adaption, and sale of hearing aids and includes the testing of hearing by means of a audiometer, or by any other device designed specifically for these purposes.

The Act not only anticipates the practice of audiology, but requires the licensees to be proficient in their use of it. *Idaho Code* § 54-2909(b) requires that practical tests be given to applicants testing their proficiency in the techniques of:

> 1. pure tone audiometry, including air conduction testing and bone conduction testing;
>
> 2. live voice or recorded voice speech audiometry, including speech reception threshhold testing and speech discrimination testing;
>
> 3. masking when indicated;
>
> 4. recording an evaluation of audiograms in speech audiometry to determine proper selection and adaption of the hearing aid;

The Act, in *Idaho Code* § 59-2912(b), also provides for revocation or suspension of a dealers license for:

> 3. unethical conduct, including:
>
> (E) representing that the service or advice of a person licensed to practice medicine will be used or made available in the selection, fitting, adjustment, maintenance or repair of hearing aids when that is not true, or using the words "doctor," "clinic," "state certified," or "state approved" or any other term,

> abbreviation, or symbol when it would falsely give the impression that service is being provided by persons trained in medicine or audiology, or that the licensee's service has been recommended by the state when such is the case.

This section intends that the public not be misled into the belief that they are receiving the services of a person licensed to practice medicine or trained in medicine or audiology or that the licensee has been recommended by the state when such is not the case.

The term "Certified Hearing Aid Audiologist," when used by a licensed hearing aid dealer, puts the public on notice that this individual has been certified as a hearing aid audiologist, but does not communicate to the public the entity that so certified the licensee. The general public when viewing the phrase is not aware that this licensee is certified by the National Hearing Aid Society.

In the health care field, a certification program for practitioners generally is sanctioned and controlled by state agencies or boards and implies state certification. The intent of *Idaho Code* § 54-2912(b)(3)(E) is that the public not be confused in the servcies they are receiving. This could especially apply to the perception a consumer receives when he views the term "Certified Hearing Aid Audiologist" used by licensees under the act. It is worthy to note that the "Idaho Consumer Protection Act," particularly *Idaho Code* § 48-603(2) identifies as an unfair method of competition or deceptive practice "causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or servcies." In order that the public is not confused or misled into believing the licensee is certified as a Hearing Aid Audiologist by the state or some entity other than the National Hearing Aid Society, the public should be informed whenever the phrase is used that is conferred by the National Hearing Aid Society.

Idaho Code § 54-2904 exempts certain persons from compliance with the Act. Particularly, *Idaho Code* § 54-2904(b) exempts from licensing certain individuals practicing audiology by the following language:

> This act does not apply to a person who is a physician licensed to practice in Idaho and an audiologist holding the certificate of clinical competence provided such person or organization employing such persons does not engage in the sale of hearing aids.

Through the Act's exception in *Idaho Code* § 54-2904, it is recognized that certain individuals have received a post-graduate degree from accredited colleges and universities in audiology and that this degree may qualify these individuals for a certificate of clinical competence in audiology from the American Speech and Hearing Association. By the Act's exemption, the legislature has acknowledged the distinction between persons who have a certificate of clinical competence as a result of post-graduate study in an accredited college and individuals licensed under the Act. The former are called "Audiologists" or "Clinical Audiologists" while licensees under the Act who

meet the National Hearing Aid Society's requirements are certified and referred to as "Certified Hearing Aid Audiologist."

Individuals using the term "Audiologist" who have received a certificate of clinical competence from the American Speech and Hearing Association are not licensed by the state or under its jurisdiction with respect to the practice of their profession. The legislature has not enacted any legislation which would clarify this position on the use of the terms "Audiologist" or "Certified Hearing Aid Audiologist" other than *Idaho Code* § 54-2912(b)(3)(E). It has come to the attention of this office, however, that legislation is pending before the legislature regarding the licensing of "Audiologists" and presumably such legislation in this area would end any uncertainties in the area of the proper use of the term "Audiologist."

With due regard to the foregoing, it is the opinion of this office that the use of the term "Audiologist" in the phrase "Certified Hearing Aid Audiologist" is proper, provided that the public is not misled or confused as to the identity of the certifying entity. Accordingly, whenever the phrase "Certified Hearing Aid Audiologist" is utilized, it should be modified by a phrase identifying the National Hearing Aid Society as the certifier. Such phrases as "Hearing Aid Audiologist Certified by the National Hearing Aid Society" or "Certified Hearing Aid Audiologist by the National Hearing Aid Society" would be adequate to put the public on notice that the National Hearing Aid Society is the entity certifying the hearing aid audiologists and avoid any possibility that the consumer would be misled into believing this hearing aid dealer had been certified by the state.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 48-603(2); 54-2901(f); 54-2904; 54-2909(b)(1), (2), (3), (4); 54-2912(b)(3)(E).

2. *Ariz. Op. Att'y Gen.* (August 28, 1975).

DATED this 10th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

H. THOMAS VANDERFORD
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-6

TO: Senator Vernon K. Brassey
Legislative District No. 14
Statehouse
Building Mail
Boise, ID 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the Permanent Building Fund Council use permanent building funds to make the building programming and space planning studies needed to provide the Council and the Department of Administration with the proper information so they may perform their statutory duties?

CONCLUSION:

The Permanent Building Fund Advisory Council may use permanent building funds for building programming and space planning studies necessary for future construction of state office buildings providing approval is also obtained from the State Board of Examiners and providing that monies are appropriated from the permanent building fund by the Idaho Legislature. However, the statute relating to the Council and its role in planning state office buildings appears to be in conflict. Therefore, corrective legislation to resolve this problem is recommended.

ANALYSIS:

The answer to the question raised in this opinion depends primarily on a careful analysis of the development of the State's duties relating to construction of state office buildings in Idaho. The laws pertaining to these duties have changed over the years.

Initially, in 1921, the Commissioner of Public Works was granted authority and power to plan for, construct, furnish and prepare all buildings for the State of Idaho. See § 67-2304, *Idaho Code, repealed 1974*. At this time, there was no distinct fund set aside for the duties created by § 67-2304. However, in 1947, the legislature established the Permanent Building Fund Act, § 57-1101, *et seq.*, *Idaho Code*, which created the fund in the State treasury. Pursuant to § 57-1105, *Idaho Code*, the fund was intended to defray "the cost of planning, site purchases and erection of public buildings". In order to fulfill these purposes, the fund was perpetually appropriated to the State Board of Examiners, and the Board of Examiners was given authority to authorize preparation of plans and specifications needed for construction of public buildings. See also § 57-1106, *Idaho Code*, providing in part as follows:

> "It is declared as the purpose of this act with regard to future public building construction and improvement, that there shall

> be laid before the legislature from time to time well organized plans for necessary public facilities in the interest of intelligent and orderly legislative consideration and to avoid hasty and injudicious projects. For execution of that purpose it is made the duty of the State Board of Examiners to cause necessary plans and specifications to be prepared and to be submitted to each legislative session as need for public buildings and public building improvements may appear to it to arise, under advice and recommendation of the division of tourism and industrial development; . . . "

Thus, under this legislative authority, although final approval for construction of public buildings vested in the legislature, the Board of Examiners was empowered to have prepared necessary plans and specifications for the legislature's consideration.

The Permanent Building Fund Act was extended in 1961 by the addition of §§ 57-1108 through 57-1112, *Idaho Code.* See H.B. No. 71, chapter 43, 1961 Idaho Session Laws p. 66. The Act as amended by H.B. No. 71 in 1961 added § 57-1108, *Idaho Code* reading as follows:

> "The permanent building fund is hereby created and established in the state treasury to which shall be deposited all revenues derived from taxes imposed and transfers authorized pursuant to the provisions of this act. All monies now or hereafter in the permanent building fund are hereby dedicated for the purpose of building needed structures, renovations, repairs to and remodeling of existing structures at the several state institutions and for the several agencies of state government."

Curiously, this legislative enactment did not refer in any way to the permanent building fund as created in 1947 under the authority of the State Board of Examiners.

The 1961 addition to the Permanent Building Fund Act also created the Permanent Building Fund Advisory Council, and the Commissioner of Public Works and heads of the various State agencies were required to consult with the Council concerning any plans for construction of State office buildings. See § 57-1111, *Idaho Code, repealed* 1974 Idaho Session Laws, ch. 34, § 1, p. 988. Under § 57-1111, *Idaho Code*, the Council was required to approve any undertaking of planning or construction of future State office buildings. Once again, the earlier sections of the Permanent Building Fund Act, which placed authority for planning and specifications in the State Board of Examiners, were not referred to in any way in § 57-1111, *Idaho Code.*

In 1974, § 67-5701, *et seq.*, *Idaho Code* was passed creating the State Department of Administration and outlining the powers and duties of the various divisions within that Department. The provisions of that law applicable to this opinion are §§ 67-5710 through 67-5712, *Idaho Code.* Section 57-1111,

Idaho Code, repealed 1974 Idaho Session Laws, ch. 34, § 1 p. 988 was carried over practically verbatim into § 67-5710, *Idaho Code.* Thus, under the present law, the Permanent Building Fund Advisory Council has authority to work with the Division of Public Works and various State agencies concerning planning, designing and construction of state office buildings. Pursuant to § 67-5711, the Director of the Department of Administration, in conjunction with the Permanent Building Fund Council, secures all plans and specifications for state office buildings and has authority to contract for and supervise construction, alteration, equipping, furnishing and repair of these buildings. Further, under § 67-5712, *Idaho Code*, the Council and the Director of the Department of Administration must submit each year to the Governor a projection of building requirements for all institutions and agencies of State government.

Under existing law, the Permanent Building Fund Advisory Council and the Department of Administration are empowered, and, in fact, are required to plan the construction of State office buildings and establish the needs for future buildings of the State. There is also clear authority in the Permanent Building Fund Act to expend monies from the fund for planning construction of state office buildings. See § 57-1105, *Idaho Code*, establishing cost of planning as a legitimate expenditure from the fund, and § 57-1106, *Idaho Code* which requires establishment of plans for future State office buildings. See also § 67-5711, *Idaho Code* which authorizes and requires the Director of the Department of Administration and the Permanent Building Fund Advisory Council to provide and secure all necessary plans and specifications for state office buildings. Finally, pursuant to § 67-5712, *Idaho Code*, the Council and the Director of the Department of Administration must prepare annually a report for the Governor concerning future requirements for state office buildings. [It should be noted here that the legislature passed in 1974 the Idaho State Building Authority Act, § 67-6401, *et seq.*, *Idaho Code.* This Act established the State Building Authority whose duty it is to finance and construct future state office buildings for lease to the State of Idaho. However, this Act did not repeal the planning responsibilities of the Department of Administration and Permanent Building Fund Advisory Council as discussed earlier in this opinion. Thus, the requirements of the State Building Authority are not discussed or affected by this opinion.]

Apparently, in the 1961 additions to the Permanent Building Fund Act, the legislature intended to transfer authority for planning and approving specifications for state office buildings from the State Board of Examiners to the Permanent Building Fund Advisory Council which was created at that time. However, the earlier sections of the Act were not repealed or referred to in any way, and the latter sections do not necessarily alter the requirments of the earlier provisions of the Act. Therefore, under the Permanent Building Fund Act as it now exists, it appears that approval must be obtained by the Permanent Building Fund Advisory Council as well as the State Board of Examiners before the legislature is approached with the plans and specifications for the future buildings. Further, although § 57-1108, *Idaho Code* may have been intended to alter the disposition of the Permanent Building Fund, it did not in any way repeal § 57-1105, *IdahoCode*, which perpetually appropriated that fund to the State Board of Examiners. This creates a conflict, and the safe policy would be to require an appropriation from the legislature even though such procedure may not be required under § 57-1105, *Idaho Code.*

As earlier noted, § 57-1111, *Idaho Code* was repealed and carried over to § 67-5710, *Idaho Code*. However, § 67-5710, *Idaho Code*, incorporates the Permanent Building Fund Act in its entirety, thus bringing over the provisions of that law relating to the State Board of Examiners and the perpetual appropriation fund. The law is settled in Idaho that a new statute referring to another statute makes the latter applicable to the subject of the new legislation. Legislation which incorporates other statutes is referred to as a "reference statute." See *e.g. Nampa and Meridian Irrigation District v. Barker*, 38 Idaho 529 (1924), stating that "where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted had been incorporated bodily into the adopting statute." 38 Idaho at 533. Since § 67-5710, *Idaho Code*, is a reference statute, embodying the Permanent Building Fund Act in its entirety, all of the sections of the Act must be considered.

In light of the existing law, although planning for construction of state office buildings is clearly within the authority of the Council and the Department of Administration, approval by the Council should be followed up by approval from the State Board of Examiners pursuant to the Permanent Building Fund Act. Following this, appropriations should be obtained from the fund by the Idaho legislature.

As a recommendation for the future, we suggest that the legislature strongly consider necessary amendments to the Permanent Building Fund Act and § 67-5701, *et seq., Idaho Code* in order to clearly establish the appropriate procedure for planning and construction of future state office buildings.

AUTHORITIES CONSIDERED:

1. § 67-5710 through § 5712, *Idaho Code.*
2. § 57-1101, *et seq., Idaho Code.*
3. *Nampa and Meridian Irrigation District v. Barker*, 38 Idaho 529 (1924).

DATED this 17th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-7

TO: Gordon Trombley
Director
Department of Lands

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the State Board of Land Commissioners deny an application for an exploration lease of oil and gas land despite the applicant's compliance with the provisions of Title 47, Chapter 8, *Idaho Code*, and all pertinent regulations.

CONCLUSION:

Although the Board of Land Commissioners is bound when issuing a lease to comply with the procedural requirements of Title 47, Chapter 8, it is within the discretion of the Board to deny the lease application in the absence of arbitrary, capricious or discriminatory conduct on its part.

ANALYSIS:

Section 47-801 refers to the lease of state or school lands for oil and gas development. The legislature there stated that the "State Board of Land Commissioners hereby *authorized and empowered*" to lease lands for that purpose (emphasis added). In further sections the legislature went on to lay down limitations and procedures which must be followed when such lands are leased. The language used by the framers of the statute very strongly indicates their intention that the Board have a choice in whether or not to issue a lease. This interpretation is bolstered when read in conjunction with Section 47-702, *Idaho Code*, this section throws open all unlocated or unclaimed state lands for the purposes of mineral exploration, but oil and gas are specifically exempted from its terms. Section 47-701, *Idaho Code*, reserves to the state all "mineral rights" in lands belonging to the state until those rights are sold or leased. Oil and gas lands are specifically included in the terms of this section. In construing similar precatory language in Section 47-704, *Idaho Code*, the Idaho Supreme Court has stated that the Board of Land Commissioners has considerable discretion in whether or not to grant a lease. *Allen v. Smylie* (1969), 92 Idaho 846, 452 Pac.2d 343. The court has also held that "It is obvious that if the contemplated action of the Board of Land Commissioners involves the exercise of a judgment or discretion vested in them by law this Board cannot and will not attempt to control that discretion or in any manner interfere with or direct the action of the Board." *East Side Blaine County Livestock Ass'n v. State Board of Land Commissioners* (1921), 34 Idaho 807, 198 Pac. 760; *Barber Lumber Co. v. Gifford* (1914), 25 Idaho 654, 139 Pac. 557.

The courts have indicated that the discretion of the Board is not without limitation and that the Commissioners cannot act in an arbitrary, capricious or discriminatory manner, see *Allen v. Smylie, supra.* The test requires the Board to

exercise its discretion for the benefit of the people of the State. *Pike v. State Board of Land Commissioners* (1911), 19 Idaho 268, 113 Pac. 477.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 47, Chapter 8, Section 47-701, 47-702, 47-704.

2. *Allen v. Smylie* (1969), 92 Idaho 836, 452 Pac.2d 343, *East Side Blaine County Livestock Ass'n v. State Board of Land Commissioners* (1911), 19 Idaho 268, 113 Pac. 447, *Barber Lumber Co. v. Gifford* (1914), 25 Idaho 654, 139 Pac. 557. *Pike v. State Board of Land Commissioners* (1911), 19 Idaho 268, 113 Pac. 447.

DATED this 19th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. MacCONNELL
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-8

TO: Charles P. Brumbach
City Attorney, City of Twin Falls
P.O. Box 822
321 Second Ave. East
Twin Falls, Idaho 83301

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May platoon commanders of a given municipal fire department be excluded from union membership by mutual agreement between the municipality and the local bargaining agent for said union?

CONCLUSION:

Platoon commanders of a given municipal fire department may be excluded from union membership by mutual agreement between the municipality and the local bargaining agent for said union.

ANALYSIS:

In order to determine the collective bargaining rights of firefighters in Idaho, one must go first to I.C. § 44-1801 *et seq.* Any rights which firefighters in Idaho do have must of necessity arise under state law, as Federal labor laws specifically exclude from their coverage employees of states or their political subdivisions. National Labor Relations Act, § 2(2), 29 USC § 151 *et seq* (1935), *as amended by* Labor-Management Relations Act, 29 USC § 141 *et seq* (1947).

The Idaho firefighters law, in § 44-1801(a), defines "fire fighter" as " . . . the paid members of any regularly constituted fire department in any city, county, fire district or political subdivision within the state." Sections 44-1802 and 44-1803 of that law give firefighters, as defined above, the right to bargain collectively with their employer and to be represented in negotiations by a bargaining agent who has been selected by majority vote.

Given the broad definition of "firefighters" under Idaho Law, it could conceivably be argued that all firefighters, including supervisory personnel, have the right to organize and join a union and bargain collectively with their employers. However, upon examination of the statute, and consideration of its legislative intent and of generally recognized principles of labor law, such an interpretation is not recommended.

The courts of other jurisdictions (though not Idaho), considering the question of whether or not the fire chief or other high-ranking officers are properly to be considered "members" of a given fire department, have reached a negative conclusion. The court in the case of *State ex rel Harrell v. City of Wabash*, 65 N.E. 2d 494 (1946), in construing a fireman's pension law, construed that law to exclude the fire chief because a consideration of the likely intent of the statute suggested as a matter of logic, that the inclusion of the chief was not intended. Similarly, the court in the case of *Kohler v. City of Kewanee*, 321 Ill. App. 479, 53 N.E. 2d 479 (1944), noted that a distinction should properly be made between *officers* of a given municipal fire department and employees of that department, noting that the former are not generally to be considered "members" of the department.

The inclusion of supervisory personnel in a collective bargaining unit with rank-and-file employees is also contrary to all generally accepted principles of labor law. The National Labor Relations Act, §§ 2(3) and 2(11), as amended by the Labor-Management Relations Act, specifically provides that supervisory personnel are not to be considered as "employees" for the purposes of the Act. An NLRB case construing these sections, *Basic Management, Inc.*, 104 NLRB 1038 (1953), held that captains and lieutenants in a fire department are not to be included in the same bargaining unit with subordinate employees. A similar decision has been reached under state labor laws with regard to firefighters. *See, e.g., City Firefighters Union, Local No. 311 v. City of Madison*, 48 Wis. 2d 262, 179 N.W. 2d 800 (1970).

The reason for exclusion of management personnel from an employee bargaining unit is obvious; their interests are completely divergent from those of

rank-and-file employees with regard to wages and other conditions of employees; and, furthermore, their presence at a union meeting would tend to inhibit the employees from their airing of grievances. Then, too, such an exclusion is for the protection of supervisory personnel as well; to compel them to be in the same bargaining unit with rank-and-file employees would put them into a completely untenable position; that of divided loyalty to both management and employees. *See Safeway Stores v. Retail Clerks International Ass'n.*, 41 Cal. 2d 567, 261 P.2d 721.

As to the question of which individuals in a given fire department should properly be considered "supervisors", it would be useful to examine Section 2(11) of the National Labor Relations Act, as amended, which defines supervisor as " . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is the understanding of this office that, in the Twin Falls Fire Department, platoon commanders have extensive authority in the hiring and firing area, have the authority to reassign employees, and have supervision of an entire shift of employees. Therefore, they would unquestionably be "supervisors" within the meaning of the Act.

In consideration of the fact that most, if not all, labor law statutes and decisions, both state and Federal, provide that supervisory employees are not to be included in the same bargaining unit as subordinate employees, it would be the opinion of this office that supervisory employees such as platoon commanders, of a given municipal fire department may be excluded from union membership by mutual agreement between the municipality and the local bargaining agent for said union. In this regard, the definition of "supervisor" set out in the National Labor Relations Act, as amended, in Section 2(11), should give guidance as to whether or not a given fire department employee is a "supervisor". Though the Idaho firefighters law could arguably be interpreted to include *all* members of a fire department, including supervisors, it is the feeling of this office, that such an interpretation would not be justified in light of general labor law principles and the cases cited above the holding that supervisory personnel are not generally to properly be considered as "members" of a fire department.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 44-1801(a), 44-1802, 44-1803.

2. *Other authorities:* National Labor Relations Act, §§ 2(2), 2(3) 29 U.S.C. § 151 *et seq* (1935), *as amended by* Labor-Management Relations Act, 29 U.S.C. § 141 *et seq* (1947); *Basic Management, Inc.*, 104 NLRB 1038 (1953); *City Firefighters Union, Local No. 311 v. City of Madison*, 48 Wis.2d 262, 179 N.W. 2d 800 (1970); *State ex rel Harrell v. City of Wabash*, 65 N.E. 2d 494

(1941); *Kohler v. City of Kewanee*, 321 Ill. App. 479, 53 N.E. 2d 479 (1944); *Safeway Stores v. Retail Clerks International Ass'n.*, 41 Cal. 2d 567, 261 P.2d 721; National Labor Relations Act, § 2(11).

DATED this 24th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THOMAS H. SWINEHART
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-9

TO: Mr. Ronald S. George
Bannock County Deputy Prosecuting Attorney
P.O. Box 4986
Pocatello, Idaho 83201

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Under rule 43 of the Idaho Criminal Rules, may a magistrate conduct the trial for a misdemeanor offense and impose sentence against the defendant who is absent from the proceedings and not represented by counsel?

CONCLUSION:

In situations other than misdemeanor traffic offenses for which specific procedures have been established, the Idaho Criminal Rules permit a magistrate, in his discretion, to proceed with the trial and imposition of sentence in the defendant's absence, but such authority should be exercised only after the court is satisfied that the defendant has knowingly and voluntarily waived his appearance at such criminal proceedings.

ANALYSIS:

Rule 43 of the Idaho Criminal Rules states as a general proposition that the presence of the defendant is required at all stages of the trial from the arraignment through the imposition of sentence. The rule, however, contains three exceptions to this general requirement. The exception pert nent to the question raised in this opinion regards prosecutions for all lesser degree misdemeanors and reads as follows:

> Presence of the Defendant. — The defendant shall be present at the arraignment, at every stage of the trial from and including the empaneling of the jury to and including the return of the verdict, and also at the imposition of sentence, except as otherwise provided by this rule . . . In prosecutions for all misdemeanors, except those for an extended term, the defendant may appear and enter a plea by counsel. The court may also permit trial and imposition of sentence in the defendant's absence . . . ICR, Rule 43.

Thus, the rule on its face appears to authorize without restriction the magistrate's discretionary power in misdemeanor cases to receive a plea, conduct the trial, and impose sentence in the defendant's absence.

The general authority, however, is limited by three conditions. First, the rule permits such discretionary authority only "in prosecutions for all misdemeanors, except those for an extended term." The precise limits of authority are not clearly outlined by the rule because of the use of the phrase "extended term." This phrase is not defined within Rule 43 and appears in only one other place within the Idaho Criminal Rules. Rule 7 pertaining to prosecution of criminal offenses by indictment or information refers to an extended term of imprisonment but does so in the context of the persistent violator provisions of *Idaho Code*, § 19-2514, and the recent Supreme Court decision in *State v. Wiggins*, 96 Idaho 766 (1975). Since the persistent violator provisions relate only to felony convictions and no similar provision relates to misdemeanor convictions, the phrase "extended term" in Rule 43, may reasonably be interpreted to designate the difference between the two categories of misdemeanors within the laws of the State of Idaho.

Historically, misdemeanors have been of two classifications. First is the class of misdemeanors for which a maximum penalty is six months in the county jail plus a monetary fine. The second class refers to the category of offenses generally known as "indictable misdemeanors," which subject a convicted defendant to a potential term of one year in the county jail plus a monetary fine. The phrase "extended term", therefore, must refer to this second class of misdemeanors which provide for a longer term of imprisonment than the petty misdemeanor. Thus, the magistrate's authority within Rule 43 to conduct criminal proceedings in the absence of the defendant extends only to prosecutions for petty misdemeanors.

Recently, the Idaho Supreme Court in the case of *Gibbs v. Shaud*, 23 ICR 719 (December 9, 1976), clarified Idaho constitutional provisions and previous case law and held that an accused is not constitutionally entitled to a preliminary hearing on a charge commonly designated as an indictable misdemeanor. Arguably, *Gibbs* would also appear to abolish the distinction between the petty and indictable misdemeanor categories. However, since Rule 43 was established prior to the *Gibbs* decision, the intent of the rule as manifested by its language in distinguishing between the types of misdemeanors triable by a magistrate in the defendant's absence should remain as discussed in the preceding paragraph until further interpretation by the Idaho Supreme Court.

The second condition limiting the magistrate's discretion in these matters relates to prosecutions for traffic offenses involving issuance of a citation rather than a formal criminal complaint. The Rules Of Procedure In Traffic Cases promulgated by the Idaho Supreme Court in 1970, established specific guidelines for handling traffic cases, and are designed to provide procedures for efficient and convenient disposition of traffic cases involving the issuance of the uniform traffic citation. The rules require that a defendant either make a formal appearance in court, or file a written appearance and plea of guilty to the charge, or appear, plead and be sentenced through an attorney. Traffic Case Rules, Rule 8 and Rule 14. Thus, the specific requirements for appearance under these rules indicate a comprehensive procedure governing traffic cases which further limits the discretion by the magistrate to conduct misdemeanor trials against an absent defendant.

The third condition which should be placed by implication over the magistrate's discretionary authority within Rule 43 concerns the constitutional principles of due process. Although the criminal rule permits a misdemeanor trial and imposition of sentence against the defendant in absentia, the court should proceed in the defendant's absence only after the facts indicate that the defendant has knowingly and voluntarily waived his appearance at the proceedings.

Although the defendant has a right to a trial and to appear both personally and with counsel at the criminal proceedings against him, it is clear that such rights may be waived. Idaho Constitution Art. I, §§ 7 and 13; *Idaho Code*, § 19-1903; *State v. Carver*, 94 Idaho 677 (1972). Paramount, however, is the guarantee under the Idaho Constitution, Art. 1, § 13 and the United States Constitution, Amend. V, that "no person shall be deprived of life, liberty or property without due process of law."

To satisfy the requirements of due process, the court should be fully satisfied that the defendant has been adequately notified of the proceedings against him and the potential punishment for the crime should he be found guilty, the defendant's right to be present, and the power of the court to proceed with the trial and sentencing in the defendant's absence should he or his attorney fail to appear in the case. It would also be advisable to include in such notice a written consent form which would formalize the defendant's waiver of his appearance at the proceedings.

In this manner, the court can insure that the defendant's absence is not due to any excusable neglect or ignorance on the part of the defendant, or to any illness which would prevent his appearance in court on the day of his trial. See: Annot. 68 ALR2d 638, Power To Try, In His Absence, One Charged With Misdemeanor.

After the court has been satisfied that the defendant has been afforded the opportunity to appear at his trial and that the record shows either a formal consent to the proceedings in his absence, or the facts and circumstances indicate a voluntary waiver of his appearance, the court may proceed with the trial and sentencing of a defendant in absentia, for those misdemeanor offences

punishable by imprisonment for not more than six months in the county jail and which do not fall within the procedures governing traffic cases.

AUTHORITIES CONSIDERED:

1. United States Constitution, Amend. 5.
2. Idaho State Constitution, Art. 1, §§ 7 and 13.
3. *Idaho Code*, § 19-2514.
4. *Idaho Code*, § 19-1903.
5. *State v. Carver*, 94 Idaho 677 (1972).
6. *State v. Shaud*, 23 ICR 719 (December 9, 1976).
7. *State v. Wiggins*, 96 Idaho 766 (1975).
8. Idaho Criminal Rules, Rule 43 and Rule 7.
9. Rules of Procedure in Traffic Cases.
10. Annotation 68 ALR2d 638: Power to Try, In His Absence, One Charged With Misdemeanor.

DATED this 24th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES F. KILE
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-10

TO: Wendy Ungricht
Lyman G. Winchester
State Representatives
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

Article I, Section 1, *Idaho Constitution.* — Acquiring, possessing and protecting property.

Question: Does the State, city or county have the right to require aesthetics to the detriment of the property owner?

Answer: Title 67, Chapter 65, *Idaho Code*, contains the enabling legislation for planning and zoning by local goverments and the overall purpose of the legislation would authorize a governing board to enact aesthetic controls wherever necessary to protect local environmental features which the communities wish to protect and enhance. The trend throughout the states has been to accept aesthetic controls, but the standards enacted for their enforcement are often the basis of litigation. Standards going too far have been stricken down.

Article I, Section 14, *Idaho Constitution;* private property can be taken for public use, but not until a just compensation shall be paid therefor.

Questions:

1. What rights in real property does a private citizen hold at Common Law where he holds in fee simple absolute?

Answer: A private citizen who holds property in fee simple absolute holds all rights incident thereto which includes the right to use the property. However, this right has been restricted by the Common Law to those uses which do not harm the property of another.

2. To what extent may the State or a political subdivision of the State limit private rights in real property under the "Police Power" of the State?

Answer: The general police power of a State permits regulations to promote the health, safety, and general welfare of the people of the State, and as long as the regulation bears a rational relationship to promote those interests, the regulation will be upheld even though it may limit private rights in real property. However, courts have on occasion found that regulation of property exceeded the rational relationship to health, safety and welfare and that compensation or cessation of the regulatory control was required.

3. Does such a limitation of the fee simple absolute by the State under the "Police Power" constitute a taking of private property?

Answer: Regulations enacted pursuant to the police power of the State which limit the fee simple absolute do not constitute a taking of private property unless and until the regulation goes too far in limiting a fee. The point at which a taking of property occurs is a matter of degree, and depends upon the circumstances of each case.

4. May the "Police Power" of the State be used to require property owners to

expend funds in development of their real property for arbitrary standards of public aesthetics and uses required by 67-6518, *Idaho Code*, relating to greenbelts, planting strips, and other open spaces, etc., constitute a taking of property as described in the last paragraph of Article 1, Section 14, Constitution of the State of Idaho?

Answer: Constitutional guarantees definitely do not allow application of arbitrary standards to private real property. However, Title 67, Chapter 65 of the *Idaho Code*, known as the Local Planning Act of 1975, lists various purposes to be achieved by planning and zoning, amongst them the protection of our environment, and the enhancement of our communities. Section 67-6518, *Idaho Code*, authorizes the enactment of standards by the localities which wish to enact ordinances to further these goals. It authorizes standards for greenbelts, planting strips, and other open spaces, etc., but the act itself does not provide the standards. Instead, the standards are prepared and enacted by the governing boards which are in charge of planning and zoning. The question turns on whether these standards are arbitrary and capricious. If so, they can be challenged and declared invalid or considered a taking of private property pursuant to Article 1, Section 14, *Idaho Constitution*.

5. Is there any legal distinction in a "taking" by the State by the "Police Power" or "eminent domain"? If so, what is the distinction?

Answer: Police power permits regulations for the protection of the public health, safety, morals, or welfare without compensation to property owners since the losses incurred as a result of these regulations are absorbed by the public as a whole. "Eminent domain" on the other hand is a taking of private property for specific public purposes such as reservoirs, canals, ditches, roads, and such a taking requires compensation to the private property owner for the loss of his land.

6. What kind of "taking of property" does Article I, Section 14 of the Constitution, State of Idaho, prohibit?

Answer: Article I, Section 14 of the Idaho Constitution prohibits the taking of property for any of the uses listed in that section, and prohibits the enactment of any regulations pursuant to the police power which as applied to a specific piece of property will constitute a taking under the balancing test applied by the court.

7. Does the Legislature have the power to prescribe a "taking" of private real property under the "Police Power" in light of Article 1, Section 14 of the Idaho Constitution without just compensation?

Answer: The Legislature has the power under the police power of the State to enact regulations or to delegate the enactment of such regulations which limit the use of private property, but these limitations pursuant to the police power may not be extended to the point that they constitute a "taking". Overall, the question is one of reasonableness. But when recognized authority of a legislative body under its police power is exceeded, courts do not hesitate to declare such action void as a violation of Constitutional guarantees.

8. Does the power of "Zoning" provided in Title 67, Chapter 65, *Idaho Code*, allow the State to arbitrarily discriminate against real property owners in such manner as to enhance the economic value of land in a zone, and decrease the economic value of a contiguous parcel not in the same zone? See particularly 67-6511, *Idaho Code.*

Answer: Title 67, Chapter 65, *Idaho Code*, enables the cities and counties to enact comprehensive plans and zoning ordinances in accordance with the requirements set out in that chapter. A zoning ordinance often enhances the value of some property while at the same time decreasing the value of other property. As pointed out in the *Petaluma* Case, discussed herein, all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants, which would affect the reasonableness of the ordinance. But, as pointed out in Answer 4. above, arbitrary discrimination has always been prohibited through Constitutional mandate.

9. Does the discrimination allowed by Title 67, Chapter 65, *Idaho Code*, constitute a "taking of real property" which is compensable?

Answer: Title 67, Chapter 65, *Idaho Code*, provides enabling legislation for communities to plan and zone under the police power of the State. Such regulations are valid as long as they further a legitimate State interest, and as applied to a specific piece of property do not constitute a taking.

10. Does Section 67-6529, *Idaho Code*, constitute a change of discriminatory legislation in that the citizens of each county who hold "agricultural" land will be treated differently because of 44 different interpretations of the definition of "agricultural land"?

Answer: Section 67-6529, *Idaho Code*, does not define agricultural land, but authorizes a community by ordinance to define agricultural land. Should the definition of agricultural land vary from community to community, the citizens within each community will be affected in the same way, and the discrimination between communities will be no greater than the discrimination experienced by a citizen who is affected by different zoning and subdivision ordinances. Still, if the community defines agricultural land in an arbitrary or discriminatory manner, such definition will likely crumble if challenged on constitutional grounds. The final question again is whether the regulation is within the parameters of legitimate police power.

ANALYSIS:

Our state constitution provides in Article I, Section 1, that:

> All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing and securing safety.

This section guarantees that every citizen of this state has the inalienable right to

acquire, possess and protect property. Any limitations imposed on this right are found in our common law and legislative acts. The evolution of restrictions can be traced from the common law to the present system of land use controls.

When a person acquired property in fee he acquired all rights incident thereto. One of these incidents of ownership is the right to use the property. That right is protected by the 5th Amendment to the Federal Constitution which states, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This same protection is granted in our state constitution Article I, Section 14, which provides, in part:

> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

These constitutional protections, however, do not allow for an unrestricted license to use the land without regard to the impact of such use upon the land of others, and it was not enjoyed without restriction under the common law. The maxim "use thine own so that thou dost no harm to another" enjoined landowners from using their property in such a way that it would injure the land of another. The common law of nuisance enforced this maxim.

The law of nuisance developed on a case by case basis as one landowner sought to enjoin the use of adjacent or neighboring property on the ground that the use in question substantially diminished his enjoyment of his land. The complainant had to prove that the use was unreasonable and substantially reduced the use value of his property. Many factors must be considered in this evaluating process. PROSSER, TORTS (2d ed., p.395). It was not necessary that the use complained of was a nuisance per se, but merely that use in those particular circumstances proved a nuisance. *Heeg v. Licht*, 80 N.Y. 579 (1880). Courts enjoined those uses which were incompatible with their surroundings. *Bohan v. Port Jervis Gas Light Co.*, 122 N.Y. 18, 25 N.E. 246 (1890).

These nuisance cases show an early recognition by the courts that some uses are incompatible with others and that the rights of all landowners will be diminished unless the rights of all are subject to reasonable restraints. This principle is the premise of comprehensive zoning and other legislative limitations upon the use of the land. *Euclid v. Ambler Realty Co*, 272 U.S. 365, 71 L.Ed.303, 47 S.Ct. 114, 54 A.L.R. 1016 (1926).

The common law of nuisance proved effective in those instances where the use complained of was declared unreasonable and incompatible by the courts. It did not protect property values or uses in those instances where the use complained of was incompatible but fell short of being declared a nuisance. To protect property from those uses, restrictive covenants were developed which imposed restrictions on property for the benefit of other property owners.

These restrictive covenants became part of the deed, and the owner was bound to refrain from the proscribed use. These covenants were enforced by the courts as long as they were rational in relation to the development of the land which is benefited by the restrictions. Many of these restrictive covenants now appear in zoning regulations such as setback lines, prohibition of businesses, prohibitions of certain uses and height restrictions. See 6 AMERICAN LAW OF PROPERTY, § 26.63 (1952).

Both the law of nuisance and the concept of restrictive covenants could limit the use of property on a small scale. However, as congestion and population expanded, a feeling arose in some sections that nuisance law and restrictive covenants were not sufficient to handle major, widespread problems. Some of the communities tried to control their growth by using the powers of eminent domain, but that process was too expensive. BASSETT, ZONING, p.27 (1940).

Instead of relying on nuisance law, restrictive covenants and/or eminent domain to regulate land uses, some communities used their general police power, which permits the regulation of conduct for the protection of the public health, safety, morals, or welfare. The exercise of this power did not require the expenditure of public funds for condemned uses but the losses incurred as the result of limitations on uses were absorbed by all property owners in the same way as the public absorbs other losses caused by limitations on conduct in general. The early restrictions on land were usually related to health and safety, and would be upheld if it did not destroy the entire interest of the landowner.

Various state courts were asked to rule on the constitutionality of restricting land use under the police power, but it wasn't until 1926 that the United States Supreme Court was finally asked to rule on that issue in *Euclid v. Ambler Realty Co., supra.* In this case the village of Euclid had enacted a comprehensive zoning ordinance which divided the town into use areas, height districts and area districts, and a zoning map accompanied the ordinance showing the location and limits of the various use, height and area districts, from which it appeared that the three classes overlapped one another. Plaintiff alleged that the ordinance as a whole attempted to restrict and control the lawful uses of his land so as to confiscate and destroy a great part of its value. He argued that the existence and maintenance of the ordinance in effect constituted a present invasion of his property rights and a threat to continue it. The question presented to the court was whether the ordinance was invalid in that it violated the constitutional guarantee to the right of property in the Plaintiff by attempted regulations under the guise of the police power which were unreasonable and confiscatory. The court in answering this question first looked at the basis and rationale for other regulatory measures:

> Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or

> contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course must fall.
>
> The ordinance now under review and all similar laws and regulations must find their justification in *some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.* A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. (Emphasis added). 272 U.S. at 387.

The Court in discussing the criteria to be employed in distinguishing a valid exercise of the police power referred to the common law of nuisance and the maxim "use your own property in such a manner as not to injure that of another." The Court went on to say:

> And the law of nuisance, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question of whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question of whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. 272 U.S. at 388.

The United States Supreme Court in *Euclid, supra,* made it clear that comprehensive zoning may be a constitutional exercise of the police power, but cautioned that an ordinance can be declared unconstitutional where the provisions of the ordinance are arbitrary and unreasonable, having no substantial relation to the public health, safety, morals and general welfare. Comprehensive zoning was no longer considered a taking without due process of law when such zoning remained within reasonable police power limits.

Once the power to zone had been established as a valid exercise of the police power, the scope of the power was and still is being tested in the courts. The main issue in these cases is to what extent can property be regulated before it will be considered a taking without due process of law. As Justice Holmes stated in the landmark decision of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), which dealt with the taking issue:

> The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment (citation omitted). When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> *The general rule*, at least, is that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking* . . . As we already have said, this is a question of degree — and therefore cannot be disposed of by general propositions. 260 U.S. at p.415 and 416.

Justice Holmes established the balancing test as the basis for deciding a "taking case" and each case requires an analysis of the particular fact situation before the Court:

> When regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the issues and circumstances before them, declaring that it is not in the nature of things that any definitive list of the police power's applications can be drawn up. Netherton, Implementation of Land Use Policy: Police Power vs. Eminent Domain, 3 LAND & WATER L.REV. 33, 38 (1968).

This balancing test involves few theoretical elements, and the taking issue is greatly influenced by the philosophies of the time and of a particular community. Certain types of regulations are so well accepted, such as off-street parking that they are never considered a taking, but other regulations such as aesthetic controls, are not as acceptable and generate litigation. The cases indicate that there is a correlation between the nature of the public purpose which the regulation is designed to achieve and the willingness of judges to uphold the regulation. BOSSELMAN, THE TAKING ISSUE, p.197 (1973).

The public purposes to be achieved by comprehensive zoning initially parallel those purposes established under the common law of nuisance. With the increasing awareness of our environment, new regulations were enacted which in part were based on aesthetics. The legal problem posed by these aesthetic regulations is the difficulty of establishing objective standards which legal sanctions require. Nevertheless, courts have gradually approved a wide variety of controls to provide some protection for an attractive environment. The U.S. Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), recognized aesthetics as an important consideration in community development:

> The concept of the public welfare is broad and inclusive... The values it represents are spiritual as well as physical, aesthetic as

> well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. 348 U.S. at 32-33.

Many state courts have reviewed and approved ordinances where aesthetic restrictions were involved. A New Jersey court stated in *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964):

> We have no doubt that under present-day zoning concepts, and in an appropriate factual setting, a zoning ordinance may properly bring into play aesthetic considerations in regulating the use of property.

A New York court made it clear that aesthetics alone were enough, if the aesthetic considerations were serious ones:

> The exercise of the police powers should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on the economic, social, and cultural patterns of a community or district. Advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction, and deterioration. They are just as much subject to reasonable controls, including prohibition, as enterprises which emit offensive noises, odors, or debris. The eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern. *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1962).

As these cases indicate, there is today a trend to allow regulation for valid aesthetic concerns. But the trend is by no means uniform, and it does not allow aesthetic controls unreasonable in nature. For example, as pointed out by Justice Frederick Hall:

> . . . regulations primarily aimed at dictating the style and appearance of buildings may well meet the difficulty, if for no other reason than the problem of prescribing proper standards which can be fairly enforced and will not deprive the owner of the last vestige of individual property freedom. Hall, *One Judge Looks at Land Use Regulation in 1961*, in American Society of Planning Officials, Planning 1961 at 13.

Another area which has given rise to some litigation is the regulation of open spaces such as parks, green belts, planting strips, yards and courts under the police power. In order to justify such regulations, two considerations are paramount.

1. Whether the land as restricted can still be used in some

> reasonably useful way, and thus provide some income to the owner . . .
>
> 2. Within metropolitan areas, there are a few special types of landscape where unrestricted development — or, sometimes, — any development — may do serious and permanent environmental damage. The best of these examples are flood plains, wetlands, and steep slopes. In such cases, there are commanding considerations of public health and safety which may require that a particular piece of land be kept in an open condition . . . 5 WILLIAMS, AMERICAN LAND PLANNING LAWS, § 158.02 at p.307 (1975).

The power to impose these zoning regulations is granted in most enabling acts. The Idaho Enabling statute as it relates to open space states in § 67-6502 that the purpose of this act shall be to promote the health, safety, and general welfare of the people of the state of Idaho as follows:

> d) To ensure that the important environmental features of the state and localities are protected and enhanced.
>
> g) To avoid undue concentration of population and overcrowding of land.
>
> i) To protect life and property in areas subject to natural hazards and disasters.
>
> k) To avoid undue water and air pollution.

These purposes are then specifically carried out in zoning ordinances which restrict height, bulk, and density of population. Ordinances contain setback provisions which serve aesthetic interests, reduce fire risks, and insure adequate light and air by separating buildings. Under the same theory as setback requirements, yard regulations, lot regulations, frontage regulations are enacted to insure some open spaces in developed neighborhoods and to limit density. Lot coverage regulations and minimum lot requirements also prevent undue concentration of population and allow for open space. Subdivision controls and planned unit development are generally used to reserve larger areas of open space for land which is to be developed. 3 ANDERSON, AMERICAN LAW OF ZONING, § 19.25 and 19.39 (1968).

The Local Planning Act contains a provision for the enactment of standards for yards, greenbelts, planting strips, parks and other open spaces, but the actual standards which pertain to those provisions are adopted, amended or repealed by the governing board of the municipality which is enacting the ordinance for greenbelts, parks, and other open spaces. Standards enacted for any ordinance provision cannot be arbitrary, but must be sufficient to guide the discretion of the body administering the standards and provide a basis for judicial review. *Kohnberg v. Murdock*, 6 N.Y.2d 927, 190 N.Y.S.2d 1005, 161 N.E.2d 217 (1959). If the standards are too vague and indefinite, they can be declared invalid by a

court. Thus, when examining Idaho's planning laws for constitutionality, the courts will consider the end to be achieved, the means used to accomplish that end, and the reasonableness of the statutory authority in question. Though approved in some jurisdictions by case law, open space planning continues to be a problem faced by the courts.

Comprehensive planning and zoning ordinances should be utilized to assure reasonable, orderly and attractive development of cities and counties. The extent to which growth can be controlled is witnessed in the recent decision rendered by the U.S. Court of Appeals for the 9th Circuit, *Construction Industry Association of Sonoma County v. The City of Petaluma*, 522 F.2d 897 (9th Cir., 1975), Cert. den., 96 S.Ct. 1148 (1976). In that case the city of Petaluma located about 40 miles north of San Francisco adopted a temporary freeze on development in early 1971 as the result of an accelerated rate of growth in 1970 and 1971. During this moratorium the city council and city planners had the opportunity to study the housing and zoning situation and to develop short and long range plans. As a result of these studies the city council in 1972 adopted the "Petaluma Plan" which fixed a housing development growth rate not to exceed 500 dwelling units per year for a five year period. The Plan also positioned a 200 foot wide "greenbelt" around the city, to serve as a boundary for urban expansion for at lease five years, and with respect to the east and north sides of the city for perhaps ten to fifteen years. The Plan also contained procedures and criteria for the award of the annual 500 development unit permits. The purpose of the Plan was to "insure that development in the next five years will take place in a reasonable, orderly, attractive manner." Id. 901. The Plaintiff alleged that the purpose of the Plan was to limit Petaluma's demographic and market growth in housing and in the immigration of new residents. The Court of Appeals however stated:

> The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure on a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the exclusion bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act... The reasonableness, not the wisdom of the Petaluma Plan is at issue in this suit. Id. at p.906.

The Court, upon its review of the Petaluma Plan, determined that it was not arbitrary or unreasonable and held that:

> Concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.

> . . . the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce . . . Id. at p.909.

The Plan was upheld. The Court, you observe, did not address the wisdom of the major land use plan, limiting itself only to the constitutional problems involved.

In summary, the United States Constitution and the Idaho Constitution guarantee to every citizen the right to acquire, possess and protect property. These rights however, are not unlimited but restricted by the maxim "use thine own so that thou dost no harm to another." This maxim has been enforced under the common law nuisance doctrine and restrictive covenants. However, rapid growth has paved the way for comprehensive planning and zoning. In 1926 the U.S. Supreme Court in *Euclid v. Ambler, supra*, ruled that comprehensive zoning was a valid exercise of the state's police power and did not constitute a taking under the federal and state constitutional guarantee, providing the zoning was reasonable and not arbitrary.

Each state has enacted enabling legislation for comprehensive planning and zoning. The implementation of this power has frequently come under attack. The U.S. Court of Appeals for the 9th Circuit in the recent opinion, *Construction Industry Association of Sonoma County v. The City of Petaluma, supra*, held that if the zoning regulation furthers a legitimate state interest, it constitutes a valid legislative act. If it does not bear any rational relationship to a legitimate state interest, the zoning regulation is invalid. As Justice Marshall summarizes in *Belle Terre v. Boraas*, 416 U.S. 1, at 13-14 (1974).

> Local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes.

Keep in mind, though, that regulatory controls still must be reasonable and within the limits of police power authority. Constitutional guarantees for ownership of property remain and serve as the basis for overturning controls which go too far.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* Article I, Sections 1 and 14.
2. *Idaho Code*, Title 67, Chapter 65.
3. *Belle Terre v. Boraas*, 416 U.S. 1 (1974).

4. *Berman v. Parker*, 348 U.S. 26 (1954).

5. *Bohan v. Port Jervis Gas Light Co.*, 122 N.Y. 18, 25 N.E. 246 (1890).

6. *Construction Industry Association of Sonoma County v. The City of Petaluma*, 522 F.2d 897 (9th Cir., 1975), Cert. den., 96 S.Ct. 1148 (1976).

7. *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1962).

8. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016 (1926).

9. *Heeg v. Licht*, 80 N.Y. 579 (1880).

10. *Kohnberg v. Murdock*, 6 N.Y.2d 937, 190 N.Y.S.2d 1005, 161 N.E.2d 217 (1959).

11. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

12. *United Advertising Corp. v. Borough of Metuchen*, 42N.J.1, 198 A.2d 447 (1964).

13. 6 AMERICAN LAW OF PROPERTY, § 26.63 (Casner ed. 1952).

14. 3 ANDERSON, AMERICAN LAW OF ZONING, § 19.25, 19.39 (1968).

15. BASSETT, ZONING (1940).

16. BOSSELMAN, THE TAKING ISSUE (1973).

17. PROSSER, TORTS (2nd ed.).

18. 5 WILLIAMS, AMERICAN LAND PLANNING LAW, § 158.02 (1975).

19. Hall, *One Judge Looks at Land Use Regulation in 1961*, American Society of Planning Officials, Planning (1961).

20. 3 LAND & WATER L.REV. 33 (1968).

DATED this 27th day of January, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-11

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

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does Section 39-1459, *Idaho Code*, exempt contractors from the licensing requirements of Section 54-1902, *Idaho Code*.

CONCLUSION:

The licensing provisions of Section 54-1902 apply to contractors who construct facilities pursuant to the Idaho Health Facilities Authority Act, Sections 39-1441, *et seq., Idaho Code.*

ANALYSIS:

Section 54-1902, *Idaho Code*, states in pertinent part:

> "It shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within the state without first obtaining and having a license therefor as herein provided unless such person is particularly exempt as provided in this act . . ."

Section 54-1904, *Idaho Code*, lists certain activities which are exempted from the requirement of 54-1902, but the list does not include the construction of a "health facility" as defined in the Health Facilities Construction Act, Section 39-1401, *et seq., Idaho Code.*

The purpose of the licensing requirements found in Section 54-1901, *et seq.*, is to assure that a contractor who does public work for the state in all but the areas listed in Section 54-1903, meets a minimum level of competence and reliability. This assurance becomes even more important in the construction of a public health facility. Section 39-1459 does not address itself to the qualifications of the builder but allows the Idaho Health Facility Authority latitutde in the construction and materials for such a facility.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Public Works Contractors Act, Title 54, Chapter 19; Health Facilities Construction Act, Title 39, Chapter 14, Sections 1401 through 1416; Idaho Health Facilities Authority Act, Title 39, Chapter 14, Sections 1441, *et seq.*

DATED this 2nd day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. MacCONNELL
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-12

TO: William Stevenson
Director
United States Department of Agriculture
Farmers Home Administration
304 North 8th Street
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

You have asked this office the following questions: (1) Whether a *water or sewer district* has the authority to execute a mortgage to secure a promissory note; (2) Whether such a district has the authority to assign the proceeds of an *ad valorem tax* levy; (3) What is the strength of the remedies available to a creditor in Idaho in the event of a default under an assignment of a tax levy as compared to a default under revenue and general obligation bonds; (4) Whether a water and sewer district may borrow money under a note without a separate submission of the indebtedness to the electorate since the district was created for the express purpose of borrowing $12,500 to finance sewers for the district.

CONCLUSIONS:

I. Water and sewer districts formed under Chapter 32, Title 42, *Idaho Code*, are ad valorem taxing districts. Their taxing powers are provided for in part by I.C. §§ 42-3213 through 42-3216. The recent case of *Baker v. Waggoner*, 96 Idaho 214, 526 P.2d 174, indicates that districts of government which have ad valorem taxing power are subject to Article 8, Section 3 of the Idaho Constitution. This means they can incur no indebtedness contrary to Article 8, Section 3; Article 8, Section 4 and Article 12, Section 4, Idaho Constitution. Thus, they cannot mortgage their property or borrow by use of a promissory note, except as provided for registered warrants or tax anticipation as provided for by law.

2. Such districts cannot assign a tax levy; they may, however, in certain cases register warrants or prepare and issue tax anticipation notes as provided for by law.

3. Because of the above two conclusions, it appears that no answer to your third question is necessary.

4. I.C. § 42-3222 requires the board of a water and sewer district to hold an election in regard to any expenditure over the amount of $5,000. Article 8, Sections 3 and 4 and Article 12, Section 4 of the Idaho Constitution require such an election if the expense exceeds the income of the district for any particular year or extends past any particular year. Just mentioning the amount needed for a sewer system in the procedure for establishing such a district will not suffice. The Constitution and statutes require a separate election for this purpose. (A discussion of this question is not included in the analysis.)

ANALYSIS:

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

> Limitations on county and municipal indebtedness. — *No* county, city, board of education, or school district, or other *subdivision of the state, shall incur any indebtedness, or liability,* in any manner, or for any purpose, *exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds of the qualified electors thereof voting at an election* to be held for that purpose, *nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness* as it falls due, *and* also to *constitute a sinking fund for the payment of the principal thereon thirty years* from the time of contracting the same. *Any indebtedness or liability incurred contrary to this provision shall be void: Provided,* that *this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state* and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and *provided* further, that any city or other *political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision,* water systems, *sewage collection systems,*

> water treatment plants, *sewage treatment plants,* and may rehabilitate existing electrical generating facilities, and *for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities,* as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district. (Emphasis added.)

Article 8, Section 4 of the Idaho Constitution reads as follows:

> No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

From reading these sections, it is apparent that a county or other subdivision of the State, such as a sewer district, which falls within this section, can only borrow by certain methods. I.C. § 42-3222 also further limits the district in this same manner. It reads as follows:

> Whenever any board shall, by resolution, determine that the interest of said district and the public interest or necessity demand the acquisition, construction, installation or completion of any works or other improvements or facilities, or the making of any contract with the United States or other persons or corporations, public or private, municipalities, or governmental subdivisions, to carry out the objects or purposes of said district, rquiring the creation of an indebtedness of $5,000 or more, and in any event when the indebtedness will exceed the income and revenue provided for the year, said board shall order the submission of the proposition of issuing such obligations or bonds, or creating other indebtedness to the

> qualified electors of the district at an election held for that purpose. The declaration of public interest or necessity herein required and the provision for the holding of such election may be included within one and the same resolution, which resolution, in addition to such declaration of public interest, or necessity, shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the works or improvements, as the case may be, the amount of principal of the indebtedness to be incurred therefor, and the maximum rate of interest to be paid on such indebtedness. Such resolution shall also fix the date upon which such election shall be held and the manner of holding the same and the method of voting for or against the incurring of the proposed indebtedness. Such resolution shall also fix the compensation to be paid the officers of the election and shall designate the polling place or places and shall appoint, for each polling place from the electors of the district, the officers of such election consisting of three (3) judges, one of whom shall act as clerk.

The recent case of *Barker v. Waggoner*, 96 Idaho 214, 526 P.2d 174, collects many of the cases on this subject, including *Jensen v. Boise-Kuna Irrigation District*, 75 Idaho 133, 269 P.2d 775; *Oregon Shortline Railroad v. Pioneer Irrigation District*, 16 Idaho 578, 102 P. 904; *Gem Irrigation District v. VanDuesen*, 31 Idaho 779, 176 P. 887; and *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720. These cases in substance hold that any district which has authority to levy ad valorem taxes falls within Article 8, Section 3 of the Idaho Constitution. Under I.C. §§ 42-3213 through 42-3216, it is clear that water and sewer districts are ad valorem taxing districts since they are specifically granted those powers therein. It is then apparent that Article 8, Section 3 and Article 8, Section 4 of the Idaho Constitution apply to water and sewer districts and restrict water and sewer districts so that they can incur no indebtedness contrary to these two sections. Various exceptions are provided for in Article 8, Section 3. The first of these exceptions is that such districts may incur an indebtedness if it will be repaid within the year and is less or not more than the revenue provided for the district by its taxes and charges for that year. *Ball v. Bannock Co.*, 5 Idaho 602, 37 P. 454. The second exception is for ordinary and necessary expenses authorized by general laws. It is very doubtful that the building of a sewer within the district would amount to an ordinary expense, *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643. It is more likely that this is an extraordinary expense. *General Hospital, Inc. v. Grangeville*, 69 Idaho 6, 201 P.2d 750; *Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644; *Swenson v. Buildings, Inc.*, 93 Idaho 466, 463 P.2d 932. Many other cases are collected in the *Idaho Code* annotation to this constitutional section.

It should also be noted that Article 8, Section 3, Idaho Constitution, provides for revenue bonds in certain cases and includes in that exception political subdivisions and sewage collection systems. In such cases, there is to be an election as to whether the revenue bonds shall be issued which requires a majority of the qualified electors voting at the election. In this regard, attention should also be given to I.C. § 42-3222.

Under Chapter 17, Title 50, *Idaho Code*, water and sewer districts are local improvement districts in Idaho. See, I.C. § 50-1702, definition of municipality. This chapter provides for revenue bonds and revenue bonds can thus be used by a sewer district. In fact, under the case of *Straus v. Ketchin*, 54 Idaho 56, 28 P.2d 824, a drainage district was held to be a local improvement district even though not specifically included within this statute.

It should be pointed out to you that most of Chapter 2, Title 57, *Idaho Code*, relating to bond issues probably does not apply to a water or sewer district. The first 26 sections of that chapter were an act of the legislature in 1927, whereas §§ 57-227 to 57-230 were an act of the legislature of 1935, First Extraordinary Session, Idaho Session Laws, 1927, Ch. 262, p.546; Idaho Session Laws 1935 (1st E.S.), Ch. 59, p.160. Under the 1927 law, only counties, cities and highway districts are included and sewer improvements excluded. Thus, the general municipal bond law does not apply. Only the 1935 law relating to sale to the federal government applies to you. Chapters 31, 32 and 35 of Title 50, *Idaho Code*, were replaced in 1967 by Chapter 17, Title 50, *Idaho Code*, which contains the revenue bond law generally used in Idaho.

AUTHORITIES CONSIDERED:

1. Chapter 32, Title 42; Chapter 17, Title 50; and Chapter 2, Title 57, *Idaho Code*.

2. Article 8, §§ 3 and 4; Article 12, § 4, *Idaho Constitution*.

3. *Barker v. Waggoner*, 96 Idaho 214, 526 P.2d 174.

4. *Jensen v. Boise-Kuna Irrigation District*, 75 Idaho 133, 269 P.2d 755.

5. *Oregon Shortline Railroad v. Pioneer Irrigation District*, 16 Idaho 578, 102 P. 904.

6. *Gem Irrigation District v. VanDuesen*, 31 Idaho 779, 176 P. 887.

7. *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720.

8. *Ball v. Bannock Co.*, 5 Idaho 602, 37 P. 454.

9. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643.

10. *General Hospital, Inc. v. Grangeville*, 69 Idaho 6, 201 P.2d 750.

11. *Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644.

12. *Swenson v. Buildings, Inc.*, 93 Idaho 466, 463 P.2d 932.

13. *Straus v. Ketchin*, 54 Idaho 56, 28 P.2d 824.

DATED this 5th day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-13

TO: Representative Harold W. Reid
House of Representatives
State of Idaho
Statehouse Mail
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Is it legally permissible for the House Agricultural Affairs Committee to conduct a vote on a motion by written ballots?

CONCLUSION:

Written ballots would not comply with Idaho law unless they are made available to the public upon request, and unless the respective committee members casting the ballots are identifiable by signature or other discernible means. A secret ballot would violate the provisions of Idaho law which prohibit secrecy in the formation of public policy.

ANALYSIS:

Ordinarily, we are reluctant to issue an opinion concerning a procedural matter which originates in the Legislature, because we are fully cognizant of the doctrine of separation of powers, and because we are mindful of Article 3, Section 9, Idaho Constitution, which provides in pertinent part that: "Each house when assembled shall . . . determine its own rules of proceeding . . . "

It is also noteworthy that Section 24(4) of Mason's *Manual of Legislative Procedure* provides:

Under a constitutional provision declaring that each house of

> the legislature should determine the rules of its own proceedings, the fact that a house acted in violation of its own rules or in violation of its parliamentary law in a matter clearly within its power does not make its action subject to review by the courts.

Further, Section 21(5) of Mason's *Manual of Legislative Procedure* provides:

> A third party cannot object to a breach of parliamentary rules. The members of the body alone have that right.

Mason's *Manual of Legislative Procedure*, insofar as it sets forth rules of parliamentary procedure, is expressly incorporated by the House as a procedural guide, pursuant to Rule 10 of the Rules of the House of Representatives, unless the manual is inconsistent with other applicable rules and orders, or with other provisions of Idaho law.

We believe that other provisions of law make it mandatory that we speak to the issue presented, particularly since the issue was brought to our attention by a member of the House of Representatives.

Article 3, Section 12 of the Constitution of Idaho provides that: "The business of each house, and of the committee of the whole shall be transacted openly and not in secret session." Concededly, this provision does not expressly mandate open meetings of legislative committees other than the Committee of the Whole. However, the provision certainly does not preclude the Legislature from yielding its possible power to conduct certain legislative committee meetings in secrecy.

Rule 57 of the Rules of the House of Representatives provides as follows:

> Any person may attend any meeting of any standing or select or special committee, but may participate in said committee only with the approval of the committee itself. Such committee may resolve itself into executive session upon the vote of two-thrids of the membership of the committee, at which time persons who are not members of the legislature may be excluded, *provided however, that during such executive session, no votes or official action may be taken.* (Emphasis supplied.)

Even more significant, the Legislature has statutorily spoken to the issue of open committee meetings through enactment of the Open Meeting Law. I.C. § 67-2340 provides:

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

The Open Meeting Law is expressly applicable to all standing, special or select legislative committees, under I.C. § 67-2346.

The Open Meeting Law, like Rule 57 of the Rules of the House of Representatives (quoted above), requires that any committee vote or final action be conducted in open session. Although I.C. § 67-2345 permits executive or secret sessions in certain enumerated instances, subsection (3) provides that: "No executive session may be held for the purpose of taking any final action or making any final decision."

Rule 57 of the Rules of the House of Representatives, as noted above, is even more specific in providing that when a committee is in executive session, "no *votes* or official action may be taken." (Emphasis supplied.)

It is clear that voting must be conducted in public. We do not believe that a written ballot taken at a public meeting satisfies this requirement, unless the ballots are made available to the public and the respective committee members casting the ballots are identifiable, through signature or other discernible means.

We acknowledge that recorded votes at committee meetings are not ordinarily required. Rule 36 of the Rules of the House of Representatives requires a roll call vote (or similar recorded vote) in only certain specific instances, such as final passage of bills. The rule further provides that "The ayes and nays shall not be ordered on other matters unless requested by three members."

Section 632 of Mason's *Manual of Legislative Procedure* sets forth that rules of procedure in committee are generally similar to rules governing the entire body, except that they may occasionally be more relaxed. Accordingly, it would not ordinarily be necessary to record the respective vote of each member in committee, but we believe that such a record must be made if written ballots are used, because otherwise secrecy in violation of Rule 57 and in violation of the Open Meeting Law cannot be avoided.

Mason's *Manual of Legislative Procedure* logically distinguishes between voice vote and written ballot in the following manner:

> The usual manner of voting, except when the constitution or rules may require a roll call, as upon passage of a bill, is for the presiding officer to call for the "ayes" and "noes" on a question and judge the vote by the sound. This is usually known as a *viva voce* vote. It is much the quickest and simplest manner of voting, but has the defect that if the vote is close it is difficult to determine the prevailing side. It usually serves, however, because on most questions there is a decided majority. (Section 532(1)).
>
> * * *
>
> Voting by ballot is rarely, if ever, used in legislative bodies, as the members vote in a representative capacity and their

> constituents are entitled to know how their representatives vote. In order to insure that right, constitutions usually require that all bills be passed by roll call and that the vote be recorded in a journal, and also that a small number can require a roll call on any question and have the vote recorded in the journal. (Section 536(1)).

We do not believe that a *viva voce* vote contravenes Rule 57 or the Open Meeting Law, even though it may sometimes be awkward to attempt to attribute the outcome of such a vote to particular members of the committee. Our reasoning is based upon the premise that such a method of voting has long been recognized by express rules and by precedent (unless, in specific cases, a roll call or recorded vote is required), and that it is not unreasonable to assume that members of the public can devise relatively simple methods to ascertain the voice vote of individual members of the committee, if the public desires to do so. In contrast, a vote by written ballot, unless such ballot be signed or otherwise coded for identification, is tantamount to a secret vote, which strikes at our concept of open government, and which is neither supported by legislative precedent or by express provisions of rules or of law.

AUTHORITIES CONSIDERED:

1. Article 3, Section 9; Article 3, Section 12, Idaho Constitution.

2. *Idaho Code* §§ 67-2340, 67-2345, 67-2346.

3. Mason's *Manual of Legislative Procedure* §§ 21(5), 24(4), 532(1), 536(10, 632.

4. Rules 10, 36 and 57 of the Rules of the House of Representatives.

DATED this 15th day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

RUDOLF D. BARCHAS
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-14

TO: Steve Antone
House of Representatives
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Can a zoning ordinance impose minimum lot regulations which would prevent the owner of several contiguous substandard lots from developing each lot separately?

2. Is a zoning ordinance which in its application devalues certain property constitutional?

CONCLUSION:

1. Ordinances which require minimum lot standards have been held constitutional in jurisdictions other than Idaho. The question has not been settled in Idaho, but case law indicates that our Court would probably follow the existing precedent of upholding such ordinances. The owner of various contiguous substandard size lots is usually required to combine lots to meet the minimum requirement.

2. A zoning ordinance which in its application devalues certain property is unconstitutional, if it constitutes a "taking of property". (See analysis.)

ANALYSIS:

I.

The Standard State Zoning Enabling Act and the Idaho Enabling Act, Title 67, Chapter 65, *Idaho Code* authorize zoning regulations which prohibit the construction of residences or other buildings on lots containing less than a specified area. Minimum lot area regulations are generally enacted to serve the standard purposes of the police power by ensuring adequate light and air and by reducing the danger of spread of fire. These regulations are generally upheld by the courts for their tendency to serve the public health or safety. The reasonableness of the specific minimum and the construction of the specific language is normally involved in litigation.

An ordinance enclosing a minimum lot area may also require the building lot to have a certain minimum frontage. These ordinances are normally upheld when they have a reasonable relation to the surrounding area, and have been disapproved when they deprive the landowner of a reasonable use of his property.

These ordinances present a specific problem to the owners of substandard lots. Generally speaking, the owner of a substandard lot which was of record prior to the adoption of the restrictive ordinance is entitled to develop his lot within the limitations of the exception. However, the courts have treated differently the owner of contiguous (adjoining) substandard lots. Those cases generally hold that an ordinance which changes lot size requirements after a subdivision has been platted does not give the owners of contiguous (adjoining) substandard lots the right to exceed the ordinance limitations on any single lot, since the lots can readily be joined together to meet the minimum lot size zoning restrictions. As stated by the court in *Citizens Bank & Trust Co. v. Park Ridge*, 5 Ill.Ap.3d 77, 282 N.E.2d 751 (1972), the fact that a parcel of property has been divided into improved platted lots of a certain size does not preclude a municipality from exercising its zoning authority to restrict the area and frontage to a greater size. Also see *Khare v. Massapequa Park*, 62 MISC 2d 68, 307 N.Y.S.2d 996 (1970), affirmed 27 N.Y.2d 991, 318 N.Y.S.2d 746, 267 N.E.2d 481 (1970); and *Hill v. City of Manhatten Beach*, 98 Cal.Rptr. 785, 491 P.2d 350 (1971).

The Local Planning Act of 1975 in § 67-6516, *Idaho Code*, deals with variances, and defines a variance as a "modification of the requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of building or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots." Therefore the owner of a lot which cannot meet the ordinance requirements can seek a variance for his lot. Though, at the present time the Idaho Surpreme Court has not ruled on the issue of contiguous substandard lots, the owner of such a lot could either try to get a variance or file a suit based on undue hardship, vested rights or estoppel since he did buy, or does hold, his lots in reliance upon the lot sizes which were offered as a "proper" size for building uses under the former zoning ordinance. The owner of contiguous lots might even raise a constitutional "equal protection" argument since it is generally held that the owner of a *single* lot of below-minimum size will be allowed to develop and use his substandard lot, but that the owner of more than one adjoining lot will be forced to join his lots together to meet the newly-imposed lot size minimums, thus losing the opportunity to develop and use one or more of the lots he originally purchased or held.

Short of initiating a lawsuit locally in Idaho to clarify the status, however, it would appear that the person owning two or more contiguous lots which are individually smaller than the present allowable individual lot size has the substantial weight of case law nationally going against his contention that he should be able to continue to develop or use each individual lot according to its former, platted lot size as the same existed prior to the change in lot size zoning restrictions.

II.

The general police power of the state permits regulation of conduct for the protection of the public health, safety, morals or welfare. This general police power authorizes the enactment of comprehensive planning and zoning to

promote the health, safety and general welfare of the people of the state, and the exercise of this power does not require the expenditure of public funds for condemned uses, but the losses incurred as the result of limitations on uses are absorbed by all property owners in the same way as the public absorbs other losses caused by limitations on conduct in general. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See also local authority granted under Article 12, Section 2, *Idaho Constitution.*

The exercise of police power is not without limit, but the line which separates a legitimate from an illegitimate assumption of power cannot be defined, but varies with the circumstances and conditions in each case. As pointed out by the court in *Euclid, supra*, "a regulatory zoning ordinance, which would be clearly valid as applied to the great cities might be clearly invalid as applied to rural communities." The amount of taking (down zoning) authorized under the police power requires a balancing test applied by the courts. Certain regulations are well accepted and require no litigation. The cases generally indicate that there is a correlation between the nature of the public purpose which the regulation is designed to achieve and the willingness of judges to uphold the regulation. BOSSELMAN, THE TAKING ISSUE, p.197 (1973). Generally speaking, an ordinance which *substantially* deprives a property owner of the use of his property will constitute a taking of that property without due process, and therefore is either invalid as applied to that piece of property or requires compensation for the taking.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 12, Section 2.

2. *Idaho Code*, Title 67, Chapter 65.

3. *Citizens Bank & Trust Co. v. Park Ridge*, 5 Ill. App.3d 77, 282 N.E.2d 751 (1972).

4. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

5. *Hill v. City of Manhatten Beach*, 98 Cal. Rptr. 785, 491 P.2d 369 (1971).

6. *Khare v. Massapequa Park*, 62 MISC 2d 68, 307 N.Y.S.2d 996 (1970), affirmed 27 N.Y.2d 991, 318 N.Y.S.2d 746, 267 N.E.2d 481 (1970).

7. BOSSELMAN, THE TAKING ISSUE, p.197 (1973).

DATED this 15th day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-15

TO: John Bender, Director
Department of Law Enforcement
Statehouse Mail
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Whether the Department of Law Enforcement is correct in its position that motor vehicle caravan permits are, in fact, registrations or licenses for the limited purposes as set forth in Title 49, Chapter 18; and that the revenue derived from the caravan permits is not adequate to pay the compensation of clerks and other assistants administering the Act and therefore all revenues derived from the caravan permits be paid into the Motor Vehicle Fund for use by the Department of Law Enforcement with no division of said permit fees between the Department of Law Enforcement and the Department of Transportation.

CONCLUSION:

Although motor vehicle caravan Permits can be considered registrations or licenses, *Idaho Code* § 49-1806 specifically requires that such permit fees be paid into the State Highway Fund. *Idaho Code* § 49-1807 does, however, charge the Department of Law Enforcement with the administration and enforcement of the Act and authorizes all administrative costs to be paid from the motor vehicle caravan fund, which originally held all fees collected under the Act. The Department, with the approval of the Governor, is accordingly entitled to all fees derived from the motor vehicle caravan permits necessary to pay administrative costs as identified in *Idaho Code*, § 49-1807.

ANALYSIS:

The Caravan Motor Vehicle Act was first enacted by the Second Extraordinary Session of the 1935 Legislature. (*Idaho Code* §§ 49-1801 through 48-1808.) This Act provided for the licensing of motor vehicles in caravan and set the fee therefor. Section 5 of the Act provided that the caravan permit fee shall be in lieu of all other registration fees and license fees. Section 6 created the "Motor Vehicle Caravan Fund" to be comprised of deposited fees collected by the Department of Law Enforcement. Section 7 charged the Department of Law Enforcement with the responsibility of administering and enforcing the Act and, with the approval of the Governor, authorized the Department to employ such additional clerical and other assistants necessary to administer and enforce the Act. Compensation for the additional clerical and other assistants was to be paid from the Motor Vehicle Caravan Fund.

In 1939 the legislature amended Section 6 of 49-1806 to provide that all fees collected by the Department under the caravan act be paid into the Motor

Vehicle Fund. In 1950 the legislature again amended the Act to provide that fees collected under the Act be paid to the State Treasurer and by him paid into the State Highway Fund.

It should be noted that Section 7, which appears now as § 49-1807, was neither amended nor repealed. As a result, *Idaho Code* §§ 49-1806 and 49-1807 have become conflicting statutes within the same act.

In your opinion request, you take the position that motor vehicle caravan permits are registrations or licenses and therefore should be included in the Motor Vehicle Fund pursuant to *Idaho Code* § 49-1301. We do not concur in this contention for two reasons.

First, *Idaho Code* § 49-1301, in establishing the Motor Vehicle Fund, specifically states that:

> There shall be set aside, paid into and credited to said motor vehicle fund one third (1/3) of all moneys collected for licenses issued by the department of law enforcement of the state of Idaho for motor vehicles in conformance with the provisions of chapter 1 of this title.

Chapter 1 of Title 49 is the Uniform Registration Act and does not include the Caravan Motor Vehicle Act. The Acts are separate and distinct with the fees collected under each act flowing specifically into different funds. Although the fees charged under both acts are for vehicle registration, *Idaho Code* § 49-1301 includes only fees collected under the Uniform Registration Act.

Secondly, the legislature has specifically spoken in unambiguous language in *Idaho Code* § 49-1806. This section clearly States that:

> All fees collected by the department of law enforcement under this act shall be paid to the state treasurer and by him paid into the state highway fund.

All fees collected under the Caravan Motor Vehicle Act are to be paid into the State Highway Fund.

Notwithstanding the clear legislative language as to where the funds collected under the Act are to be deposited, it is confusing as to how they are to be distributed. The legislature has reviewed *Idaho Code* § 49-1806 on three different occasions and has accordingly required that the fees collected be paid into three different funds.

At the same time, the legislature has never changed the companion statute, *Idaho Code* § 49-1807. Under § 49-1807 the Department of Law Enforcement continues to be charged with the responsibility of the administration and enforcement of the Act, as it was originally in 1935. The Department also continues to be authorized, with the approval of the Governor, to employ additional clerical and other assistants as necessary to administer and enforce

the act with costs for such personnel to come from the Motor Vehicle Caravan Fund.

Since the legislature has reviewed this Act on numerous occasions and has not determined to repeal *Idaho Code* § 49-1807 we are of the opinion that it was their intent that it remain in full force and effect with such costs continuing to be paid from the funds which replaced the original Motor Vehicle Caravan Fund.

Such authorization for payment of administrative costs is supported by Idaho Constitution Art. 7, § 17. This section reads as follows:

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

There is a specific provision in this section allowing payments for the necessary costs of collection and administration for the registrations of motor vehicles. This section not only allows but requires that the administrative costs of *Idaho Code* § 49-1807 be paid out of fees collected under the Caravan Motor Vehicle Act.

We are therefore of the opinion that the costs allowed under *Idaho Code* § 49-1807 should be paid out of the State Highway Fund. Any action to the contrary would require the specific repeal of *Idaho Code* § 49-1807 and Idaho Constitution Art. 7, § 17.

AUTHORITIES CONSIDERED:

1. 1935 Idaho Session Laws; 1939 Idaho Session Laws; and 1950 Idaho Session Laws.
2. *Idaho Code* §§ 49-1301; 49-1806; 49-1807; 49-1808.
3. Idaho Constitution, Article 7, Section 17.

DATED this 16th day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO
WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-16

TO: Richard L. Barrett
State Personnel Director

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Is it permissible to compensate as "work time" the time that an employee spends in traveling to and from a work station when called back after hours?

2. Is it permissible to establish certain minimum overtime credits for call backs after working hours? For example, a 2-hour minimum guarantee even though the employee may be away from home for a lesser time, including travel time to and from home?

3. Is it permissible to establish a block time overtime credit table for after-hour calls on a schedule which, for example, would state that if the telephone call duration was from 10-30 minutes, the employee would receive ½ hour overtime credit? From 31-60 minutes, 1 hour overtime credit? From 61-120 minutes, 2 hours overtime credit? In those instances where the employee receives a number of calls, and the multiple calls in which the employee is engaged are over 4 hours in any 8-hour period, would receive 6 hours overtime credit? Multiple calls totaling more than 6 hours in an 8-hour period would be compensated with 8 hours overtime credit?

4. In those instances where off duty state employees are required to be on standby to answer telephone calls after hours, can such employees be compensated for the inconvenience even though they may receive no calls?

CONCLUSION:

1. The time that an employee spends in traveling to and from a work station when called back after hours is not compensable unless there is an agreement in writing providing for such compensation. A written employment policy of a department providing for such compensation would be a sufficient basis for payment of such travel time.

2. An employee called back after hours should be compensated only for the actual time worked. Time worked may by agreement or policy include travel time. The rate of pay for such time worked should be at that employee's rate of pay or overtime rate, as the case may be.

3. A "block time overtime credit table" may be established for administrative convenience. Such a table, if adopted, should aim to approximate the actual time worked. Thus, for example, it would be proper to provide for rounding to the nearest ¼ hour of time actually worked.

4. It could be agreed in writing that an employee would receive a fixed sum for

the inconvenience of being on call. However, where such a duty is one of the normal duties associated with a particular position, pay for the inconvenience should already be reflected in the salary associated with the position.

ANALYSIS:

Section 44-1202, *Idaho Code*, provides in pertinent part:

> In any and all suits, actions and court proceedings, whether now pending or hereafter instituted, for attorneys' fees, liquidated damages, back or unpaid wages, salaries or compensation for work or labor performed in Idaho, where wages or salaries have been paid to any employee for a pay period, and such employee claims additional salary, wages, overtime compensation, penalties, liquidated damages or attorneys' fees because of work done and services performed during his employment for the pay period covered by such payment, the following is and shall be the definition of "hours" worked", and of time put in for which attorneys' fees, liquidated damages, back or unpaid wages, salaries, or compensation may be recovered:
>
> * * *
>
> (3) In no event shall any of the following be deemed, held or considered as time or hours worked:
>
> * * *
>
> (g) Time spent in traveling to or from the place of work;
>
> * * *
>
> (i) Time spent in any incidental activities before or after work, which may involve activities which are excluded from compensable work time by industry practice, custom or agreement.

Section 44-1203, *Idaho Code*, provides:

> Nothing contained in this act shall be construed as preventing the recovery of any wages, salaries, overtime compensation, liquidated damages or attorneys' fees, where salaries or wages have not been paid for a pay period, nor as preventing an employer and an employee from agreeing in writing as to what shall constitute hours worked or time spent for which compensation shall be paid, and on which overtime compensation shall be paid.

Thus, in those situations in which an employee has accepted pay for a

particular pay period, he cannot receive additional pay for travel time unless such pay is provided for in a written contract or employment policy.

There may be practical problems with a policy that provides compensation for travel time of employees called back to work. Nevertheless, pay for travel time would not be illegal, if founded upon a prior contract or employment policy.

A similar rule is stated in the Fair Labor Standards Act, as amended. The rule stated in Title 29, § 254(a) U.S.C. is that an employer is not required by the act to pay an employee for time spent before or after the particular workday in:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities.

The remaining questions asked deal with the legality of various forms of overtime payment for those who are on call or called back to work. "Overtime work" is defined in Section 67-5327(e), *Idaho Code*, as follows:

> (e) "Overtime work" means time worked in excess of forty (40) hours in a period of one hundred sixty-eight (168) consecutive hours or in the case of those employees covered, any work week established for an employee under the provisions of the Fair Labor Standards Act of 1938, as amended.

There have been a number of cases decided under the Fair Labor Standards Act, as amended, which deal with the question of whether on-call time should be considered as overtime work. *Wage and Hour Interpretive Bulletins*, 29 C.F.R. 785.17, summarizes as follows:

> On-Call Time. — An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F.2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F.Supp. 384 (S.D. Ga. 1945).

If compensation for on-call time is not mandated by the Fair Labor Standards Act, an agency should next determine whether or not some payment should be made as a policy matter. Payment could legitimately be made in several ways.

If an agency believes that the on-call requirements of a particular position are particularly arduous, it may choose to consider on-call time as time worked. In

this case, the agency must compensate the employee for on-call time at his normal rate of pay, or at the overtime rate for overtime hours.

Alternately, it could be agreed in writing that an employee would receive a fixed amount for the inconvenience of being on call. However, if being on-call is one of the normal job requirements of a particular position, the requirement should be noted in the job description, and subsequently the salary associated with the position should reflect the on-call job requirement.

Next, it is necessary to consider your questions regarding proper compensation for employees on-call who are called back to work. Such employees clearly must be compensated for the actual time worked at their rate of pay or their overtime rate. However, as stated above, "time worked" would not include travel time to and from work unless so provided by agreement of departmental policy.

You have asked whether it would be permissible to provide a minimum 2-hour overtime credit for call backs even though the employee is away from home for a lesser time. Such a policy would be inconsistent with the overtime provisions of Chapter 53, Title 67, *Idaho Code*.

Section 67-5328, *Idaho Code*, provides that state departments shall provide cash compensation for overtime work for employees who:

> (b) Are required to remain or report back after completion of the normal day or work week or when otherwise off duty; . . .

Section 67-5330, *Idaho Code*, provides:

> Cash compensation for overtime shall be at one and one half (1½) times the hourly rate for that employee's grade, class and step contained in the established compensation schedule of the Idaho personnel commission.

Section 67-5327(e) defines the time period for which compensation may be paid. "Overtime work" is therein defined as *"time worked* in excess of forty (40) hours in a period of one hundred sixty-eight (168) consecutive hours . . ." Therefore, overtime compensation is necessarily limited to "time worked". "Time worked" could reasonably be interpreted so as to include all time away from home on state business, and thus could include travel time when called back to work.

On the other hand, a minimum two-hour overtime payment for call backs would result in overtime payment for time not worked in those cases where the employee is called back to work for less than two hours.

Inasmuch as the legislature has specifically provided for the manner and amount of payment for employees required to report back after completion of the normal day or work week, it is our opinion that an agency may not provide a different manner or amount of payment.

A "block time overtime credit table" may be established for administrative convenience if the table utilizes reasonable intervals of time and is structured so as to approximately compensate for actual time worked. Rounding off of reported overtime is of course permitted if the rounding is established for some reasonable interval of time. Thus, for example, rounding off to the nearest 5 or 15 minutes would be valid, whereas rounding to the nearest 2-hour interval or 1-second interval would likely be deemed invalid as unreasonable. Similarly a block time overtime credit table must utilize reasonable intervals of time.

Such a table must also be structured so as to approximately measure and compensate for actual time worked. As discussed above, the legislature has provided for the manner and amount of overtime pay. Employees are to receive overtime pay only for "time worked". A table which has the effect of regularly overcompensating employees for "time worked" would not be consistent with legislation requirements for overtime compensation. Likewise a table which results in regularly undercompensating employees would not be permissible.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 44-1202, 44-1203, 67-5327, 67-5328, and 67-5330.

2. Fair Labor Standards Act, 29 U.S.C. § 254(a).

3. Wage & Hour Interpretive Bulletin, 29 C.F.R. 285.17.

4. *Armour & Co v. Wantock*, 323 U.S. 126 (1944); *Handler v. Thrasher*, 191 F.2d 120 (C.A. 10, 1951); *Walling v. Bank of Waynesboro, Georgia*, 61 F.Supp. 384 (S.D.Ga. 1945).

DATED this 22nd day of February, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-17

TO: Bartlett Brown, Director
Department of Administration
Statehouse
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

The following questions have arisen under the Idaho Purchasing Act:

1. Section 67-5717(12), *Idaho Code* reads: "The administrator of the division of purchasing: may accept proposals and enter into negotiations, only for services which need not be bid." What does this provision mean?

2. Section 67-5716(5), *Idaho Code* defines services as: personal services, in excess of personnel regularly employed for whatever duration and/or covered by personnel system standards, for which bidding is not prohibited or made impractical by statute, rules and regulations or generally accepted ethical practices." What does this provision mean?

3. What is the interpretation of the word "services" within the meaning of §§ 67-5717(12) and 67-5716(5), *Idaho Code* as it relates to the needs of the departments and agencies of the State of Idaho?

4. Section 67-5735, *Idaho Code* reads: "within ten days after the property acquired is delivered as called for by the bid specifications, the acquiring agency shall complete all processing required of that agency to permit the contractor to be reimbursed according to the terms of the bid . . ." Does "delivered" mean the physical delivery of goods ordered together with proper invoice?

5. Section 67-5716(15) defines an agency as "all officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, lieutenant-governor, the secretary of state, the state auditor, the state treasurer, the attorney general and the superintendent of public instruction." In light of their constitutional coverage, is the University of Idaho covered by these provisions?

CONCLUSION:

1. In answering the first two questions, § 67-5717(12) and § 67-5716(5), *Idaho Code*, when read together, provide that the Administrator of the Division of Purchasing must obtain through the competitive bidding process of the State Purchasing Act all personal services performed for the State except (a) services performed by persons who may be categorized as "employees", (b) services for which bidding is prohibited or made impractical by statute, rules or regulations, and (c) services which are prohibited or made impractical by generally accepted ethical practices.

2. The definition of the term "services", when applied to the needs of various departments and agencies within the State, means all personal services, of whatever kind, performed for the State of Idaho by an individual or individuals, unless the services fall into one of the three exceptions listed in Conclusion (1) above.

3. Section 67-5735, *Idaho Code* contemplates that the contractor must

deliver the property called for plus a proper invoice before the acquiring agency must complete the reimbursement process.

4. Section 67-5716(15), *Idaho Code*, in defining the entities of State government subject to the Purchasing Act, does not include the University of Idaho within the control of this legislation, because of the constitutional nature of the University of Idaho as defined and explained by the Idaho Supreme Court.

ANALYSIS:

MEANING OF THE TERM "SERVICES"

The Idaho Purchasing Act, § 67-5714, *et seq., Idaho Code* establishes competitive bidding procedures for acquisition of goods and services. The definition of the term "services" for purposes of the Act is found in § 67-5716(5), *Idaho Code*, which defines the term as:

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

This definition must be applied to § 67-5717(12), *Idaho Code*, providing that "the administrator of the division of purchasing: may accept proposals and enter into negotiations, only for services which need not be bid." Since no Idaho case law exists for these particular statutory provisions, their meaning turns necessarily on statutory construction.

Under § 67-5717(12), *Idaho Code* the Administrator of the Division of Purchasing must follow the competitive bidding procedures for services unless they are of the type which are exempted by the legislation. Exempted services are outlined in the definition of the term in § 67-5716, *Idaho Code*. There are three (3) exceptions: (1) personal services performed by individuals serving in the capacity of a state employee, (2) services for which bidding ais prohibited or made impractical by statute, rules or regulations, and (3) services which are prohibited or made impractical by generally accepted ethical practices.

The first exception, services performed by employees, is not difficult to delineate. If the individual is employed on a full or part-time basis by State government, obtaining those servcies does not require subjecting the employee to the competitive bidding process. A problem may arise in the situation of independent contractors employed by the State. Although the exact status of such persons may be difficult to determine on occasion, the ultimate test will be the degree and amount of employee benefits retained by the individual. For example, classification under the Idaho Personnel Commission, payment of wages on a regular basis, office space provided by the State, and employee fringe benefits all should be used to determine whether the person is, in fact, an employee. If so, his services need not be obtained through competitive bidding.

The second exception, services which are prohibited or made impractical by statute, rule or regulation is more difficult to determine. Overall, the exception should be narrowly construed. For the most part, this exception will require some statute, written rule or regulation specifically providing in some manner that the service is not to be subjected to the competitive bidding process of the Idaho Purchasing Act. Of course, any rule or regulation prohibiting or affecting application of the act to services would have to comply with statutory authority. For example, it would be very difficult for the Administrator of the Division of Purchasing to exempt services through rule or regulation, since the Idaho Purchasing Act specifically applies to most services. This is apparent from § 67-5727, which, although allowing direct acquisition of property in certain circumstances, excludes direct acquisition of any "services" under those conditions.

Finally, services need not be subjected to the competitive bidding process when to do so would violate generally accepted ethical practices. Again, this exception is not easily defined. Needless to say, the intent of the Act cannot be frustrated by exempting services on the grounds that it would some way violate obscure ethical practices. The ethical considerations involved in exempting services from the competitive bidding process would have to be obvious and well documented before they could be effective.

In summary, the Administrator of the Division of Purchasing must obtain personal services through the competitive bidding process unless those services fall under one of the exceptions outlined in the definition of that term in § 67-5716(5), *Idaho Code*. This would also be the guideline in determining applicability of the term "services" to the needs of the various departments and agencies of State government. The Administrator of the Division of Purchasing should be informed by an agency when they acquire personal services which, in their opinion, are exempted from the Idaho Purchasing Act. Preferably, this would be by written communication. For instance, if an agency feels that personal services to be acquired are to be performed by an apparent independent contractor who actually is an employee, they should so inform the Division of Administration, stating the reasons why they reached that conclusion. [Obviously, agencies of State government need not inform the Division of Purchasing every time an employee is hired. This would only be necessary in the unusual situations, such as where it appears the individual is an independent contractor.]

REIMBURSEMENT FOR PROPERTY ACQUIRED

Section 67-5735, *Idaho Code* provides that:

> "Within ten days after the property acquired is delivered as called for by the bid specifications, the acquiring agency shall complete all processing required of that agency to permit the contractor to be reimbursed according to the terms of the bid . . ."

The question involved here is whether the term "delivered" requires physical

delivery plus a proper invoice before the acquiring agency is obligated to complete the reimbursement process. Once again, there is no case law on point and the answer hinges on statutory interpretation.

Viewed from a practical standpoint, an acquiring agency would be hard pressed to complete all processing required to permit the contractor to be reimbursed unless that contractor submitted a proper invoice upon delivery of the property. For this reason, and because the phrase "delivered as called for by the bid specifications" can be construed to require submission of a proper invoice, a logical conclusion is that the legislature intended delivery of the property and submitting of an invoice before the acquiring agency need process the papers necessary for payment.

APPLICATION OF THE PURCHASING ACT TO THE UNIVERSITY OF IDAHO

The Idaho Purchasing Act, pursuant to § 67-5716(15), *Idaho Code*, applies to:

> "All officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial boards of government, and excluding the governor, the lieutenant-governor, the secretary of state, the state auditor, the state treasurer, the attorney general and the superintendent of public instruction."

In light of the definite exceptions provided, it would appear initially that the University of Idaho is to be included within the requirements of the Idaho Purchasing Act. However, when the constitutional framework of the University of Idaho as explained by several Idaho Supreme Court decisions is considered, it becomes apparent that the legislature did not intend the Act to apply to the University of Idaho.

The constitutional foundation for the University exists in Art. IX, § 11, *Idaho Constitution*, which provides in part that "the regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university under such regulations as may be prescribed by law." The Idaho Supreme Court has interpreted Art. IX, § 11, *Idaho Constitution* very broadly. The Court in *State v. State Board of Education*, 33 Idaho 415 (1921) referred to the Board of Regents of the University as a constitutional corporation, and said that as long as the Board of Regents function within the scope of their authority, they are not subject to the control or supervision of any branch of State government. The Court in this case also said that a claim against the University is not a claim against the State of Idaho.

The broad interpretation given to the constitutional nature of the University of Idaho was extended later by the Idaho Supreme Court in *Dreps v. Board of Regents of the University of Idaho*, 139 P.2d 467 (1943). The court in *Dreps* held that the legislature did not intend to extend the Idaho Nepotism Act to the University of Idaho or its Board of Regents. In so holding, the Court said that:

> "It is true the University is 'under the exclusive control of the state' but that does not make it a department of *state government* or subordinate to the legislature. [Citation omitted.] It is also true that the university is a 'state agency', in the sense that it has been created by the state and exists as a public corporation for educational purposes; but the legislature has no power to impair, dissolve or destroy it. It received its charter and authority from the people at the same time and in the same manner the legislature was created, each independent and exclusive of the other in the sphere of its own purpose and objects." 139 P.2d at 471.

In considering the Idaho Nepotism Act, the Idaho Supreme Court observed that the Act did not expressly exempt the University of Idaho from its provisions. In fact, the Idaho Nepotism Act was quite broad in its coverage, applying to "an executive, legislative, judicial, ministerial or other officer of this state." Due to the constitutional nature of the University of Idaho, the Court concluded that the legislature necessarily intended its exclusion from that legislation.

Under the present Idaho case law, it must be assumed that the legislature did not intend to include the University within the coverage of the Idaho Purchasing Act, even though it is not specifically included in the exemptions to the Act. This was the approach taken by the Court in *Dreps, supra.* Also, the Court in *State v. State Board of Education, supra*, approved a resolution containing, among other things, this provision:

> "The Board of Regents directs its executive officers and agents, upon the sole authorization of this board to buy or purchase anything necessary to carry out the purposes of the Act creating the institution, any pretended legislative acts to the contrary not withstanding".

In approving this provision, the Court said that:

> "If the regents have funds available for the purpose of making purchases of supplies, they may do so without requisition upon and without the consent of the commissioner of public works, [who was then responsible for state purchases] and if they have money which is available for the purchase of land, . . . we know of no reason why they should not do so." 33 Idaho at 430.

Other cases broadly interpreting the constitutional framework of the University of Idaho are *Evans v. VanDeusen,* 31 Idaho 614 (1918), and *Melgard v. Eagleson*, 31 Idaho 411 (1918). All the cases suggest that the University of Idaho and its Board of Regents are to be considered an entity on the same plane with the Idaho Legislature and separate unto themselves. This is clear from the Court's interpretation in *State v. State Board of Education, supra*, where quoting from another jurisdiction, the Court said that the University of Idaho "is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which within the scope of its functions is

co-ordinate with and equal to that of the legislature." 33 Idaho at 427. The ultimate conclusion, therefore, must be that the Idaho Purchasing Act is not applicable to the University of Idaho and its Board of Regents.

AUTHORITIES CONSIDERED:

1. Art. IX, § 11, *Idaho Constitution*.
2. § 67-5716(5), *Idaho Code*.
3. § 67-5717(12), *Idaho Code*.
4. § 67-5735, *Idaho Code*.
5. § 67-5716(915), *Idaho Code*.
6. *State v. State Board of Education*, 33 Idaho 415 (1921).
7. *Dreps v. Board of Regents of the University of Idaho*, 139 P.2d 467 (1943).
8. *Evans v. Van Deusen*, 31 Idaho 614 (1918).
9. *Melgard v. Eagleson*, 31 Idaho 411 (1918).

DATED this 3rd day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-18

TO: HONORABLE MARJORIE RUTH MOON
Treasurer of Idaho
Statehouse
Boise, Idaho 83720
BUILDING MAIL

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Whether the powers granted by *Idaho Code* § 67-2328 and the rest of the Joint Exercise of Powers Act, allow one taxing unit to sign an agreement with another taxing unit covering the joint investment of public funds, and whether the State Treasurer can enter into an agreement with another Idaho governmental unit to invest the funds of and for that governmental unit.

CONCLUSION:

The joint exercise of powers statutes provide ample authority for information of the type of agreement you contemplate so long as the basic statutes and ordinances which regulate the basic activities both of your office and the public agency concerned provide no threshhold barrier to the formation of such an agreement for the intended purpose.

ANALYSIS:

The two entities which you contemplate as parties to a proposed agreement, an Idaho governmental unit and the State Treasurer, are both included within the definition of "public agency" as contained in *Idaho Code* § 67-2327, to wit:

> "Public agency" means any . . . political subdivision of this state, including, but not limited to counties, . . .; instrumentalities of counties, cities or any political subdivision created under the laws of the state of Idaho; any agency of state government; . . .

From and after the effective date of government reorganization in Idaho, the word "agency" where used in the *Idaho Code* to relate to prior divisions and entities of state government should be deemed to include all present "departments" of state government, which would include the State Treasurer.

As you note, *Idaho Code* § 67-2328 both authorizes and sets forth certain criteria for the creation of joint exercise of powers by and between public agencies, the State of Idaho, and others. A formal contractual agreement, with specified form, is contemplated. *Idaho Code* §§ 67-2328 and 67-2332.

The only caveat we perceive, other than the obvious consideration by *both* contemplated parties to such an agreement as to whether such agreement and its

purpose are within the statutory authority of each to enter into, is the limitation imposed by law which prevents any such contract as a whole from exceeding the individual power or right of any one of the participants thereto. In other words, a county could not exercise greater rights than it might have under the general laws relating to counties by the act of entering into a joint agreement with an entity of state government which, itself, could exercise powers or possessed rights greater than a county's. As noted in § 67-2328, powers may be exercised jointly "but never beyond the limitation of such powers" possessed individually. Further in § 67-2328(a), the act provides:

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

This limitation is reiterated in § 67-2333, which reads:

> Nothing in this act shall be interpreted to grant to any state or public agency thereof the power to increase or diminish the political power of the United States, the state of Idaho, a sister state, nor any public agency of any of them.

As a final note, *Idaho Code* § 67-2331 authorizes any public agency entering into a joint agreement to appropriate funds and conduct other activities with regard to the activities covered by any such agreement, so there would seem to be no problem concerning the authority of a county or other political subdivision to agree to pay the State Treasurer for any services rendered.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 67-2327, 67-2328, 67-2331, 67-2332 and 67-2333.

DATED this 3rd day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PETER E. HEISER, JR.
Chief Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-19

TO: FRANCIS PARTRIDGE, Chairman
State Podiatry Examining Board
201 East Bannock
Boise, Idaho 83701

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

A. Does *Idaho Code* §§ 6-1012 and 6-1013 (Chapter 277, 1976 Idaho Session Laws) apply to podiatrists because of the phrase "or other provider of health care" contained in *Idaho Code* § 6-1012?

B. Are amendments and clarifications in the upcoming session of the legislature necessary either to make *Idaho Code* §§ 6-1001 through 6-1011 (Chapter 278, 1976 Idaho Session Laws) applicable to Idaho podiatrists?

CONCLUSION:

A. Yes. Podiatrists are health care providers within the meaning of *Idaho Code* §§ 6-1012 and 6-1013, which will require expert testimony on a community standard of podiatry health care in cases of malpractice involving podiatrists.

B. Yes. Amendments are necessary to make *Idaho Code* §§ 6-1001 through 61011 applicable to Idaho podiatrists since the intent of the legislature appears to require a hearing panel for pre-litigation screening of malpractice cases only in those cases involving physicians, surgeons and hospitals.

ANALYSIS:

A. *Idaho Code* §§ 6-1012 and 6-1013 require proof of a community standard of health care practice in medical malpractice cases by an expert witness.

Idaho Code § 6-1012 states that such expert testimony will be required:

> In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon *or other provider of health care . . .* " (Emphasis added.)

The legislaure in enacting *Idaho Code* §§ 6-1012 and 6-1013 stated its intent in Section 1 of Idaho Session Laws, 1976, Chapter 277:

> That appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians, hospitals and *other health care providers* in this state and that the same be available at reasonable cost thus assuring the availability of such health providers for the provision of care to persons in the state. (Emphasis added.)

The legislature in enacting *Idaho Code* § 6-1012 clearly stated it intended expert testimony to be required in malpractice cases involving physicians, surgeons, and *other providers of health care.*

Podiatry is defined in *Idaho Code* § 54-602 as:

> . . . the diagnosis and mechanical, electrical, medical, physical and surgical treatment of ailments of the human foot and leg, and the casting of feet for the purpose of preparing or prescribing corrective appliances, prosthetics, and/or the making of custom shoes for corrective treatment; . . .

The *Idaho Code* definition of podiatry, particularly "medical, physical and surgical treatment of ailments of the human foot and leg," indicates that podiatrists are definitely health care providers.

B. The legislature in *Idaho Code* § 6-1001 directs the Board of Medicine to provide pre-litigation hearing panels in alleged malpractice cases involving physicians, surgeons or licensed acute care general hospitals. In this section, the legislature did not include the language "and other health care providers" as it did in *Idaho Code* § 6-1012 providing for expert testimony on community standards in malpractice cases.

The legislature recognizes that the practice of podiatry is included within the practice of medicine, but is more limited in scope. *Idaho Code* § 54-602 provides in part:

> . . . that a podiatrist may administer narcotics and medications in the treatment of ailments of the human foot and leg in the same manner as a physician and surgeon. . . [however] nothing within this chapter shall prohibit any physican or surgeon, registered and licensed as such and authorized to practice under the laws of the state of Idaho, . . . from practicing medicine and surgery.

The legislature in *Idaho Code* § 6-1002 defines the composition of the prelitigation hearing panel, stating that the Board of Medicine shall appoint:

> . . . one (1) person who is licensed to practice medicine by the state of Idaho. In cases involving claims against hospitals, one (1) additional member shall be a then serving administrator of a licensed acute care general hospital in the state of Idaho. One (1) additional member of each such panel shall be appointed by the commissioners of the Idaho state bar, which person shall be a resident lawyer licensed to practice law in the state of Idaho, and shall serve as chairman of the panel. The panelists so appointed shall select by unanimous decision a layman panelist who shall not be a lawyer, doctor or hospital employee . . .

It appears that the legislature, in enacting *Idaho Code* § 6-1002, did not

contemplate the appointment of a podiatrist to the pre-litigation hearing panel, since it directs the Board of Medicine to appoint as a member of the panel one person licensed to practice medicine in Idaho. Podiatrists are licensed and governed by Title 54, Chapter 6 of the *Idaho Code*, rather than Title 54, Title 18 of the *Idaho Code*, which gives the Board of Medicine its authority. The Board of Medicine appears to have no authority to appoint a person it has no jurisdiction over. This section is consistent with *Idaho Code* § 6-1001 which speaks of pre-litigation hearing panels in malpractice cases concerning physicians, surgeons and licensed acute care general hospitals only.

The title to Chapter 278, 1976 Idaho Session Laws, which is the legislation regarding pre-litigation hearing panels, states in part: "Providing for a hearing panel for prelitigation considerations of *claims against physicians and hospitals*." (Emphasis added.)

Statutes are to be construed to effectuate the intent of the legislature by reviewing the entire act, amendment and title thereto. *State v. Murphy*, 94 Idaho 849, 499 P.2d 548 (1972); *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318 (1971). *Idaho Code* § 6-1007 providing for a notice of claims against an accused provider of health care uses the broader language of "provider of health care." However, construing this language in light of the specific language of physician, surgeon and hospitals, used in the title of the act, and Section 1, Chapter 278, 1976 Idaho Session Laws, declaring the legislature's intention, as well as *Idaho Code* §§ 661001 and 6-1002, it appears that the legislature specifically intended the prelitigation hearing panel to be applicable only to malpractice cases involving physicians, surgeons, and acute care general hospitals, licensed in Idaho.

Ordinarily, statutes contained within the same act are to be read together and construed as a whole. The statutes providing for expert testimony and prelitigation screening panels have been codified into the same chapter of the *Idaho Code* which is Title 6, Chapter 10. However, the expert testimony legislation and pre-litigation screening panel legislation were enacted into law as different chapters of the Idaho Session Laws of 1976, Chapters 277 and 278 respectively. Also, as previously discussed, the wording of the particular statutes involved has indicated the legislature wished to distinguish between physicians, surgeons and hospitals in the pre-litigation screening panel legislation and the broader language of health care providers as used in the expert testimony legislation regarding standards of due care in medical malpractice cases. For the above reasons, the two different sets of statutes codified within the same chapter are construed to have a different scope.

From the foregoing, it is the opinion of this office that podiatrists are health care providers as required by *Idaho Code* § 6-1012 and spoken of in Section 1, 1976 Idaho Session Laws, Ch. 377, and as such providers of health care, *Idaho Code* § 6-1012 and § 6-1013 would apply to malpractice cases involving podiatrists and require expert testimony on a community standard of podiatry health care.

It is the further opinion of this office that *Idaho Code* §§ 6-1001 through 61011, which provide for pre-litigation hearing panels in malpractice cases

against physicians, surgeons, and hospitals licensed in Idaho, do not apply to podiatrists.

In light of the above, if the Podiatry Examining Board desires to incorporate the concept of the pre-litigation screening committee in actions against podiatrists, it would be necessary to amend the statutes involved. Such an amendment probably should allow for appointment of a podiatrist to serve on such a panel in an action against a podiatrist.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 6-1001; 6-1002; 6-1007; 6-1012; 6-1013; 54-602.

2. *Idaho Session Laws*, 1976, Ch. 278.

3. *Idaho Cases: State v. Murphy*, Idaho 849, 499 P. 2d 548 (1972);*Summers v. Dooley*, 94 Idaho 87, 481 P. 2d 318 (1971).

ATTORNEY GENERAL OPINION NO. 77-20

TO: Stewart A. Morris
KING, WIEBE & MORRIS
304 North 5th Street
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the Idaho State Board of Dentistry legally become a member of the Western Region Examining Board and conduct dental license examinations outside the state of Idaho?

CONCLUSION:

Art. VIII, § 2, Idaho Constitution forbids subdivisions of the State of Idaho from becoming members of private corporations. Thus membership in the private corporation which constitutes the Western Region Examining Board is only possible if the State Board of Dentistry is not a stockholder.

ANALYSIS:

Idaho Code, § 67-2328. The Joint Exercise of Power Act, provides that public agencies of the Idaho State government may act jointly with like agencies of sister states, provided the action taken is within the allowable powers, privileges, and authority of said agencies.

Specifically, the Joint Exercise of Power provision reads:

> (a) Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority; and the state or public agency of the state, may exercise such powers, privileges and authority jointly with the United States, any other state, or public agency of any of them, to the extent that the laws of the United States or sister state, grant similar powers, privileges or authority, to the United States and its public agencies, or to the sister state and its public agencies; and provided the laws of the United States or a sister state allow such exercise of joint power, privilege or authority. The state or any public agency thereof when acting jointly with another public agency of this state may exercise and enjoy the power, privilege and authority conferred by this act; but nothing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone.

Without deciding upon the issue of whether or not a proposed agreement between governing bodies of two or more states would violate federal sovereignty provisions of the United States Constitution, the most expedient way to determine the validity of this agreement is to subject the agreement to scrutiny under Idaho Constitution, Art. VIII, §§ 2 and 4.

In relevant part § 2, Art. VIII, Idaho Constitution reads:

> The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or association; nor shall the state directly or indirectly, become a stockholder in any association or corporation, . . .

Art. VIII, § 4, Idaho Constitution reads:

> County, etc., not to loan or give its credit — No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to or in aid of any individual, association or corporation, for any amount or for any purpose whatever, nor become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

The critical passage of Art. VIII, § 2, as far as this inquiry is concerned, is the clause stating "nor shall the state directly or indirectly, become a stockholder in any association or corporation, . . . " A literal reading of this clause would prevent the Idaho Board of Dentistry from becoming a stockholder in the Western Regional Examining Board. This conclusion must be based upon the

given assumption that the Examining Board plans to operate in the corporate form. No inference can be drawn that membership in an organization such as the Examining Board is invalid merely because examination activities occur out-of-state.

Case law interpreting Art. VIII, § 2, Idaho Constitution, is scarce, and arguably not directly applicable to the facts relevant to this opinion. Case law interpreting Art. VIII, § 4, Idaho Constitution is more abundant. In the past, the Idaho Supreme Court has not been specific in defining whether court decisions turned on the "credit clauses" of Art. VIII, §§ 2 and 4, or upon the "stockholder clause" of Art. VIII, § 2. Scrutiny of both clauses is important to determine the nature of the proposed actions of the Idaho Board of Dentistry.

The extension of "credit" portions of these two constitutional sections have been interpreted by the Idaho Supreme Court. When distinguishing between lending credit, and purchasing a service, the Court stated that a contract based upon sufficient consideration is not a lending of credit by the State. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133 (1954). More recently this view has been expanded. In *Engleking v. Investment Bd. of State of Idaho*, 93 Idaho 217 (1969), the Court ruled that credit, as the word is used in Art. VIII, §§ 2 and 4, implies imposition of some new financial liability upon the State. To fall within the definition of credit, this action must result in a State debt incurred for the benefit of private enterprise. The Court held that the "credit clause" of Art. VIII, § 2 is intended to preclude only State actions which primarily aim to aid various private schemes. *Dave v. Moon*, 77 Idaho 146 (1935). Therefore it appears that the "loaning of credit clause" of Art. VIII, §§ 2 and 4, Idaho Constitution, will not be violated by this proposed agreement.

The "stockholder clause" of Art. VIII, § 2, presents a separate problem however. The Idaho Supreme Court has interpreted the "stockholder clause", of Art. VIII, § 2, to mean that the State cannot become a party to a private corporation whereby the end result of such corporate membership enhances a private benefiant, as opposed to a public benefiant. *School Dist. No. 8, Twin Falls County v. Twin Falls Ins. Co.*, 30 Idaho 400 (1917). In a more recent, and often cited case, the Idaho Supreme Court held that a city, upon investing public monies in a private corporation, violated Art. VIII, §§ 2, 3, and 4. In this case, the city attempted to issue bonds for the purchase of a privately-held manufacturing corporation. In declaring this scheme unconstitutional, even though a public benefit would indirectly occur due to increased community employment, the Court held that "lending the credit and faith of the municipality to a private corporation is an unconstitutional and void act." *Village of Moyie Springs v. Aurora Mfg.*, 82 Idaho 337 (1960).

A broad reading of *Moyie Springs* could be interpreted to prevent political subdivisions, such as the State Board of Dentistry, from contributing financial assistance to, or even becoming a stockholder in, a private corporation. Such a broad reading could prevent entry into the association of the Western Region Examining Board, irregardless of the fact that a public benefit will eventually be gained from such membership.

On the other hand, since the Western Region Examining Board is a non-profit corporation, and since the State of Idaho will be receiving valuable consideration in the form of examination services rendered, then it is possibly conceivable that stock ownership, to signify membership in the Board, could be allowed. This theory, however, cannot be supported by Idaho case law.

It is my opinion that since the language of the "stockholder clause" of Art. VIII, § 2 is clear and straightforward, and since case law interpretations of this section do not provide specific guidance, and further since alternative means of obtaining the services of the Western Region Examining Board are possibly available if the Idaho Board of Dentistry refrains from becoming an actual stockholder in said Board, and instead purchases the services of the Examining Board, then any attempt by the State Board of Dentistry to become a stockholder in this private corporation is violative of Art. VIII, § 2, Idaho Constitution.

AUTHORITIES CONSIDERED:

1. Idaho Constitution, Art. VIII, §§ 2 & 4.

2. *Idaho Code*, § 67-2328.

3. *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133 (1954).

4. *Engleking v. Investment Bd. of State of Idaho*, 93 Idaho 217 (1969).

5. *Dave v. Moon*, 77 Idaho 146 (1935).

6. *School Dist. No. 8, Twin Falls County v. Twin Falls Ins. Co.*, 30 Idaho 400 (1917).

7. *Village of Moyie Springs v. Aurora Mfg.*, 82 Idaho 337 (1960).

DATED This 3rd day of March, 1977

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-21

TO: The Honorable Pete T. Cenarrusa
Secretary of State
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

In the event a city recall election conducted in accordance with Chapter 17, Title 34, *Idaho Code*, results in the recall of the mayor and all councilmen, who is responsible for appointing successors to those offices?

CONCLUSION:

If the mayor of the city and all the city councilmen are recalled, the Governor should appoint the successors to those offices.

ANALYSIS:

Section 34-1712 (5), *Idaho Code*, provides:

> If an officer is recalled from his office the vacancy shall be filled in the manner provided by law for filling a vacancy in that office arising from any other cause.

The normal manner for filling vacancies in the office of mayor is provided by Section 50-608, *Idaho Code*. That section provides in pertinent part:

> When a vacancy occurs in the office of mayor by reason of death, resignation or permanent disability, the city council shall fill the vacancy from within or without the council as may be deemed in the best interests of the city, which appointee shall serve until the next general city election, at which election a mayor shall be elected for the full four (4) year term.

The manner for filling vacancies on the city council is provided by Section 50-704, *Idaho Code*, which provides:

> A vacancy on the council shall be filled by appointment made by the mayor with the consent of the council, which appointee shall serve only until the next general city election, at which such vacancy shall be filled for the balance of the original term.

Thus, normally vacancies in the offices of mayor or councilmen are filled by the mayor and councilmen. Also, a public officer normally holds office until his successor is installed in office. This general rule has been codified in Section 67-303, *Idaho Code*, which provides:

> *Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary.* This section shall not be construed in any way to prevent the removal or suspension of such officer, during or after his term, in cases provided by law. [Emphasis supplied.]

Thus, in the case of *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927), the Idaho Supreme Court held that a watermaster whose term had expired, nevertheless retained the authority of his office until a new watermaster was elected and qualified some months later.

Therefore, if there were no statute to the contrary, a recalled mayor or city councilman would serve until his successor was appointed and qualified, and would thereby participate in the selection of his successor.

However, Section 34-1712(4), *Idaho Code*, provides:

> If recalled, *an officer shall be recalled as of the time when the results of the special recall election are proclaimed*, and a vacancy in the office shall exist. [Emphasis supplied.]

Thus, when an officer is recalled, he may not automatically serve until his successor is appointed and qualified. Rather, he is recalled as of the time the results of the recall election are proclaimed. Consequently, a recalled mayor or councilman could not participate in the selection of his successor. As a result, if the mayor and all councilmen were recalled, the offices would be vacant and there would be no mode provided by law for filling the vacancy.

It might be argued that the county commissioners, pursuant to Section 50-102, *Idaho Code*, could appoint where no mode is provided by law for filling such a vacancy. However, Section 50-102, *Idaho Code*, which deals with the incorporation of cities, provides that the Board of County Commissioners shall appoint the mayor and councilmen "at the time of the incorporation."

The section grants no power to appoint other than at the time of incorporation. It has been held that the power granted by statute to fill vacancies must be narrowly construed. *State v. Kehoe*, 49 Montana 582, 144 P. 162 (1914), and see *People v. Christian*, 58 Wyo. 39, 123 P. 2d 368 (1942). Therefore, Section 50-102, *Idaho Code*, is not sufficiently broad to authorize appointment of city officials by the Board of County Commissioners except with respect to the initial incorporation.

Fortunately, Section 59-912, *Idaho Code*, provides a method for filling vacancies when no other method is provided by law. This section provides:

> when any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by granting a commission, to expire at the end of the next session of the legislature or at the next election by the people.

It is our opinion that no other mode is provided by law for filling the vacancies resulting from recall of the mayor and all councilmen. Therefore, pursuant to Section 59-912, *Idaho Code*, the Governor should fill the vacancies by granting commissions to persons qualified to hold the positions of mayor and councilmen. Those commissioned would hold office until the next city election.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 34-1712; 50-102; 50-608; 50-704; 59-912; and 67-303.
2. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927).
3. *State v. Kehoe*, 49 Montana 582, 144 P. 162 (1914).
4. *People v. Christian*, 58 Wyoming 39, 123 P. 2d 368 (1942).

DATED This 18th day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-22

TO: The Honorable T. W. Stivers
House of Representatives
District #25
Twin Falls County

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

You have requested an official opinion on the following questions concerning the Land Use Planning Act of 1975:

1. Under the law must the County Commissioners appoint a Planning Board or a Zoning Board or a Planning and Zoning Board?

2. Under the law can existing Planning Boards or Zoning Boards or Planning

and Zoning Boards be dissolved and this function returned to the County Commissioners?

3. Under the law can a *county be zoned multi-purpose?*

CONCLUSION:

1. The Local Planning Act provides the County Commissioners with all of the authority of a Planning or Planning and Zoning Board. The Act directs the County Commissioners to provide by ordinance a Planning or Zoning and Planning Board *if the County Commissioners do not desire to act in that capacity.*

2. A county Commission has the authority to repeal a Planning or Zoning Board if it elects to exercise the powers in the Act.

3. The Local Planning Act requires local governments to prepare a comprehensive plan, and zoning district(s) established by ordinance must comply with the comprehensive plan, and also with the guidelines for zoning district(s) found in the Act "where appropriate".

ANALYSIS:

The answer to the first question is found in *Idaho Code*, § 67-6504, which reads as follows:

> *Planning and Zoning Commission - Creation - Membership-Organization - Rules - Records - Expenditures - Staff.* — A city council or board of county commissioners, hereafter referred to as a governing board, *may exercise all of the powers required and authorized by this chapter in accordance with this chapter. If a governing board does not elect to exercise the power conferred by this chapter, it shall establish by ordinance . . . a Planning Commission and a Zoning Commission or a Planning and Zoning Commission* . . . (emphasis added).

The first sentence of *Idaho Code*, § 67-6504 declares that the County Commissioners are empowered to exercise all of the directives in the Local Planning Act. Moreover, the second sentence of that section declares that the County Commissioners shall establish by ordinance a Planning and Zoning Commission only in the event that the County Commissioners elect not to exercise the powers of the Act themselves. Hence the answer to the first question is that the County Commissioners need not appoint a Planning Board or a Zoning Board or a Planning and Zoning Board.

The second question concerns the legality of dissolving a Planning and Zoning or Planning and Zoning Board and returning its functions to the County Commissioners. *Idaho Code*, § 67-6504, as quoted above, provides guidance in answering the second question. By this language the County Commission itself is

empowered to implement the Act. It provides the Commission with an election to exercise the powers of the Act or delegate them by ordinance to a Planning or Zoning Commission. It is fundamental that a governing body which has the power to adopt an ordinance also has the power to repeal that ordinance. The County Commissioners have similar authority to amend or repeal zoning ordinances. 82 AmJur 2d *Zoning and Planning* § 10 p. 398. Reasoning from these principles, the County Commissioners are empowered to repeal the ordinance which establishes a Planning or Zoning Commission, if it elects to exercise the duties of the act.

The third question is not expressly answered in the Local Planning Act. The Local Planning Act is mandatory, as "every city and county *shall* exercise the powers conferred by this chapter." *Idaho Code* § 67-6503. Moreover, although the County Commissioners are authorized to exercise all the powers of the Act, if it elects not to do so, it must establish by ordinance a Commission to implement the provisions of the Act. The Planning or Planning and Zoning Commission, or the County Commissioners, has a mandatory duty to prepare a comprehensive plan. *Idaho Code* § 67-6508 reads as follows:

> Planning Duties — It shall be the duty of the Planning or Planning and Zoning Commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the Plan. The Plan shall include all land within the jurisdiction of the governing board. The Plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component. The Plan with maps, charts, and reports shall be based on the following components unless the Plan specifies reasons why a particular component is unneeded.

The components are listed as population, economic development, land use, natural resource, hazardous areas, public services, facilities, and utilities, transportation, recreation, special areas or sites, housing, community design, implementation, and additional components as deemed necessary. Yet another mandatory duty of the Local Planning Act is that the governing Board shall by ordinance establish "one or more zones or zoning districts where appropriate". *Idaho Code* § 67-6511. Even more significant is another sentence of this same section, "The zoning districts *shall be in accordance with the adopted [comprehensive] plan.*" These references indicate clearly that the Local Planning Act requires certain mandatory duties of local governments and, further, that the comprehensive plan is the heart of the Local Planning Act. The governing Board, or County Commissioners, must establish at least one zone, and that zone must be in accordance with the comprehensive plan.

Although the third question is not expressly answered, the Local Planning Act as now constituted in the *Idaho Code* does provide guiding principles to answer the question. Since the comprehensive plan is the controlling component, whether a county may be zoned multi-purpose depends upon the comprehensive plan. Therefore, a county may be zoned multi-purpose if such zoning is consistent with the comprehensive plan of that county. The converse would also

be true, so that a county might be precluded from zoning the entire county as multi-purpose if the comprehensive plan calls for a different scheme of zoning. In *Idaho Code* § 67-6511, the words "where appropriate" do not take away from the mandatory duty of the governing Board to establish at least one zone, but instead refer to whether one or more zones should be established and their location.

The same section of the *Idaho Code*, Section 67-6511, provides additional guidelines for establishing a zoning district.

> Within a zoning district, the governing Board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one district may differ from those in another district.

These factors must be considered "where appropriate" and consequently, the "appropriateness" will be a significant component in the decision process for establishing zoning district(s) and an important issue in litigation which may challenge the propriety of the zoning.

In summary, the Local Planning Act is mandatory upon local governments. Local governments must adopt a comprehensive plan in accordance with the Act. Zoning districts shall be in accordance with the comprehensive plan. Guidelines provided in the Act for zoning districts must be followed where appropriate. Finally, in answer to the third question, the key is the comprehensive plan, and zoning district(s) must comply with the guidelines established in the comprehensive plan.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 67, Chapter 65.
2. Ready-to-Pour, Inc. v. McCoy, 95 Idaho 510, 511 P 2d 792 (1973).
3. 82 AmJur. 2d *Zoning and Planning*, § 10, p. 398.

DATED This 14th day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-23

TO: Honorable Pete T. Cenarrusa
Secretary of State
State of Idaho
Statehouse Mall

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

What corporate powers are granted to, or may be exercised by, professional corporations pursuant to I.C. § 30-1307?

CONCLUSION:

When incorporated pursuant to the Professional Service Corporation Act, the sole and specific purpose of a professional corporation must be the rendering of professional services. Consequently, a professional corporation may not actively engage in any other business which is unrelated to the rendering of professional services. Notwithstanding, pursuant to the proviso contained in I.C. § 30-1307, a professional corporation may own real or personal property which is necessary for the rendering of professional services, and may also passively invest its corporate funds in various types of investments.

ANALYSIS:

Looking at the applicable statutory provisions, I.C. § 30-1301 declares the legislative intent of the Professional Service Corporation Act as follows:

> It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

I.C. § 30-1303 (2) then states:

> The term "professional corporation" means a corporation organized under this act *for the sole and specific purpose of rendering professional service* and which has as its shareholders only natural persons who themselves are duly licensed or otherwise legally authorized within the state of Idaho to render the same professional service as the corporation. (Emphasis added.)

In discussing who may incorporate, I.C. § 30-1304 reiterates that a professional corporation may be incorporated only "for the sole and specific purpose of rendering the same and specific professional service."

At this point, it should be noted that a distinction must be drawn between the corporate purpose, as opposed to the permissible corporate power. That is,

corporate powers are only the permissible means of attaining the authorized corporate purpose. 6 Fletcher's *Cyclopedia of Corporations* § 2475 (1968). Bearing this distinction in mind, and based upon the above-cited Idaho statutory provisions, it is the opinion of the Attorney General that the sole purpose for which a professional corporation may be incorporated is the rendering of professional services.

Looking next at the permissible corporate power, or means, to attain this corporate purpose, I.C. § 30-1307 provides:

> No corporation organized under this act shall engage in any business other than the rendering of the professional services for which it was specifically incorporated; provided, however, nothing in this act or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, mortgages, stocks, bonds or any other type of investments, or from owning real or personal property necessary for the rendering of professional services.

Based upon the first part of I.C. § 30-12307, and when coupled with the authorized corporate purpose, it is clear that a professional corporation does not have the corporate power to actively engage in business activities which are unrelated to the rendering of professional services. This limitation is typical in the majority of states which have enacted professional corporation acts. 17 Bender *Business Organizations* § 9.04 [9] (1976); Dunn, *Professional Corporations: Their Development and Present Status with Respect to the Practice of Medicine*, 24 U. Fla. L.R. 625, at 638 (1972); Buchmann and Bearden, *The Professional Service Corporation — A New Business Entity*, 16 U. Miami L.R. 1, at 9 (1961).

Greater ambiguity arises with respect to the question of what corporate powers or activities are authorized by the proviso contained in I.C. § 30-1307. It is clear that a professional corporation may own, in its corporate name, real or personal property "necessary for the rendering of professional services." Likewise, by extrapolating from this premise, a professional corporation may not own real or personal property which is not necessary for, and not related to, the rendering of professional services.

The remaining aspect of the proviso contained in I.C. § 30-1307 is the provision that a professional corporation may invest "its *funds* in real estate, mortgages, stocks, bonds or any other type of investment." (Emphasis added.) The question arises whether the allowable investments, like the ownership of real or personal property, must also be "necessary for the rendering of professional services."

It is interesting to note that various states, including Florida (Fla. Stat. 621.08), Michigan (Mich. Compiled Laws 450.227) and Montana (R.C.M. 15-2108), have enacted statutes identical to I.C. § 30-1307. Unfortunately, there is no appellate case law interpreting any of these similar statutory provisions. In two law journal articles discussing the Florida statute, it is stated, without any

analysis or authority, that professional corporations may passively invest in real estate, mortgages, bonds, or other types of investments, even though the investments are not "necessary for the rendering of professional services."

> It is to be noted that the primary corporate purpose of a professional service corporation must be the rendition of professional services of the type which the stockholders are licensed to render. No other business may be engaged in, but the corporation may invest its funds in real estate, mortgages, bonds, or any other types of investments, or may own real or personal property necessary for the rendition of the personal services . . . It is a possibility that at some time in the future the courts will be called upon to interpret the difference between investing within the meaning of the act, and operating a business . . . Buchmann and Bearden, *The Professional Service Corporation — A New Business Entity*, 16 U. Miami L.R. 1, at 9 (1961). See also, Dunn, *Professional Corporations: Their Development and Present Status with Respect to the Practice of Medicine*, 24 U. Florida L.R. 62, at 638-639 (1972); Horsley, *Virginia Professional Association Act: Relief for the Underprivileged*, 48 Virginia L.R. 777, at 795 n. 102 (1962).

This position comports with majority law, even though, of course, statutory provisions differ from state to state.

> Accordingly, it is a fair generalization that a professional corporation can own property related to its professional activity, and in many states can own unrelated investments, but in almost no state except California and possibly Texas can it own unrelated property or investments of such a nature that the corporation's activities in connection therewith attain the dignity of a separate active business. 17 Bender *Business Organizations* § 9.04 [9] (1976).

Consistently with this majority law, it is the opinion of the Attorney General that the allowable investments permitted by I.C. § 30-1307 need not be restricted to investments which are "necessary for the rendering of professional services."

Notwithstanding, provisos contained in statutes must be strictly construed. 2A Sutherland *Statutory Construction* § 47.08 (1973). The proviso under consideration states that a professional corporation may invest "its funds" in various investments. I.C. § 30-1307. Strictly construing this limitation, it is the opinion of the Attorney General that a professional corporation may invest only its funds, not its time or efforts, in investments which are unrelated to the rendering of professional services. Thus, it would appear that investments by a professional corporation which are unrelated to the rendering of professional services can only encompass a passive investment of corporate funds. This rationale is further supported by the fact that the sole and specific purpose of a professional corporation must be the rendering of professional services and the fact that a professional corporation may not actively engage in unrelated business activities.

In conclusion, it is the opinion of the Attorney General that, when incorporated pursuant to the Professional Corporation Act, the sole and specific purpose of a professional corporation must be the rendering of professional services. Consequently, a professional corporation may not actively engage in any other business which is unrelated to the rendering of professional services. Notwithstanding, pursuant to the proviso contained in I.C. § 30-1307, a professional corporation may own real or personal property which is necessary for the rendering of professional services, and may also passively invest its corporate funds in various types of investments.

AUTHORITIES CONSIDERED:

1. I.C. §§ 30-1301; 30-1303(2); 30-1304; and 30-1307.

2. Fla. Stat. 621.08; Mich. Compiled Laws 450.227; and R.C.M. 15-2108.

3. 17 Bender *Business Organizations* § 9.04[9] (1976).

4. 6 Fletcher's *Cyclopedia of Corporations* § 2475 (1968).

5. Dunn *Professional Corporations: Their Development and Present Status with Respect to the Practice of Medicine*, 24 U. Fla. L.R. 625, at 638 (1972).

6. Buchmann and Bearden, *The Professional Service Corporation — A New Business Entity*, 16 U. Miami L.R. 1, at 9 (1961).

7. Horsley, *Virginia Professional Association Act: Relief for the Underprivileged*, 48 Virginia L.R. 777, at 795 n. 102 (1962).

8. 2A Sutherland *Statutory Construction* § 47.08.

DATED This 23rd day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-24

TO: Senator Mike Mitchell
Idaho State Senate
Statehouse
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Does a type three general contractor licensed as a public works contractor need mechanical and electrical subcontract licenses prior to the time he lists himself as a subcontractor on a public works proposal?

2. If not in compliance with the licensing requirement would the proposal be considered nonresponsive and disregarded?

CONCLUSION:

1. A contractor must have a valid public works license at the time he submits a bid, except for contracts for public works financed in whole or in part by federal aid funds, and in that event the contractor must secure a valid public works license at or prior to the award and execution of a contract by the State of Idaho. A contractor listing himself as electrical subcontractor must have a valid electrical contractors license at the time of entering into an agreement, or when a contract is signed.

2. A contractor's bid is unresponsive and void when the contractor fails to name in his bid the subcontractors who will, in the event the contractor secures the contract, subcontract the plumbing, heating, air-conditioning work, and electrical work under the general contract. A contractor's bid is also unresponsive and void when the contractor fails to comply with the Public Works Contracting laws.

ANALYSIS:

Idaho Code, § 54-1902, requires that a contractor must have a valid public works license before submitting a bid for a public works project. That section reads as follows:

> *Unlawful to engage in public works contracting without license.* — It shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within this state without first obtaining and having a license therefor, as herein provided, unless such person is particularly exempted as provided in this act, . . . unless otherwise provided in the specificatons of such contracts or to sublet any part of any contract for specialty construction to a specialty contractor who is not licensed in accordance with this act; provided, however, that no contractor shall be required to have a

> license under this act in order to submit a bid or proposal for contracts for public works financed in whole or in part by federal aid funds, but at or prior to the award and execution of any such contract by the State of Idaho, . . . The successful bidder shall secure a license as provided in this act.

This section of the *Idaho Code* requires that a general contractor obtain a public works license as a prerequisite to engaging in the business or acting in the capacity of a public works contractor. In the event a person does not comply with this statutory prerequisite, and attempts to engage in the business or act in the capacity of a public works contractor without a public works contracting license, that person commits an unlawful act. It is fundamental that the State of Idaho or Agencies or Departments of the State of Idaho cannot be party to an unlawful act. Therefore, a bid submitted by a contractor without a public works contracting license is unresponsive and void.

Idaho Code, § 54-1902, as quoted above, includes a proviso, which excepts contractors from the requirement of having a public works contracting license at the time of submitting a bid, "for contracts for public works financed in whole or in part by federal aid funds." In the event of this exception, the proviso directs that ". . . the successful bidder shall secure a license as provided in this act . . . at or prior to the award and execution of any such contract by the State of Idaho . . ."

Another issue arises concerning whether subcontractors must be listed on the bid of the general contractor. *Idaho Code*, § 67-2310 provides an affirmative answer to this question. That section states:

> . . . before the state of Idaho . . . shall let contracts for the construction . . . of any and all buildings, improvements or public works, and such construction . . . requires plumbing, heating and air-conditioning work, or electrical work, *the general contractor shall be required to include in his bid the name . . . of the subcontractors* who shall, in the event the contractor secures the contract, subcontract the plumbing, heating and air-conditioning work, and electrical work under the general contract; . . . *Failure to name subcontractors as required by this section shall render any bids submitted by a general contractor unresponsive and void.* Subcontractors named in accordance with provisions of this section must possess an appropriate license or certificate of competency issued by the state of Idaho covering the contractor work classification in which the subcontractor is named. (Emphasis added.)

This section requires a general contractor to list the names and/or addresses of the subcontractors who shall subcontract the respective assignments in the event the general contractor obtains the contract. This section further declares that failure on the part of a general contractor to list the subcontractors in his bid renders the bid unresponsive and void. Your question implies circumstances in which a general contractor lists himself as t e subcontractor(s). No statute, regulation, or court case has been found which precludes a general contractor

from listing himself as a subcontractor. Therefore, such a practice does not violate the naming requirement of *Idaho Code* § 67-2310. Moreover, since that section directs the contractor to name his subcontractors, by naming himself, a contractor has complied with the statute.

The last sentence of *Idaho Code*, § 67-2310 should not be interpreted as requiring subcontractors listed on a bid to have a subcontracting license at the time the bid is submitted. Rather, that sentence requires that subcontractors named in the bid in accordance with the section "must possess an appropriate license or certificate of competency . . . covering the contractor work classification in which the subcontractor is named." An analysis of the public works license laws in Title 54, Ch. 19 reveals that this final sentence refers to a public works license. The phrase "the contractor work classification in which the subcontractor is named" is language used in the public works license laws. *Idaho Code*, § 54-1904, declares:

> *Classes of licenses — rights granted under licenses — fees.* — There shall be five (5) classes of licenses issued under the provisions of this act which are hereby designated as classes AAA, AA, A, B, and C...
>
> For the purpose of licensing public works contractors under this act the board may adopt rules and regulations necessary to determine *the classification according to their responsibility, and the type and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage as in this act provided.*
>
> Each license issued by the board shall clearly indicate the type and scope of work for which the licensee is qualified and licensed and the holder of the license shall be permitted to submit proposals for and perform only those types of work specified in each such license; provided, however, that the board may extend the permissible type or scope of work to be done under any license when it is determined by the board that the applicant meets all of the requirements of this act to qualify him to do such other work. (Emphasis added.)

These sections of the Public Works Contractors laws elucidate the phrase "contractor work classification" in the last sentence of *Idaho Code*, § 67-2310, as referring to the public works licensing scheme. The definitionof "public works contractor" in *Idaho Code*, § 54-1901 (b), provides further support for this interpretation:

> "Public works contractor" which term is synonomous with the term "builder" "subcontractor" and "specialty contractor" and in this act referred to as "contractor" or "licensee," includes any person who, in any capacity, undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, submit a proposal to, or enter into a contract with the state of Idaho . . . authorized to let or award contracts for the construction . . . of any public work.

The Idaho Supreme Court recently reached a similar interpretation of these

laws in the case of *Neilsen & Co. v. Cassia and Twin Falls County Joint Class A School District 151*, 96 Idaho 763, 536 P. 2d 1113 (1975). In that case the general contractor named a subcontractor which possessed a AA public works license. Since the project involved an estimated cost over $250,000, *Idaho Code*, § 54-1904, requires that a contractor hold a AAA license. The Court held that the AA license held by the subcontractor was not sufficient, and that the "import of I.C. §§ 54-1901, 54-1924 requires a subcontractor not only to be licensed for a general classification work but also to hold a specific license from the State based upon type, scope and responsibility of operation." The Court stated further, "I.C. § 54-1904 specifically sets for the *classificatory license scheme* governing public works contractors" (Emphasis added.) The Court concluded that the requirements of *Idaho Code* § 67-3210, were not satisfied and that the bid was therefore unresponsive and void. Your question, whether the subcontractor listed on a bid of a general contractor must possess a mechanical and electrical subcontractors license at the time of the submission of the bid, was not presented to the Court in the *Nielsen*, case. However, the *Nielsen* case clearly interpreted *Idaho Code*, § 67-2310 as referring to the public works licensing scheme.

The preceding analysis demonstrates that the public works contracting laws and the subcontractor naming law require that a general contractor and subcontractors named in a bid of a general contractor possess appropriate public works contracting licenses. However, these laws do not require that the respective subcontractors possess mechanical and electrical subcontractors licenses at the time of the submission of the bid.

The time at which one must possess an electrical subcontractors license is set forth in *Idaho Code*, Title 54, Ch. 10. *Idaho Code*, § 54-1002, declares that electrical subcontractors license is essential to engage in business as an electrical subcontractor. That section reads as follows:

> (1) . . . it shall be unlawful for any person, partnership, company, firm, association, or corporation, to act, or attempt to act as an electrical contractor in this state until such person, partnership, company, firm, association or corporation shall have received a license as an electrical contractor . . .

The timing is further clarified by *Idaho Code*, § 54-1003A, which states:

> *Definitions.* — (1) Electrical Contractor. . . . Any person, partnership, company, firm, association or corporation engaging in, conducting or carrying on the business of installing wires or equipment to carry electric current or installing apparatus to be operated by such current or *entering into agreements* to install such . . . shall for the purpose of this act be known as an electrical contractor.

These sections provide that it shall be unlawful for any person to engage in the business of electrical subcontractor or to enter into agreements to act as an electrical subcontractor. Thus, when one enters into an agreement to perform electrical subcontracting, or when one signs a contract to do so, that person must possess an electrical subcontractors license pursuant to *Idaho Code*, Title 54, Ch. 1000.

In summary, the public works contracting laws and the subcontractors naming law of the *Idaho Code* require that contractors name their subcontractors in their bid and that the contractor and subcontractor so named hold a requisite public works contracting license, but do not require that the subcontractors listed on the bid of the general contractor possess mechanical and electrical subcontractors license at the time of the submission of the bid. The electrical licensing laws declare that a person must hold an electrical subcontractors license at the time a contract is entered into or at the time it is signed.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 54 Chs. 10 and 19; § 67-2310.

2. *Nielsen & Co. v. Cassia and Twin Falls County Joint Class A School District 151*, 96 Idaho 763, 536 P. 2d 1113 (1975).

DATED This 25th day of March, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-25

TO: Janette B. Drury
Executive Secretary
State Board of Accountancy
P.O. Box 2896
Boise, Idaho 83701

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May Public Accountants licensed by the State of Idaho use the title "licensed public accountant"?

CONCLUSION:

Yes, public accountants, although separate and not to be confused with Certified Public Accountants, may use the title "licensed public accountant" because the Idaho Accountancy Act specifically requires that public accountants be licensed.

ANALYSIS:

The distinction between "certified public accountant" and "public accountant" is noted on the definition section of the Idaho Accountancy Act. *Idaho Code*, § 54-206 (1)(2) reads:

> 54-206(1). "Certified public accountant" means any person who holds a valid, unrevoked and unsuspended certificate and/or license (where applicable) under the provisions of chapter 2, title 54, Idaho code, designating said person as a certified public accountant."
>
> 54-206(2). "Public accountant" means any person who holds a valid, unrevoked and unsuspended license under the provisions of chapter 2, title 54, Idaho Code."

The distinction between the two above-defined accountants, is that a certified public accountant must pass an examination, and must possess certain experience requirements as per *Idaho Code*, 54-208 and 54-210. Public accountants, on the other hand, must meet the qualifications of *Idaho Code*, 54-214.

> 54-214. PUBLIC ACCOUNTANTS — REGISTRATION. Any person (a) who is a resident of this state or has a place of business herein, and (b) who has attained the age of eighteen (18) years, and (c) who is of good moral character, and (d) who meets the requirements of paragraph (1), (2), or (3) hereof may register with the board as a public accountant.
>
> (1) Persons who on January 1, 1976, as determined on an individual basis by the advisory committee, held themselves out to the public as public accountants within this state in the practice of public accounting as their principal occupation and who have made application to the advisory committee between July 1, 1976, and July 1, 1977, for licensure as a public accountant.
>
> * * *
>
> (3) Persons who on January 1, 1976, hold senior accounting positions as determined by the advisory committee, as . . . In order for a person to be licensed as a public accountant pursuant to this subsection, the applicant must also pass an examination administered by the advisory committee . . .

The legislature having provided for both certified public accountants, and public accountants, the question confronts us of how to clearly distinguish the two differently qualified accountants. Complications which prevent a simple solution to this problem should be noted. They are: (1) the fact that the general public as a whole is somewhat confused about the distinction between the two groups, and the nature of the situation is such that any attempt to explain the distinction would probably add to the confusion; (2) the fact that certified public accountants are restricted by a professional code of ethics which prevents them from fully explaining the distinction between the two groups.

Idaho Code, § 54-218, concerns the use of titles by accountants. It reads:

> 54-218. USE OF TITLE — VALID LICENSE TO PRACTICE. (1) No person shall assume or use the title or designation "certified public accountant" or any other title, designation, words, letters, abbreviations, sign, card, or device to indicate that such person is a certified public accountant unless such person holds a certificate or license as a certified public accountant pursuant to chapter 2, title 54, Idaho Code.
>
> (2) No person shall assume or use the title or designation "public accountant" or any other title, designation, words, letters, abbreviations, sign, card, or device to indicate that such person is a public accountant unless such person holds a certificate or license pursuant to chapter 2, title 54, Idaho Code.
>
> (3) No person, partnership or corporation shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," "registered accountant," "accredited accountant," "accountant," "auditor" or other title or designation or any of the abbreviations "CA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "certified public accountant" or "public accountant"; . . .

If evidence is present to show that public accountants are attempting to "deceive to indicate that such person is a certified public accountant" when they employ the title "licensed public accountant", then a valid argument can be made that the title "licensed public accountant" should not be employed to designate a position of "public accountant." But, no evidence of such deception is present. Furthermore, a rational basis exists for the title "licensed public accountant" because *Idaho Code*, § 506(6) defines license to mean "a document issued by the board permitting the holder of a certificate to practice as a certified public accountant in the state of Idaho or a public accountant, and permitting a public accountant to practice as a public accountant."

It is therefore my opinion that after examining the legislative intent of the Act as supplied by Mr. Steve Swanson, one of the Act's authors, the State Board of Accountancy, and prior revisions of the proposed Act, that public accountants licensed by the State of Idaho can use the title "licensed public accountant."

AUTHORITIES CONSIDERED:

1. *Idaho Code,* § 54-206(1)(2).

2. *Idaho Code, ii* 54-208 and 54-210.

3. *Idaho Code, ii* 54-214 and 54-218.

4. *Idaho Code,* § 506(6).

DATED this 5th day of April, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-26

TO: Stephen C. Allred, Director
State of Idaho
Department of Water Resources
Statehouse
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Did those provisions of the State Water Plan, Part Two, which do not specifically call for amendment of existing laws or new legislation become effective upon adoption in December, 1976, by the Idaho Water Resource Board?

2. Would House Bill 14, if enacted in present form, conflict with Article 15, § 7, of the *Idaho Constitution* which authorized the formulation of the State Water Plan?

CONCLUSIONS:

1. A reading of Art. 15 § 7, *Idaho Constitution* and H.B. No. 14, which adds

§ 42-1736 to the *Idaho Code*, reflects an intent to require legislative approval before any of the State Water Plan becomes effective in the State of Idaho.

2. H.B. 14, as enacted by the First Regular Session of the Forty-fourth Idaho Legislature, is presumed constitutional even though it could be argued that there are flaws within that legislation.

ANALYSIS:

A PREREQUISITE TO THE STATE WATER PLAN IS APPROVAL BY THE LEGISLATURE

The answer to the first question requires a review of the Idaho constitutional and statutory scheme mandating and directing the formulation and implementation of the State Water Plan.

In 1964, Art. 15, § 7, was ratified as an amendment to the constitution of the State of Idaho. This constitutional provision requires that a water resource agency be created and lists those powers which the agency is to possess, all under such laws as may be prescribed by the legislature. The specific language follows:

> "Section 7. State Water Resource Agency. There shall be constituted a water resource agency, composed as the legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public's interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects, to generate and wholesale hydro-electric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer, and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the legislature."

The above language makes clear that the water resource agency created shall have the power to formulate and implement a state water plan. Of course, the language does not address who has the power to actually adopt the plan, and it may be presumed that this function was designed for the legislature. It should be emphasized that Art. 15, § 7, *Idaho Constitution* provides that the water resources plan shall be under laws as may be prescribd by the legislature.

The Idaho Legislature carried out its responsibility under the new constitutional provision in 1965. See Idaho Session Laws, 1965, Ch. 320; amended 1974, Ch. 20, *ii* 22 and 23. The statutory provision establishing the Idaho Water Resources Board as the constitutional water agency is codified at § 42-1732, *Idaho Code*.

A declaration of intention by the legislature in establishing the Water Resource Board appears in § 42-1731, *Idaho Code*, and reads in pertinent part as follows:

> "It is essential that a coordinated, integrated, multiple use water resource policy be formulated and a plan developed to activate this policy as rapidly as possible. It is in the public interest that these functions be carried out by a single state agency."

The powers and duties to be possessed by the Water Resource Board are more fully described in § 42-1734, *Idaho Code*. The first and last subsections of this provision set out the extent of the Board's powers and duties as follows:

> "(a) To have and exercise all of the rights, powers, duties and privileges vested by Art. 15, § 7, of the constitution of this state in the water recourse agency . . . ; [and]
>
> * * *
>
> (w) To take such other action as may be necessary to carry out its duties and powers under this act and the constitution of the state of Idaho."

Each of the powers and duties enumerated in § 42-1734, *Idaho Code* stems from one of the powers or duties vested in the State Water Resource Agency by Art. 15, § 7, *Idaho Constitution*.

As observed above, Art. 15, § 7, *Idaho Constitution* does not mention a "power of adoption" but does state that the water resource agency shall have the power to "formulate and implement" a state water plan. The provision also provides that it is subjected to such laws as may be prescribed by the legislature. Thus, it could easily be assumed that this constitutional mandate requires the State Water Resource Board to prepare ("formulate" may be read as synonymous to "prepare") a state water plan after which the plan is forwarded to the Idaho Legislature for adoption. Following adoption by the Idaho Legislature, the plan may then be implemented by the State Water Resource Board. The logic of this analysis comes from the fact that Art. 15, § 7, *Idaho Constitution* only requires *formulation* and *implementation* of the water resource plan by the State Water Resource Board. Therefore, the logical intermediate step, which is *adoption*, may easily be presumed a function of the Idaho Legislature under that constitutional mandate.

The theory outlined above was obviously followed by the First Regular Session of the Forty-fourth Legislature when it enacted into law H.B. No. 14. This law, which now will be codified as § 42,1736, *Idaho Code*, reads as follows:

> "LEGISLATIVE REVIEW. The state water plan adopted by the Idaho water resource board pursuant to authority of § 42-1734, Idaho Code shall not become effective until it has been

> submitted to the legislature of the state of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter, any change in the state water plan shall be submitted in the same manner to the legislature prior to becoming effective."

One question which may be asked is what will happen if the Idaho Legislature never approves or effectively acts upon the State Water Resource Plan formulated by the State Water Resource Board. The answer to that question is simple. If the legislature unduly shirks its responsibility to adopt or effectively act upon a state water resource plan, a violation of Art. 15, § 7, *Idaho Constitution* will have occurred and legal action may be maintained to remedy that problem. However, it must be assumed that the legislature, like the State Water Resource Board, will fulfill the obligation placed upon it by the constitution. The constitutional mandate places no time limitation upon either the Water Resource Board or the legislature to formulate, adopt, and implement a plan. Of course, it must be presumed that a reasonable time limitation is required. At this point, the plan has been prepared by the Water Resource Board. Now, the legislature should have a reasonable time to consider and act upon the plan as prepared. If the plan is rejected (or not adopted), the legislature is impliedly under a duty to state its reasons therefore. The Board could then correct and resubmit the plan pursuant to the wishes of the legislature.

In effect, Art. 15, § 7, *Idaho Constitution* makes the legislature and the State Water Resource Board partners in preparing, adopting and implementing a State Water Resource Plan. If the Board had failed to formulate a plan, a mandamus action could lie in the courts of the State of Idaho. Similarly, if the legislature fails to adopt a plan or give reasons for rejection within a reasonable time, an action in court may also be appropriate. Further, legal action may lie if the State Water Resource Board fails to implement an adopted Water Resource Plan. However, nothing at this point indicates any bad faith on the part of either the legislature or the Water Resources Board.

In short, the framework of the State Water Resource Plan under Art. 15, § 7, *Idaho Constitution* and H.B. 14 requires formulation and implementation of the plan by the Water Resource Board and adoption by the legislature. Therefore, the plan may not be implemented until the previous step — adoption — has been completed.

H.B. NO. 14 AS PASSED BY THE IDAHO LEGISLATURE MUST BE PRESUMED CONSTITUTIONAL

Abundant law in the State of Idaho as well as elsewhere supports the strong presumption given to the constitutionality of legislation. In fact, it has been said that.

> "It is frequently asserted by the courts that every presumption favors the validity of an act of the legislature and that all doubts must be resolved in support of the act. Likewise, it is presumed that the legislature acted with integrity and with an honest

> purpose to keep within constitutional limits... It has even been said that 'a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality.' "*Sutherland Statutory Construction,* 4th Ed. § 45.11.

For an Idaho case of similar construction, see *American Oil Co. v. Neill,* 86 Idaho 7 (1963). Therefore, now that H.B. No. 14 is law, the strong presumption in favor of its constitutionality must attach.

Aside from the presumption to be afforded H.B. No. 14, an analysis of its revisions does not disclose any glaring problem with constitutionality. As discussed earlier in this opinion, Art. 15 § 7, *Idaho Constitution* may easily be read to allow preparation and implementation of a state water resource plan by the Water Resource Board and adoption prior to implementation by the State legislature. Under this reading, H.B. No. 14 merges quite readily with the requirements of the constitution.

Perhaps the most serious problem with H.B. No. 14 is the implication that any affirmative action, including *rejection,* approves the Water Resource Plan. This appears to be an obvious defect in the drafting of the bill. Certainly, the legislature did not presume to adopt the plan by rejecting the plan. The apparent intent of the language is to require that the plan be submitted to the legislature for review and adoption. The plan may be accepted as presented, modified, or rejected. If the plan is rejected, it must be assumed that the reasons for the rejection will be stated in order that the Water Resource Board may correct the defects and resubmit it to the legislature for approval. In any event, it may be assumed that the legislature will, pursuant to constitutional mandate, adopt a water resource plan as expeditiously as possible. However, if the legislature does not adopt a plan as presented, as modified, or as corrected after rejection, then a violation of constitutional requirement may be apparent and legal action to correct the problem may be considered. At this point, though, H. B. No. 14 does not demonstrate any serious constitutional defects and must be assumed constitutional under the strong presumption to be afforded legislation.

AUTHORITIES CONSIDERED:

1. Article 15, § 7, *Idaho Constitution*
2. § 42-1732, *et seq., Idaho Code*
3. § 42-1736, *Idaho Code*
4. *American Oil Co. v. Neill,* 86 Idaho 7 (1963).
5. *Sutherland Statutory Construction,* 4th Ed. § 45.11

DATED this 11th day of April, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General of Idaho

ATTORNEY GENERAL OPINION NO. 77-27

TO: Mr. Richard L. Barrett
State Personnel Director
Idaho Personnel Commission
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Is Idaho Personnel Commission Rule 7-10.1, which allows accelerated advancement of employees between steps within a pay grade, compatible with the statutory requirement of § 67-5309C(c), *Idaho Code* calling for advancement only after a tenure of six months between step A and B and tenure of one year between steps C and E?

2. If Idaho Personnel Commission Rule 7-10.1 is operable in view of statutory requirements, is that portion of Rule 7-4.8 equally compatible that prescribes that an increase of less than two full steps does not create a new date for computing ingrade increases?

3. If an employee under the new statutory authority can be moved from step E to step F for commendable service, can an employee under Rule 7-10.1 be similarly moved from B to C, for example, for meritorious performance; or would it be necessary to move that employee to step F which is reserved for commendable performance or to step G reserved for exemplary and distinguished performance?

CONCLUSION:

1. Idaho Personnel Commission Rule 7-10.1 is not compatible with the requirements of § 67-5309C(c), *Idaho Code*. This statutory provision outlines the manner of ingrade promotions, effectively nullifying the contrary procedure outlines in Rule 7-10.1.

2. Idaho Personnel Commission Rule 7-4.8, prescribing that a n increase of less than two full steps within a pay grade does not create a new date for computing ingrade increases, is incompatible with the provisions of § 67-5309C(c), *Idaho Code*, which spells out the schedules and criteria for promotions within grade.

3. In order to move an employee within grade based solely on exemplary or distinguished performance, § 67-5309C(c) requires that the promotion be made into either step F or step G. A promotion into step F or G may be made from any one of the steps within the grade provided the requirements of the *Idaho Code* are followed.

ANALYSIS:

In the past, the State of Idaho has compensated its employees on a pay schedule based upon twenty grades with ten steps within each grade. Under this system, an employee could continue to receive promotions without a grade promotion by moving along the various steps within his particular grade.

In 1976, the Idaho Legislature considered and basically approved a new compensation plan, commonly referred to as the "Hay Plan". This new system establishes fifty pay grades within State government as opposed to the former twenty. Also, the ingrade steps are reduced to eight, with the last two steps reserved for employees who have demonstrated exemplary or commendable performance.

The new pay system is codified in § 67-5309B and C, *Idaho Code*. The plan will become effective July 1, 1977.

Relevant to this opinion are the provisions outlined in § 67-5309C(c), *Idaho Code*. Since this opinion turns completely on an interpretation of this section, we will quote in full the language to be considered:

> "It is hereby declared to be the intent of the legislature that the advancement of an employee to steps providing an increased salary within each pay grade shall be based solely on merit, including factors such as increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position. No employee shall advance to a higher step within a pay grade without an affirmative certification for each purpose by the employee's immediate supervisor, approved by the departmental director or the director's designee, in accordance with the following schedule and criteria:
>
> (i) step A in the salary schedule shall normally be the rate at which an employee is paid within a grade when originally employed. When necessary to obtain qualified personnel in a particular grade, however, upon petition of the appointing authority to the commission containing acceptable reasons therefore, a higher step or temporary pay grade may be authorized by the commission.
>
> (ii) Each employees work performance shall be evaluated six months after initial appointment for promotion and annually thereafter by his or her immediate supervisor. Employees shall advance to step B of the salary schedule upon completion of six

> months of satisfactory performance upon a certification of satisfactory performance by his or her immediate supervisor on an evaluation form approved by the commission for that purpose. Employees shall thereafter advance to steps C through E of the compensation schedule on an annual basis upon a certification of satisfactory performance by his or her immediate supervisor on an evaluation form approved by the commission for that purpose.
>
> (iii) Step F of the compensation schedule represents a very commendable level of performance and achievement. Step G of the compensation schedule is reserved for those employees whose service is exemplary and distinguished. Employees shall be eligible to receive steps F and G upon certification by the Department on an evaluation form developed for that purpose that performance meets the required criteria."

The overall question is whether the above-quoted statutory procedure preempts the procedure currently followed by the State of Idaho through rule and regulation of the Personnel Commission. A careful analysis requires a reply in the affirmative. Initially, § 67-5309C(c), *Idaho Code* expresses an intent to advance employees within grades primarily for meritorious service. However, the law is quite clear that "no employee shall advance to a higher step within a pay grade... [unless]... in accordance with the following schedule and criteria". Basically, the schedules and the criteria referred to depend upon three (3) possible certifications by the employee's supervisor. If the supervisor finds the employee performing in a *satisfactory* manner, he shall certify his promotion to the next step within the grade on an annual basis (except for the initial promotion from step A to B, which is six months). The second type of certification is a certification of *a very commendable level* of performance by the employee. If this is the case, the law specifies that that employee qualifies to be placed into step F. The third type of certification allows promotion into step G for employees whose service is *exemplary and distinguished.* Nothing in the law requires an employee to be in step E before he may qualify for promotions into step F or G. Therefore, it must be concluded that an employee may advance to steps F or G from anywhere in the grade schedule upon proper certification by the employer within the meaning of the Idaho law.

It may be argued with considerable justification that, given the legislative intent to promote on the basis of merit, an employee should qualify for early ingrade promotion without having to be placed in step F or G. Unfortunately, although this may be true, the law as presently drafted does not provide for such a procedure. It should be recalled again that the law is quite explicit that no employee shall advance to a higher step except in accordance with the schedules and criteria established in § 67-5309C(c), *Idaho Code.*

In summary, we believe that the newly created Idaho law governing salary schedules effectively abolishes the ability to control ingrade promotion by rule and regulation of the Personnel Commission if such rule or regulation is contrary to the procedure established in § 67-5309C(c), *Idaho Code.* The codified procedure allows a six (6) month promotion from step A to step B and

annually thereafter to step E if there is a certification of satisfactory performance. Steps F and G are reserved for oustanding employees. Step F requires a certification of very commendable performance step G requires a certification of exemplary and distinguished performance. Upon certification, an employee may move into steps F or G at any time regardless of where he is within his grade.

We recognize that a supervisor, while willing to promote an employee from grade B to grade C in less than one year based upon oustanding performance may be reluctant to move that employee all the way from step B to step F or G based upon his performance. The result could be a tendency to require all employees, whether outstanding or not, to proceed along the pay schedule until they reach step E. At this point, the oustanding ones would be considered for promotion into steps F or G. Thus, allowing an employer to move his outstanding employee expeditiously along the entire step spectrum would no doubt be desirable if, in fact, merit, not longevity, governs promotion of State employees. However, our contrary conclusion is bolstered by use of the following example.

Pursuant to § 67-5309C(c), *Idaho Code*, pomotion from step A through E depends upon a certification by the employer of *satisfactory* performance. Assume two employees, Paul and John, who are both in step B. Paul has been in that position for one year, and thus qualifies for a promotion into step C upon certification of satisfactory performance. Paul is an average employee and consequently is promoted to step C. John, however, is an outstanding employee, and his employer wishes to move him from step B to D. If the employer certifies him as a "satisfactory" employee, and moves him to step D, Paul may complain because, with a similar rating, he only advanced to step C. On the other hand, assume that John, based upon his outstanding performance, is certified as either very commendable or exemplary and distinguished and placed into step D. In this case, John may complain because these certifications qualify him under Idaho law for promotions into step F or G.

The simple answer to the questions presented is that promotions from step A through E are based primarily on longevity and satisfactory performance. The true "merit" promotions for highly commendable, exemplary and distinguished performance are reserved exclusively for steps F and G. For these reasons, we recommend that the current procedures in Idaho Personnel Commission Rules 7-10.1 and 7-4.8 no longer be followed. Of course, new rules may be implemented within the framework of § 67-5309C(c), *Idaho Code*.

AUTHORITIES CONSIDERED:

1. Section 67-5309C(c), *Idaho Code*.
2. Idaho Personnel Commission Rules 7-10.1 and 7-4.8.

DATED this 21st day of April, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

State of Idaho

ATTORNEY GENERAL OPINION NO. 77-28

TO: Will S. Defenbach
Commissioner
Industrial Commission
State of Idaho

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does the expiration of the Rehabilitation Division of the Industrial Commission pursuant to *Idaho Code*, § 72-501(a) impliedly repeal §§ 72-428(6); 72-433(3); 72-450; and 72-523(4), *Idaho Code*, as included in the State's workman's compensation law and dealing with rehabilitatin and retraining?

CONCLUSION:

Section 72-501(a) effectively terminates the Rehabilitation Division of the Industrial Commission and all administrative programs falling thereunder.

ANALYSIS:

The 1974 Idaho legislature enacted 72-501(a), *Idaho Code*, for the purpose of establishing, on an experimental basis, a Rehabilitation Division to adopt physical and vocational rehabilitation programs. Under Ch. 132, 1974 Idaho Session Laws, the legislature also enacted or amended §§ 72-428(6), 72-433(3), 72-450 and 72-523(4), *Idaho Code*. Each of these sections deals directly with vocational rehabilitation and must be administered by the Vocational Rehabilitation Division of the Industrial Commission.

Under the 1973 enactment of 72-501(a), the legislature required that the experimental period "commences on July 1, 1974, and continue for a period of two years at which time, unless the legislature should otherwise determine, it should continue as a permanent program and division of the Commission." This section was amended by the 1976 legislative session changing the experimental period from two to three years and requiring termination of the program unless the legislature should determine otherwise.

There can be no question but that 72-501(a) is inoperable after July 1, 1977.

The 1976 legislative session specifically required termination unless the 1977 session should determine otherwise. The 1977 legislature chose to remain silent and allow this statute to die. As of July 1, 1977, 72-501(a) is effectively repealed.

The question arises as to whether or not §§ 72-428(6), 72-433(3), 72-450 and 72-523(4) are accordingly repealed as a result of the language found in 72-501(a). The answer must be in the affirmative. Each of these sections was included in the vocational rehabilitation package passed by the 1974 legislative session. Each statute deal with vocational rehabilitation and a vocational rehabilitation program and each requires the administrative authority of the Industrial Commission.

With the repeal of 72-501(a), the Industrial Commission no longer has administrative authority to conduct vocational rehabilitation programs. It therefore follows that each of the sections cited is repealed.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 72-501(a)
2. Ch. 132 Idaho Session Laws
3. *Idaho Code*, §§ 72-428(6), 72-433(3), 72-450 and 72-523(4)

DATED this 22nd day of April 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-29

TO: The Honorable Pete T. Cenarrusa
Secretary of State
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Questions have arisen concerning the definition of candidate mentioned in

§ 67-6602(a), *Idaho Code*. Would expenditures of a candidate using his personal funds to travel to various areas of the state to inquire about support for a proposed candidacy be within the purview of § 67-6602(a) (1), *Idaho Code*?.

2. Would the reservation (either by cash deposit or oral agreement) of bill board space for a possible candidate bill board at a future date be within the purview of § 67-6602(a) (1), *Idaho Code*? Does the ability to cancel such reservation affect the legal status of such an act?

3. Is an organization a "political committee", as redefined by the 1977 legislature, if the organization gives in excess of $500 to a political committee which supports a candidate or measure?

4. When is a political committee "involved" in an election as stated in § 67-6607, *Idaho Code*?

5. Is compliance with § 67-6606(2), *Idaho Code*, by a nonbusiness entity sufficient if such an entity is also a political committee?

6. What restrictions if any should be placed upon a candidate's use of surplus campaign funds?

7. What requirements must be met by political treasurers who receive contributions from out of state political committees and out of state non-business entities to comply with §§ 67-6605 and 67-6606, *Idaho Code*.

CONCLUSION:

1. Those using personal funds to travel to various areas of the state to inquire about support for a proposed candidacy are not "candidates" if they limit their activities to seeking advice concerning their potential candidacy. However, one becomes a "Candidate" by either making broad based public contacts regarding his candidacy or by making any contacts aimed primarily at soliciting campaign staff, volunteers, or financing.

2. A potential candidate who reserves billboard space to be used for his candidate billboard at a future date is a "candidate" pursuant to § 67-6602(a) (1), *Idaho Code*. Consequently, the potential candidate should certify a political treasurer prior to reserving such billboard space.

3. An organization is a "political committee" as redefined by the 1977 legislature if the organization gives in excess of $500 to a political committee which in turn uses the gift in support of a candidate or measure.

4. A political committee is "involved" in an election within the meaning of § 67-6607, *Idaho Code*, when contributions are received or expenditures or encumbrances are made for or on behalf of a candidate or measure.

5. A political committee's compliance with the disclosure requirement of § 67-6606(2), *Idaho Code*, does not excuse the political committee from complying with other reporting requirements of the act.

6. There are no Idaho statutes which govern the distribution of surplus campaign funds. However, any amount diverted from the campaign fund for the candidate's personal use will be considered taxable income of the candidate in the year in which the funds are diverted.

7. The names and addresses of all contributors of over $50 must be reported to the Secretary of State. In addition, if an out of state donor of more than $50 is a "political committee", the donor must accompany its donation with a list of its own contributors of over $50. If the donor is not a "political committee" but is a "non-business entity", it must accompany its donation with a list of its own contributors of over $500.

ANALYSIS:

"Candidate" is defined in § 67-6602(a), *Idaho Code*, as follows:

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

Therefore, the answers to questions 1 and 2 turn on a determination of whether the actions taken by the person are taken for the purpose of promoting his candidacy for office, or are taken for some other purpose.

A person who uses personal funds to travel about the state to inquire about support for a possible candidacy is not a "candidate" unless his purpose is to promote his candidacy. If his purpose is merely to assess his chance of success, he is not yet a candidate. However, once his purpose becomes the promotion of his candidacy rather than the assessment of his level of support, he has become a "candidate" as defined in § 67-6602(a) above.

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

A candidate who is assessing his strength could be expected to contact a select number of people of significant political experience and knowledge and solicit

advice from them. Also, a potential candidate might conduct a random survey of households to assess name familiarity and image of various possible candidates. These activities are aimed at assessing one's chances and would not be sufficient to make one a "candidate". On the other hand, a potential candidate who makes hundreds of contacts with persons of limited political experience is almost certainly promoting his candidacy rather than merely assessing his strength. Likewise, the person who sends bulk mailings to a high percentage of households is almost certainly a candidate, and is not merely assessing his strengh.

Summarizing, those who are interested in traveling to various areas of the state to inquire about support for a proposed candidacy may do so prior to certification of a political treasurer if they limit their activities to seeking advice concerning their potential candidacy. However, certification of a political treasurer must precede communications aimed primarily at soliciting campaign staff, volunteers, or financing. Likewise, certification of a political treasurer must precede extensive and broad based contacts concerning a potential candidacy.

II.

One who reserves billboard space to be used for his candidate billboard at a future date is a "candidate" pursuant to § 67-6602(a) (1), *Idaho Code*. That section defines "candidate" to include one who

> "Receives contributions or makes expenditures or reserves space or facilities with intent to promote his candidacy for office."

The statute speaks specifically of one who "reserves space or facilities." Therefore, one who reserves a billboard with intent to promote his candidacy is a "candidate." The ability to cancel such reservations would not affect whether or not the person is a "candidate." The act of reserving facilities is all the statute requires.

Section 67-6603(c), *Idaho Code*, provides in part that no expenditure may be made on behalf of a candidate " . . . until the candidate or political committee apponts a political treasurer and certifies the name and address of the political treasurer to the Secretary of State . . ." "Expenditure" is defined in § 67-6602(f), *Idaho Code*, to include, among other things, "a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure . . ." The reservation of billboard space would be such a promise or agreement. Therefore, a political treasurer should be certified to the Secretary of State prior to reserving billboard space for a candidate.

III.

The 1977 legislature amended the definition of "political committee" stated in § 67-6602(m), *Idaho Code*, to read as follows:

> "Political Committee" means (1) any person specifically designated to support or oppose any candidate or measure/ or

> (2) any person, including a political party as defined in §§ 34-109 and 34-501, *Idaho Code*, and its local committees, which receives contributions or makes expenditures in an amount exceeding five hundred dollars ($500) in any calendar year for the purpose of supporting or opposing one (1) or more candidates or measures."

Thus, whether or not a group is a "political committee" is not determined by whether the group gives money directly or indirectly for promotion of a candidate or a measure. Rather, the determination depends on whether the contribution or expenditure is given "for the purpose of supporting or opposing one (1) or more candidates or measures." Thus, it is the purpose of the contribution rather than to whom it is given that determines whether the donor is a "political committee."

If the donor can reasonably expect that his contribution to a political committee will be used for the purpose of supporting or opposing one (1) or more candidates or measures, then the donor is a "political committee" assuming the donation is of a sufficient dollar amount.

Many political committees engage in various activities in addition to supporting candidates and measures. If a donor to one of these committees desires to support activities other than those in support of candidates and measures, then the donor should so specify when making the donation. In this manner the donor may avoid being classified as a "political committee."

IV.

Section 67-6607, *Idaho Code*, as amended by the 1977 legislature provides in part:

> 67-6607. REPORTS OF CONTRIBUTIONS AND EXPENDITURES. (a) The political treasurer for each candidate and the political treasurer of each political committee shall file with the Secretary of State:
>
> (1) not more than fourteen (14) days and not less than seven (7) days before the date of a primary *election in which the candidate or political committee is involved*, a statement of all contributions received and all expenditures or encumbrances made by or on behalf of the candidate or political committee prior to the fifteenth day before the primary election; . . . (emphasis added)

That section goes on to require several other reports by poltical committees which are "involved" in a primary or general election. The term "involved" is not defined in the act and therefore its meaning must be determined in the context of the section and of the act as a whole.

The section requires a political committee to file as to any election in which it is "involved", a statement of all contributions received and all expenditures or encumbrances made . . . " on behalf of the political committee. Thus, "involved"

is used in the context of the "contributions received and the expenditures or encumbrances made" in that election.

Thus, from the context of the section, it appears that a political committee is "involved" in an election when contributions are received or expenditures are made for or on behalf of a candidate or measure. This interpretation is also consistent with other provisions of the act. For example, "Political Committee" is defined in § 67-6602(m), *Idaho Code*, to include one who:

> " . . . receives contributions or makes expenditures in an amount exceeding five hundred dollars ($500) in any calendar year for the purpose of supporting or opposing one (1) or more candidates or measures."

Thus, it is the receipt of contributions or the making of expenditures for a candidate or measure which is the relevant consideration in the definition of "political committee," and it is through these activities that a political committee should be considered to have become "involved."

This interpretation of the term "involved" is also consistent with the purposes of the act enumerated in § 67-6601, *Idaho Code*, — namely, " . . . avoiding secrecy by those giving financial support to state election campaigns. . . . "

V.

Section 67-6606, *Idaho Code*, provides:

> Contributions by nonbusiness entities which are not political committees — (a) A political treasurer shall not accept a contribution of more than fifty dollars ($50.00) from a nonbusiness entity unless such contribution is accompanied by, either:
>
> (1) a letter signed by the political treasurer of such nonbusiness entity at the time of such contribution that such nonbusiness entity is a political committee under this act and will comply with the requirements of this act with respect to political committees, or
>
> (2) a statement signed by an officer of such nonbusiness entity listing the names and addresses of each person who contributed (including membership fees) more than five hundred dollars ($500) to such nonbusiness entity during the calendar year immediately preceding the date of such statement.

Thus, the requirements of the section depend on whether or not the donor is a political committee. Subsection (2) above, is intended to require certain disclosures by those nonbusiness entities which are not political committees. Subsection (1) is intended for political committees.

Although not required to do so, a political committee could provide a statement listing its contributors pursuant to subsection (2) above. However, providing such a list would not exempt the political committee from complying

with other provisions of the act. There is simply nothing in the language of § 67-6606, *Idaho Code*, which indicates that compliance with that section excuses a political committee from complying with other requirements of the Sunshine Law.

VI.

Occasionally, a candidate completes his campaign with surplus campaign funds. There are currently no statutes in Idaho which govern the distribution of such surplus funds.

It should be noted, however, that any amount diverted from the campaign fund for any personal purpose rather than for a campaign or similar purpose is income taxable to the candidate for the year in which the funds are diverted. See: *William O'Dwyer et ux. v. Commissioner*, 266 F.2d 575 (4th Cir. 1959) *cert. den.*, 361 U.S. 862 (1959); *United States v. Leslie E. Jett*, 352 F.2d 179 (6th Cir. 1965), *cert. den.* 383 U.S. 935 (1966).

The surplus funds will not be considered as income to the candidate if they are used to pay any campaign expense or to reimburse the candidate for any out-of-pocket campaign expense. Also, the funds will not be considered as income to the candidate if the funds are returned to donors or are given to a national, state, or local committee of a political party.

VII.

The requirements which must be met by political treasurers who receive out of state contributions depend upon whether the contributor is a political committee and whether the contributor is a nonbusiness entity.

Out of state political committees are not required to file reports with the Secretary of State. However, the donor and amount of any contribution of over $50 must be reported to the Secretary of State by the political treasurer who receives it, pursuant to § 67-6612, *Idaho Code*.

Section 67-6605(a), *Idaho Code*, imposes additional requirements. Subsection (a) provides:

> 67-6605. Contributions by nonreporting committees. — (a) A political treasurer shall not accept a contribution of more than fifty dollars ($50.00) from a political committee not domiciled in the State of Idaho and not otherwise required to report under this act (a "non-reporting committee"), unless the contribution is accompanied by a written statement setting forth the full name and complete address of each person who contributed more than fifty dollars ($50.00) to the non-reporting committee and certified as true and correct by an officer of the non-reporting committee.

Therefore, prior to accepting a contribution of over $50 from an out of state donor, the political treasurer must determine if the out of state donor is a "political committee" which is defined in § 67-6602(m) as follows:

> "Political committee" means (1) any person specifically designated to support or oppose any candidate or measure; or (2) any person, including a political part as defined in sections 34-109 and 34-501, *Idaho Code*, and its local committees, which receives contributions or makes expenditures in an amount exceeding five hundred dollars ($500) in any calendar yar for the purpose of supporting or opposing one (1) or more candidates or measures.

Thus, for example, the donor is an out of state "political committee" if the donor has given or intends to give over $500 for Idaho candidates and Idaho measures during the year. As a "political committee," it would be required to accompany its donation with a list of its contributors of over $50. If such a list does not accompany its donation, the Idaho political treasurer is required to return the contribution purusant to § 67-6605(b), *Idaho Code*.

If it is determined that the donor is not a "political committee," the political treasurer should next determine if the donor is a "nonbusiness entity."

Section 67-6606, *Idaho Code*, provides in pertinent part:

> 67-6606. Contributions by nonbusiness entities which are not political committees. — (a) A political treasurer shall not accept a contribution of more than fifty dollars ($50.00) from a nonbusiness entity unless such contribution is accompanied by,
>
> ***
>
> (2) a statement signed by an officer of such nonbusiness entity listing the names and addresses of each person who contributed (including membership fees) more than five hundred dollars ($500) to such nonbusiness entity during the calendar year immediately preceding the date of such statement.

Therefore, if the donor is not a "political committee" but is a "nonbusiness entity," then its donation of over $50 must be accompanied by a list of its contributors of over $500. "Nonbusiness entity" is defined in § 67-6603(k) as follows:

"Nonbusiness Entity" means any group (of two (2) or more individuals), corporations, association, firm, partnership, committee, club or other organization except any such group, corporation, association, firm, partnership, committee, club or other organization which:

(1) has as its principal purpose the conduct of business activities for profit; and

(2) did not during the immediatly preceding calendar year receive contributions, gifts or membership fees, which in the aggregate exceeded ten percent (10%) of its total receipts for such year.

Summarizing, if the out of state donor of over $50 is a political committee, the donation must be accompanied with a list of its contributors of over $50. If the

out of state donor is not a political committee, but is a nonbusiness entity, its donation of over $50 must be accompanied by a list of its contributors of over $500. If the donor is neither a political committee nor a nonbusiness entity, the donation may be accepted without such accompanying information. However, the names and addresses of all donors of over $50 must be included on the treasurer's reports to the Secretary of State.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§ 67-6601, 67-6602, 67-6603, 67-6605. 67-6606. 67-6607. 67-6612

2. *William O'Dwyer et ux. v. Commissioner*, 266 F.2d 575 (4th Cir. 1959, *cert. den.* 361 U.S. 862 (1959)

3. *United States v. Leslie E. Jett*, 352 F.2d 179 (6th Cir. 1965), *cert. den.* 383 U.S. 935 (1966)

DATED this 27th day of April, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-30

TO: Honorable Gary Ingram
State Representative
3530 Highland Drive
Coeur d'Alene, Idaho 83814

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Do the provisions of the Idaho open meeting law contained in § 67-2340 through § 67-2346, *Idaho Code*, apply to a public agency as defined in § 67-2341(3) (a) when that agency has been created by the Constitution?

CONCLUSION:

The provisions of the Idaho open meeting law apply to State public agencies as defined in § 67-2341(3) (a) which are created by the State Constitution.

ANALYSIS:

The provisions of the Idaho open meeting law apply to any "public agency" in the State of Idaho. "Public agency" is defined as follows in § 67-2341(3) (a), *Idaho Code*:

> (3) "Public agency" means:
>
> (a) any state board, commission, department, authority, educational institution *or other State agency which is created by or pursuant to statute,* other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission; [emphasis supplied]
>
> * * *

The emphasized portion of the statute creates some confusion, since that clause could be construed to mean that any State entity which was created by the State Constitution rather than by statute is not a "public agency."

While such a reading is possible, it is our opinion that the open meeting law does apply to constitutionally created agencies, unless specifically exempted from the act. This conclusion results from an analysis of the definition of "public agency" itself, from the overall policy of the open meeting law, from general rules of statutory construction, and from judicial precedent.

Looking first to the definition of "public agency," an initial question arises as to what the clause "which is created by or pursuant to statute" modifies. Does the clause modify "state board, commission, department," etc. or does the clause modify only the phrase "or other state agency?"

In our view the clause "which is created by or pursuant to statute" modifies the phrase "or other state agency." Read this way, the clause makes it clear that the governing bodies of other subdivisions of the state, such as divisions, bureaus, etc. come within the definition of "public agency" if the division, bureau, etc. is created by or pursuant to statute. This reading is consistent with the purpose of the act — namely, that "the formation of public policy is public business and shall not be conducted in secret." *Idaho Code*,§ 67-2340. The Idaho Supreme Court has held that in construing a statute a court should consider the object and purpose of the same. *State v. Bowman*, 40 Idaho 470, 235 Pac. 577 (1925); *Dunn v. Boise City*, 45 Idaho 362, 262 Pac. 507 (1927); *Hamilton v. Swendsen*, 46 Idaho 175, 267 Pac. 229 (1928).

If the clause, "which is created by or pursuant to statute," modifies "state board, commission, department," etc., then all constitutionally created State

agencies would be exempt from the act unless specifically stated otherwise. However, such a reading of the definition of "public agency" would be contrary to the aforesaid purpose of the act. Also, such a reading would make the definition internally inconsistent. As stated previously, "public agency" includes:

> (a) any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, *other than courts and their agencies and divisions,* and the judicial council, and the district magistrates commission; [emphasis supplied] *Idaho Code,* 2341(3) (a)

* * *

Article 5 of the Idaho Constitution, creates the Idaho court system. Therefore, if the clause "or other state agency which is created by or pursuant to statute," was intended to exempt agencies of the State created by the State Constitution, then the definition's reference to the "courts and their agencies and divisions" serves no purpose in the definition.

It must be presumed that the definition's reference to the "courts and their agencies and divisions" was intended to clarify the definition and was not without purpose. When construing a statute, all parts of the statute must be given effect if possible. *State v. Alkire,* 79 Idaho 334, 338, 317 P.2d 341 (1957).

Thus, the internal structure of the definition of "public agency" likewise indicates that constitutionally created entities of the State are included in the definition, and consequently subject to the open meeting law.

While there appears to be little judicial precedent interpreting open meeting laws, courts have generally interpreted open meeting laws broadly to further their purposes. For example, in the case of *Cathcart v. Andersen,* 85 Wash.2d 102, 520 P.2d 313 (1975), the Supreme Court of Washington broadly interpreted the definition of "public agency" contained in Washington's open meeting law. RCW, 42.30.020(1) (a). The Washington act is substantially the same as the Idaho act. The Washington act defined "public agency" to include:

> (a) Any state board, commission, committee, department, educational institution or other state agency which is created by or pursuant to statute, other than courts and the legislature.

* * *

The particular issue involved in that case was whether the open meeting law was applicable to faculty meetings of the University of Washington. Relying heavily on the purpose of the act, the Washington court held that the open meeting law applied and that the faculty meetings must be open to the public.

Various other cases have adopted liberal interpretations of open meeting law provisions in order to further the purposes of the acts. Notable are the cases of

Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968) and *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla. 1969). In these cases it was held that the open meeting statutes were enacted for the public benefit and should be liberally interpreted favorable to the public, despite the fact that the statutes contained penal provisions. In contrast, Idaho's open meeting law contains no penal provisions. Consequently, it is highly probable that the Idaho Supreme Court would liberally interpret the provisions of the Idaho open meeting law in order to further the purposes of the act.

In our opinion Idaho's open meeting law applies to state governmental entities created by the Idaho Constitution.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 67-2340 through § 67-2346
2. *State v. Bowman*, 40 Idaho 470, 235 Pac. 577 (1925)
3. *Dunn v. Boise City*, 45 Idaho 362, 262 Pac. 507 (1927)
4. *Hamilton v. Swendsen*, 46 Idaho 175, 267 Pac. 229 (1928)
5. Article 5, Idaho Constitution
6. *State v. Alkire*, 79 Idaho 334, 338, 317 P.2d 341 (1957)
7. *Cathcart v. Andersen*, 85 Wash.2d 102, 530 P.2d 313 (1975)
8. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968)
9. *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla. 1969)

DATED this 27th day of April, 1977/

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-31

TO: E. Dean Tisdale, P.E.
State Highway Administrator
Idaho Transportation Department

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Could a specification on value engineering be included in the Idaho Standard Specifications for highway construction?

CONCLUSION:

There is no legal obstacle toward including a value engineering specification in the Standard Specification for highway construction.

ANALYSIS:

The term "value engineering" is applied to a specification which permits the contractor to propose change, which would save money in the construction of a project, and permits a part of the savings made to accrue to the contractor himself as a reward for diligence in ways of seeking to reduce the cost of the project.

The federal government and many states have used such a specification for a number of years. The theory is that contractors frequently have more practical knowledge and more practical skill in the field of construction than do engineers who, for the most part, work in an office.

As one writer put it:

> "Under the *changes* clause a contractor has no incentive to submit a change proposal suggesting a method of reducing the cost of performance. If such a change were ordered, the price would be reduced by the full costs saved, plus the contractor's profit on such cost. As a result, the contractor would be penalized by a reduction in profit for suggesting a method of saving money for a procuring agency.
>
> To overcome this result, a number of government agencies have developed value engineering clauses. These clauses are special purpose changes clauses applicable only to contractor initiated cost reduction proposals to change the specifications, drawings or other requirements of the contract. The most complete coverage of this subject is found in Sec. 1, Pt. 17 of the Armed Services Procurement Regulation, and most of the discussion in this chapter will deal with clauses and procedures contained in this regulation." Nash, *Govt. Contract Changes* at 133.

The author goes on to say at page 147:

> "One of the most difficult aspects of value engineering has been the formulation of incentive provisions that assure contractors that they will benefit financially if they submit value engineering proposals. The difficulty lies in the fact that it takes time for the procuring agencies to process proposals (an average of over 90 days in the Department of Defense activities), and this often precludes the achievement of savings on the contract on which the proposal was submitted. To counteract this difficulty, the regulations now call for a full range of contractor sharing on a variety of types of savings that flow from a value engineering proposal. While this results in a rather complex set of contract provisions, it should provide sufficient motivation to induce contractors to undertake value engineering work on a great number of contracts. Various types of savings are discussed in the following material."

These savings include instant contract savings, future contract savings, collateral savings and concurrent contract savings. It is not likely that the Division of Highways would be interested in so elaborate a proposal, but merely wishes to give the contractor an opportunity to initiate a proposal which would save money to the state, while allowing reduction of the price of the contract for his profit.

Of course, it will be noted that there is a provision in the specifications to the effect that the proposal must be approved by the department before it can proceed.

While there is quite a body of law considering value engineering in the Court of Claims cases and the Board of Contracts Appeals cases, there is unfortunately very little law regarding the validity of the provision itself. The cases we have found deal with the enforcement of the clause rather than the validity, validity apparently never having been challenged.

State law, both cases and statute, is silent upon the matter. Section 40-2205 requires that whenever work on the state highway system is let by a contract, sealed bids must be called for by public advertisement. It may, perhaps, be argued from this requirement that where the contract has been changed at the request of the contractor and the price changed that the contract was performed by someone who has not actually bid on the contract as performed. Yet, changes are made in virtually every contract, usually upon the order of the state, and these changes usually entail price adjustment either upward or downward, so price contingency is something that is always present. The only difference here is that these changes would be initiated by the contractor and what is perhaps more important, the contractor would receive a benefit from the change. It would seem that if a change can be made and price adjustment made, either upward or downward, at the instigation of the state, that the same change could be made at the initiation of the contrator, but with two differences: (1) that these changes under this clause would always save the state money; and, (2) some sort of reward would go to the contractor who initiated the change. It is clearly desirable to reduce costs. No one would argue that. But, without some form of material reward to the contractor, there would be no incentive. The state would

save less money because of this reward, but would save money nevertheless. It would appear that a saving made at some cost to the state would be better than no saving at all. It is, therefore, my conclusion that since there is no legal restriction against the inclusion of such a provision in the Standard Specifications, the provision set forth in the letter of request may be added to the Idaho Standard Specifications for highway construction.

DATED this 4th day of April, 1977

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ANTON HOHLER
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-32

TO: Michael C. Moore
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128 Main Street
Lewiston, Idaho 83501

Ruth R. Modie
Lewiston City Library Trustee
P.O. Box 676
Lewiston, Idaho 83501

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does *Idaho Code* § 50-341, which requires competitive bidding for all city expenditures exceeding $5,000, apply to expenditures by a city board of library trustees established pursuant to *Idaho Code* § 33-2603?

CONCLUSION:

Idaho Code § 50-341 does apply to expenditures exceeding $5,000 by a city board of library trustees, and thus, a city board of library trustees is not exempt from the competitive bidding requirements of *Idaho Code* § 50-341.

ANALYSIS:

Looking at the applicable statutes, *Idaho Code* § 33-2602 grants to city councils the power to establish a public library, and for such purpose, a city council may annually levy a tax, not exceeding 5 mills on the dollar, on taxable property to constitute a library fund "which shall be kept by the treasurer separate and apart from other moneys of the city or village, and be used exclusively for the purchase of books, periodicals, necessary furniture and fixtures." *Idaho Code* § 33-2603 then provides that a board of five library trustees may be appointed by the city council to govern the library. Once a library board is appointed, the trustees have the following powers.

> Said trustees shall, immediately after their appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading room as may be expedient. *They shall have the exclusive control of the expenditure of all moneys collected for the library fund,* and the supervision, care, and custody of the room or buildings constructed, leased or set apart for that purpose; and such money shall be drawn from the treasury by the proper officers, upon properly authenticated vouchers of the board of trustees, without otherwise being audited. They may, with the approval of the common council, lease and occupy, or purchase or erect on purchased ground, an appropriate building: provided, that no more than one-half (½) of the income in any one (1) year can be set apart in said year for such purchase of building. They may appoint a librarian and assistants, and prescribe rules for their conduct. *Idaho Code* § 33-2604. (Emphasis added.)

Based upon *Idaho Code* § 33-2604, a board of library trustees is somewhat independent of the city council, and in particular, the trustees are given exclusive control of the expenditures from the library fund.

Looking next at the chapter on Municipal Corporations, *Idaho Code* § 5-341 provides that "all cities" must use competitive bidding procedures for city expenditures, if the contemplated expenditure exceeds $5,000. The work "expenditure" is defined to 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:* . . . (Emphasis added.)

The question which arises is whether a city board of library trustees is exempt from the competitive bidding requirements, since the board of trustees is given "exclusive control of the expenditures of all moneys collected for the library fund." It is the opinion of the Attorney General that based upon the public policy

considerations supporting competitive bidding requirements, a city board of library trustees is not exempt from the competitive bidding requirements of *Idaho Code* § 50-341 when they make expenditures in excess of $5,000. While no cases have been found dealing with this specific problem, the opinion of the Attorney General is based upon the following reasons.

First, it is necessary to examine the legislative purpose behind requiring competitive bids. Although no declaration of legislative intent was codified along with *Idaho Code* § 50-341, in the statutes requiring competitive bidding by the State of Idaho, *Idaho Code* § 67-5715 provides:

> The Idaho legislature, recognizing that an offered low price is not always indicative of the greatest value, declares it to be the policy of the state to expect open competitive bids in acquisitions of property, and to maximize competition, and maximize the value received by the government of the state with attendant benefits to the citizens.

This declaration of the legislative intent is consistent with the general policy considerations underlying competitive bidding requirements.

> The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal 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, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, 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 Corporation* § 29.29, at 321-323 (1966).

Second, as previously noted, city public libraries may be funded by city taxes, pursuant to *Idaho Code* § 33-2602, and even though the resultant library fund must be kept separate and apart from all other city moneys, and be used exclusively for the purchase of books, periodicals, necessary furniture and fixtures, the fact remains that the library fund is still taxpayers' money. Since the public policy behind requiring competitive bidding is to insure that taxpayers are afforded the best bargain from their taxes, it is consistent to require that expenditures from the library fund be made by competitive bid. This conclusion is further supported by *Idaho Code* § 50-341(B) which defines "expenditure" to include "every manner and means whereby the city disburses funds or obligates itself to disburse funds."

Third, even though a board of library trustees is somewhat autonomous, pursuant to *Idaho Code* § 33-2604, a board of library trustees is created and appointed by the city council, *Idaho Code* § 33-2602, and as a result, a city board of library trustees remains an agency of the city.

> However, corporate agencies created by a municipality pursuant to an enabling statute are usually considered to be independent public corporations. Bodies, boards, trustees and the like, exercising the functions of a public corporation, have been held to be corporations although not specifically so named in the statute creating them. *At any event, even if deemed to be a separate corporation, such a board or department, is not, strictly speaking, a separate municipal corporation, and, if a corporation of any kind, is at the most a quasi-municipal corporation,* although by statute or otherwise in a few states the corporation is defined or considered as a municipal corporation. 1 McQuillin *Municipal Corporations* § 2.30, at 176-177 (1971). (Emphasis added.)

Thus, it is the opinion of the Attorney General that a board of library trustees, although given the power to act independently with respect to expenditures from the library fund, still remains a municipal corporation and an agency of the city, subject to the competitive bidding requirements of the cities. This determination does not undermine the trustees' right to "the exclusive control of the expenditures of all moneys collected for the library fund," since a city board of library trustees still has the power, independently of the city council, to determine what expenditures should be made and what books should be purchased.

Fourth, prior to the enactment of competitive bidding statutes, it was not required that municipal contracts, or other public contracts, be let upon competitive bidding. 10 McQuillin *Municipal Corporations* § 29.31 (1966); C.J.S. *Public Contracts* § 8 (1975). In construing statutes which modify the common law, *Idaho Code* § 73-102 provides:

> The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they related, and their provisions and all proceedings under tham *are to be liberally construed, with a view to effect their objects and to promote justice.* (Emphasis added.)

Fifth, this interpretation of the Attorney General also comports with other general rules of statutory construction. In construing any statute, the intent of the legislature is controlling and this intent "may be implied from the language used, or inferred on grounds of policy or reasonableness." *Summers v. Dooley,* 94 Idaho 87, 89, 481 P.2d 318 (1971); *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P.2d 766 (1969). Further, the Idaho Supreme Court has stated:

> As a fundamental rule of statutory construction, 'Statutes *in pari materia* [pertaining to the same subject], although in apparent conflict, are so far as reasonably possible contrued to be in harmony with each other.' Citing 2 Sutherland, *Statutory Construction* § 5201, at 531-532 (3d ed. 1943). *Christensen v. West,* 92 Idaho 87, 88, 437 P.2d 359 (1968).

The rule that apparently conflicting statutes pertaining to the same subject are, so far as reasonably possible, to be construed in harmony with each other applies to statutes enacted at different times and to amendments, as well as to contemporaneously enacted statutes. *Christensen v. West, supra.* both *Idaho Code* §§ 50-341 and 33-2603 deal with expenditures of city moneys. Thus, the legislative policy and intent supporting statutes requiring competitive bidding is controlling, and, as is possible in this situation, the statutes must be construed in harmony with each other.

Based upon the foregoing, it is the opinion of the Attorney General that the competitive bidding requirements of *Idaho Code* § 50-341 apply to a board of library trustees. Consequently, if a contemplated expenditure exceeds $5,000, the expenditure must be contracted for and let to the lowest responsible bidder, pursuant to *Idaho Code* § 50-341(C).

It might be noted that, while expenditures by a city board of library trustees which exceed $5,000 must be made by competitive bid, the purchase of books by a library creates a somewhat unique situation. That is, if the board of library trustees chooses to purchase specific, identifiable books, each book may, in essence, constitute an individual expenditure. The competitive bidding statute does not treat expenditures in the aggregate, but rather refers to individual, separate expenditures which exceed $5,000. Thus, if purchases are made by the names of individual books, it is probable that such purchases need not be made by competitive bid. In contrast, if bulk purchases are made, even though individual books are purchased, from one or two suppliers, and if such purchases exceed $5,000 with respect to any suppliers, the book purchases should be made by competitive bid. As a possible guideline, if the book purchases are susceptible of being purchased in bulk through one or two suppliers, the competitive bidding procedure should be used.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 33-2602, 33-2603, 33-2604, 50-341, 67-5715, and 73,102.
2. 10 McQuillin *Municipal Corporations* §§ 29.29 and 29.31 (1966).
3. 1 McQuillin *Municipal Corporations* § 2.30 (1971).
4. 72 C.J.S. *Public Contracts* § 8 (1975).
5. *Summers v. Dooley,* 94 Idaho 87, 481 P.2d 318 (1971).
6. *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P.2d 766 (1969).
7. *Christensen v. West,* 92 Idaho 87, 437 P.2d 359 (1968).

DATED this 00 day of May, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-33

TO: State Board of Land Commissioners

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Whether the Land Board could be directed by the legislature to sell the Eagle Island property and dedicate up to $1,000,000 of the proceeds thereof to the improvement of the penitentiary site at its new location, specifically dormitories. This question impliedly asks whether the legislature has the authority to limit the options of the Land Board in the disposal of state property.

CONCLUSION:

The state legislature is empowered to limit the options of the Land Board in the disposal of state "acquired lands".

ANALYSIS:

I have been informed by Jim Mitchell, Chief, Bureau of Lands, that the Eagle Island property was acquired by the state in the 1930's for the purpose of farming. These are not endowment lands but rather so-called "acquired lands". The disposal of acquired lands is accomplished by compliance with *Idaho Code*, Section 58-332, which reads as follows:

> *Disposal of Surplus Real Property.* — Upon transfer to it of such surplus real property the State Board of Land Commissioners shall ascertain if such property is suitable for other state use, and if it determines that suitable use can be had, then control and custody thereof shall be relinquished by said Board to the agency by whom it shall determine the best use can be made. If no such use be determined, then the State Board of Land Commissioners shall either by public sale, after notice by publication for six (6) consecutive weeks in the newspaper published in the county in which the property is situate, and in a newspaper published at Boise, sell the same to the highest and best bidder on terms and conditions to be determined by the Board and specified in the notice of sale;

The question presented concerns the power of the legislature to direct a modification from the procedure set forth above. Article IX, Section 7, *Idaho Constitution,* declares that the "State Board of Land Commissioners, . . . shall have the direction, control and disposition of the public lands of the state, under such regulations as may be *prescribed by law.*" The phrase "prescribed by law", has been interpreted by the Idaho Supreme Court as meaning prescribed by the "Legislature". *Howard v. Cook,* 59 Idaho 391. Thus, the State Board of Land Commissioner's power over state lands is limited by the laws enacted by the state legislature. Another Idaho Supreme Court decision, *Balderston v. Brady,* 17 Idaho 567, interpreted Article IX, Sections 7 and 8, *Idaho Constitution* in a like manner. The court held that the State Board of Land Commissioner's power over state lands " . . . must be in accordance with the constitution and *statutes* of the state, and not otherwise." See also *Pike v. State Board of Land Commissioners,* 19 Idaho 268. It is clear that the Idaho Supreme Court has interpreted Article IX, Section 8, *Idaho Constitution* as requiring that the State Board of Land Commisssioners, in its control over state lands, must comply with legislative enactments. Since the legislature had the power to enact the procedures for disposal of surplus real property, it also had the power to limit further the powers of the State Board of Land Commissioners for the disposal of the Eagle Island property.

Senate Bill 1301 in effect directed the State Board of Land Commissioners to refain from offering the Eagle Island property to interested agencies within the state, and to proceed directly from declaration of the land as surplus property to sale thereof. The legislature then declared that up to $1,000,000 of the proceeds from the sale of this property should be used for a specific purpose. The cases cited above and the analysis herein support the conclusion that the legislature was authorized to limit the procedure of the State Board of Land Commissioners in this manner.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* Article IX, Sections 7 and 8.

2. Idaho cases: *Howard v. Cook,* 59 Idaho 391; *East Side Blaine County Livestock Association v. State Board of Land Commissioners,* 34 Idaho 807; *Balderston v. Brady,* 17 Idaho 567; *Pike v. State Board of Land Commissioners,* 19 Idaho 268.

DATED this 12th day of May, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-34

TO: E. Dean Tisdale, P.E.
State Highway Administrator
Idaho Transportation Department

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does Idaho law authorize signs advertising motor services on highway rights of way?

CONCLUSION:

The advertisement of motorist services on highway rights of way is specifically authorized by statute in Idaho.

ANALYSIS:

Section 40-2828 of the Idaho Code prohibits erection of advertising displays along the highway right of way with certain exceptions. One of these exceptions, as originally stated when the law was passed in 1968, read;

> "(5) Displays erected or maintained pursuant to regulation of the department *at information centers,* and designed to give information in the specific interest of the traveling public." (Emphasis supplied)

Information centers, as originally conceived, were to be large blocks of signs, fairly modest in size, which were to be available to advertisers who offered services to the traveling public. The concept never materialized and when the law was revised by the 1972 Legislature, the words "at information centers, and" were deleted. Since this section was originally designed to permit the advertisement of roadside services in a specific area, the subsection, as amended, can only mean that such advertising is still permissible but that the idea of information centers for their location has been abandoned.

Subsection (f) of Title 23, Sec. 131, USC, provides for the erection on the right of way of signs giving specific information in the interest of the traveling public. This section is as follows:

> "(f) The secretary shall, in consultation with the states, provide within the rights of way for areas at appropriate distances from Interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The secretary may also, in consultation with the states, provide within the rights of way of the Primary System for areas in which signs, displays and devices giving specific information in

> the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the secretary."

While subsection (5) of Section 40-2828 is much more brief, the general import appears to be the same as the section of the federal code, quoted above. It would appear to permit signs which conform to the federal code without further amendment. Before any action is taken, regulations should be adopted which conform to the criteria already set out in the Federal Aid Highway Program Manual, Vol. 6, Chapter 8, Section 3, subsection (8).

The letter of the State Highway Administrator requesting this opinion voices some reservations about the restrictions in Sections 40-308 and 18-7029 of the Idaho Code. Section 40-308 provides that "no commercial enterprise or actitivity for serving motor vehicle users . . . shall be conducted within or on any property designated as, or acquired for, or in connection with a prohibited access highway, as designated by the Idaho Transportation Board." It will be noted that this refers to a commercial enterprise or activity. This section was originally enacted to prevent the erection of gasoline service stations and the like directly on non-access highways. It does not and did not have in mind signs which direct motorists to these services off the highway.

Section 18-7029 prohibits the placing of election literature or other promotional or sales material upon public or private property without permission from the owners of such property. Here, where permission is written into law, the section does not apply.

It is, therefore, my conclusion that under Section 40-2828 (5), pursuant to regulations properly promulgated thereunder, it will be legal and proper to permit signs and displays giving specific information in the interest of the traveling public.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* § 18-7029.
2. *Idaho Code,* § 40-308
3. *Idaho Code,* § 40-2828(5)
4. *U.S. Code,* Title 23 § 131(f)
5. *Federal Aid Highway Program Manual,* Vol. 6, Ch. 8, Section 3(8)

DATED this 23rd day of May, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ANTON HOHLER
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-35

TO: L. T. Lund, Administrator
Commercial Vehicle Division
Department of Law Enforcement

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Are specially constructed vehicles which are over-legal in size and/or weight, which are temporarily transported on the highways, subject to licensing as a commercial vehicle or personal property tax?

The vehicles involved are (a) large mobile construction cranes, overweight, overwidth and overlength; (b) large rotary drilling crane, overweight; (c) Union Pacific mobile construction/wrecker crane, overweight; (d) log jammers/loaders, overweight, overwidth and overlength.

CONCLUSION:

There is no legal basis for licensing these vehicles and they should be permitted on the highways only on special permit; hence they are subject to personal property tax. The load would be subject to tax in any event.

ANALYSIS:

It appears that these vehicles are constructed around the crane, drill or jammer/loader and specially built to house and carry the equipment. They are frequently grossly overweight, sometimes approaching a 50,000 lb. axle weight and gross weight as much as 65,000 lbs. They are far above the weight of a vehicle, which can operate on the highways on its regular license, and must travel under special permit. They are, furthermore, primarily off-the-road vehicles and seldom travel the roads and highways of the state for as much as a thousand miles in a year. Their primary purpose, therefore, is not highway travel, but working at a job site off the highway. There is a provision in the statute regarding this type of vehicle:

> "49-101(i) The term 'specially constructed vehicle' shall mean any vehicle which shall not have been originally constructed under a distinctive name, make, model or type by a generally recognized manufacturer of vehicles."
>
> Section 49-130, Idaho Code, provides:
>
> "The director of the department of law enforcement is hereby authorized to adopt and enforce such rules as may be consistent with and necessary to determine the classification of and the basis on which operating fees shall be computed on specially constructed vehicles not otherwise provided for in this chapter, as nearly as possible to conform to the fees provided for herein on similar vehicles."

No rules have been adopted under this statute. There is, therefore, no basis for licensing the vehicles in question and indded they are not licensed as a rule. The only time licenses are issued is when the weights of the vehicles are misrepresented to the licensing authorities. For the most part they are allowed to travel on the highways under a special permit. This would seem to be the better method of handling the matter and in any event, since they are not really road vehicles and their weight is far in excess of that permitted for ordinary vehicles built for travel on the highway.

The question of whether or not these machines are subject to personal property tax is answered by § 63-101, I.C., which reads as follows:

> "All property within the jurisdiction of this state, not expressly exempted, is subject to assessment and taxation."

There is no provision exempting these machines, expressly or otherwise, and they are, therefore, subject to tax.

It is, of course, true that motor vehicles properly registered are exempt from property taxation under § 63-105P of the code. However, since these vehicles are not registered, they would not fall within the exemption. The question has arisen in a letter from State Representative Gary J. Ingram that if some of these machines have been licensed and subsequently the licensing is found to be ineffective, does the equipment in question become subject immediately to personal property tax or only upon expiration of the license? As explained above, these machines that have been licensed were so licensed only as a result of misrepresentation or, possibly, fraud and are, consequently, not *properly* licensed. Under such circumstances licensing is ineffective and the machines subject to personal property tax immediately.

I see no reason why these units should not be taxed as personal property by the assessor of the county in which they are situate. Those that move from county to county would, of course, be taxed on a pro rata basis under Chapter 14, Title 63, of the Idaho Code.

For the reasons stated, my conclusion is that there is no basis for licensing

these machines under existing law and that, therefore, they should not be licensed, but allowed to move on the highway by special permit. It is, furthermore, my conclusion that they may be taxed as personal property.

AUTHORITIES CONSIDERED:

1. § 49-101 (i), *Idaho Code.*
2. § 49-130, *Idaho Code.*
3. § 63-101, *Idaho Code.*
4. Chapter 14, Title 63, *Idaho Code.*

DATED this 27th day of May, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ANTON HOHLER
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-36

TO: Honorable Monroe C. Gollaher
Director of the Department of Insurance
State Office Building
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

(1) Has a motor vehicle dealer entered into a contract of "insurance", as defined in Title 41, *Idaho Code,* if in the ordinary and usual course of his business, he enters into a "service contract" in connection with a motor vehicle sale whereby the dealer, for an additional consideration, agrees to provide (1) repair or parts replacement due to specified mechanical breakdowns, (2) reimbursement for such repair or replacement, *or* (3) reimbursement for towing charges or car rental use due to such breakdowns?

(2) Is the "service contract" described above "insurance" under the provisions of Title 41, *Idaho Code,* if in addition to the above described contractual arrangement, the dealer also purchases a Blanket Contractual Liability Policy through an insurance company licensed to write casualty insurance in the State of Idaho, which contract will reimburse the dealer for his losses resulting from claims under the "service contracts" described above.?

CONCLUSIONS:

(1) A motor vehicle dealer may enter into a "service contract" with the purchaser of a motor vehicle, and the "service contract" will not be construed as a contract of insurance under Title 41, *Idaho Code,* provided that the "service contract" is in fact a "warranty" of the motor vehicle sold. To meet the test of being a warranty, the following criteria must be met:

> (a) The motor vehicle dealer must enter into the service contract contemporaneously with the contract of sale of the motor vehicle to the purchaser so that the "service agreement" or warranty is incidental to and collateral to the contract of sale of the motor vehicle.
>
> (b) The warranty must not promise indemnity broader in scope than against loss resulting from defects in the automobile sold. It may not insure against risk or loss outside of and unrelated to defects in the automobile itself, such as road hazards, accidents, theft, vandalism, etc.

(2) A motor vehicle dealer may insure the contractual risk contingency he incurs when he enters into a warranty agreement with the purchaser of a motor vehicle without affecting the nature of the warranty contract between the motor vehicle dealer and the purchaser.

ANALYSIS:

I.

The *Idaho Insurance Code* § 41-102 defines "insurance" as a "contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies", and an "insurer" is defined in *Idaho Code* § 41-103 to include "every person engaged as an indemnitor, surety, or contractor in the business of entering into contracts of insurance or annuity". *Idaho Code* § 41-305 generally prohibits any person from directly or indirectly transacting "insurance" except as authorized by a subsisting certificate of authority. Further, *Idaho Code,* Title 41, Chapter 5, defines specific classifications or "kinds" of insurance with the proviso that such definitions or classifications are not mutually exclusive, but that certain insurance coverages may fall within the definition of two or more kinds of insurance as defined in Title 41, Chapter 5, *Idaho Code.*

One of the definitions of a "kind of insurance" provided in *Idaho Code* § 41-506(1) (b) is "automobile guaranty" insurance which is defined as "Insurance of the mechanical condition or freedom from defective or worn parts or equipment, of motor vehicles". The question arises, "Can the definition of 'automobile

guaranty insurance' as defined in *Idaho Code* § 41-506(1) (b) be construed to be more expansive than the general definition of insurance provided in *Idaho Code* § 41-506?" The answer to that question must be clearly in the negative for the reason that the definition of the term "insurance" in *Idaho Code* § 41-102 establishes at the outset in the Idaho Insurance Code what the scope of that term is to be for regulatory purposes throughout the insurance code. The definitions of the "kinds of insurance" provided in Title 41, Chapter 5 of the *Idaho Code* provides the subclassifications or "kinds" of insurance to aid in distinguishing among the different kinds or classifications of insurance so that they can be categorized, and dealt with separately in other chapters of the insurance code. Therefore, if a contract does not fall within the scope of the term "insurance" as defined in *Idaho Code* § 41-102, it follows that the contract cannot fall within the scope of one of the "kinds of insurance" in Title 41, Chapter 5, *Idaho Code*. The definition of the term "insurance" in *Idaho Code* § 41-102 must control.

We observe that the provisions of *Idaho Code* §§ 41-102, and 41-506(1) (b) were both enacted in 1961 as part of an act for a comprehensive codification, consolidation and revision of the insurance laws of the State of Idaho, 1961 *Idaho Session Laws*, Chapter 330, pp. 647, 698, and therefore, must be construed together as being "in para materia". "Statutes should be so construed as to give effect to each and every part thereof, if it is possible to do so". *Ingard v. Barker*, 27 Idaho, 124, 138, 147 P. 293 (1915). to give effect to the *Idaho Code* § 41-102 definition of the term "insurance" as that term is employed in defining "automobile guaranty" insurance in *Idaho Code* § 410506(1) (b), it is necessary that "automobile guaranty" insurance be construed to be within the scope of the "insurance" as defined in § 41-102. "Automobile guaranty" insurance must be construed to be a subclassification of the term "insurance" if effect is to be given to both sections.

As the Idaho Supreme Court has stated:

> "This court has repeatedly recognized it to be a firmly established rule of statutory construction that legislative definitions of terms included within the statute control and dictate the meaning of those terms as used in the statute." (Citing cases.) *Roe v. Hopper*, 90 Idaho 22, 27, 408 P.2d 161 (1965)

II.

In construing whether the "service contract" described in your opinion request constitutes a contract of "insurance" as would be subject to regulation by the Idaho Insurance Department, we refer to 44 C.J.S. "INSURANCE", § 1(b) pp. 473-474 which distinguishes between a contract of "insurance" and a "warranty" as follows:

> "A warranty promises indemnity against *defects in the article sold*, while insurance indemnifies against loss or damage resulting from *perils outside of and unrelated* to defects in the article itself." (Emphasis added.) 44 C.J.S. "INSURANCE", § 1(b) pp. 473-474.

77 C.J.S. "SALES", § 302(b) pp. 1117, 1118 further describes a "warranty" as follows:

"Warranty is an incident to a contract of sale, and assumes or necessarily implies the existence thereof. A warranty is not an essential element of a sale, which can exist without it, *but there can be no warranty without a sale.*" (Emphasis added.) 77 C.J.S. "SALES", § 302(b) pp. 1117, 1118.

The Uniform Commercial Code in its chapter on "Sales" describes an express warranty in the following words:

"Express warranties by the seller are created as follows:

(a) any affirmation of fact or promise *made by the seller to the buyer* which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) . . .

(c) . . . " (Emphasis added.) *Idaho Code* § 28-2-313

In *Guaranteed Warranty Corp., Inc. v. State of Arizona, ex. rel. Humphrey*, 23 Ariz. App. 327, 533 P.2d 87 (1975), the Arizona Court of Appeals made an analysis that concluded that a warranty must be made by the *seller of goods,* and that a purported "warranty" issued by one other than the seller of goods is in reality a contract of insurance. The defendant in this case, Guaranteed Warranty Corp., Inc., was in the business of selling a "warranty" on television tubes. The defendant would replace a television tube that failed as a result of a manufacturing defect after the manufacturer's warranty had expired. The court found that a dealership was entered into between the defendant and individual television dealers, and that the defendant sold the "Guaranteed Warranty Contract" only through the individual television dealers in connection with a sale of a television set. Nevertheless, the court found that the actual Guaranteed Warranty Contract was between the defendant and the individual purchaser of the television set. Once the television dealer had sold the set and the Guaranteed Warranty Contract, the application for the Guaranteed Warranty Contract was delivered or mailed to the defendant with a check of the dealer less the dealer's commission, and thereafter, the contract was sent to the television set buyer by the defendant.

In its analysis of the case, the court in *Guaranteed Warranty Corp., Inc. v. State of Arizona, ex. rel. Humphrey* (supra) stated:

"Five elements are normally present in an insurance contract which include:

1. an insurable risk

2. a risk of loss

3. an assumption of the risk by the insurer

4. a general scheme to distribute the loss among the larger groups of persons bearing similar risks

5. The payment of a premium for the assumption of risk." (Citing authorities.) *Guaranteed Warranty Corp., Inc. v. State of Arizona, ex. rel. Humphrey* (supra) 553 P.2d 87,90

The court found that the defendant met all five elements of the insurance test on its "Guaranteed Warranty Contract" and then applied the following definition of warranty to distinguish between an insurance contract and warranty.

"A warranty is a statement or representation *made by the seller of goods* contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he represents them."

The court then concluded:

"We believe that under the facts of this case, a true warranty contract does not exist. Guaranteed Warranty is neither the manufacturer nor the seller of the television sets or picture tubes." *Guaranteed Warranty Corp., Inc., v. State ex. rel. Humphrey,* 23 Ariz. App. 327, 533 P.2d 87,90 (1975)

From the foregoing, we conclude that it is absolutely necessary that the "service contract", or "warranty" be between the seller or manufacturer and the purchaser of the automobile if it is to be construed a true "warranty" and not within the definition of "insurance".

III.

One of the leading cases distinguishing between a "warranty" and an "insurance" contract is *State ex. rel. Duffy v. Western Auto Supply,* 16 N.E. 2d 256 (Ohio 1938) in which Western Auto Supply Company "guaranteed" tires it sold "against blowouts, cuts, bruises, rim-cuts, under-inflation, wheels out of alignment, faulty brakes, or other road hazards that may render a tire unfit for further services, (except fire and theft)". The parties stipulated that "all pneumatic tires, regardless of the quality of material and workmanship, are subject to failure in varying degrees by cuts, bruises, blowouts, rim-cuts, under-inflation, wheels out of alignment, faulty brakes and collision, as well as other road hazards not herein specifically enumerated."

The court held in the *Duffy* case (supra) that the contract in question exceeded that of a warranty incident to a sale of goods, and in fact was a contract of insurance. The court's reasoning was based on the fact that the contract indemnified against loss resulting from causes other than defects in the goods sold. The court states:

"The respondent, in one of its forms of contract specifically guarantees

> 'against defects in material and workmanship without limit as to time, mileage or service', *but it goes further and undertakes to indemnify the owner of such tires against all road hazards* (except fire and theft) which may render his tire unfit for service. The terms employed in the guarantee are sufficiently broad to include not only damage from blowouts, cuts and bruises, whether resulting from underinflation, faulty brakes, or misalignment, but any and every hazard, including collisions, whether resulting from the negligence of the owner or another. It clearly embraces insurance upon the property of the owner, such as is authorized by the provisions of Section 9556, General Code, to be written by companies required to comply with the insurance laws of the state.
>
> The fact that such contract of indemnity is made only with the purchaser of the indemnitor's product does not relieve the transaction of its insurance character . . . If the contracts of indemnity involved here are not violative of the insurance laws, then every company may, in consideration of the purchase price paid therefor, furnish its product and also undertake to insure it against all hazards for a specified period." (Emphasis added.) *State ex. rel. Duffy v. Western Auto Supply Co.*, 16 N.E. 2d 256, 259 (Ohio 1938)

One would conclude from the foregoing that a seller who purports to warrant his product to cover or indemnify losses arising from other than defects intrinsic to the goods sold, such an indemnity for loss due to hazards not related to the quality or character of the goods sold has in fact sold an insurance contract rather than a warranty on the goods. Therefore, an automobile dealer may warrant the motor vehicle he sells against wear or breakage resulting from normal use of the behicle, but he may not warrant against wear or breakage resulting from exterior causes not related to the character or quality of the automobile.

As the Idaho Supreme Court stated in *Messerli v. Monarch Memorial Gardens, Inc.* (infra.):

> "That an incidental element of risk distribution or assumption may be present should not outweigh all other factors, If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particulary conditional sales and conditional service agreements. The fallacy is in looking only at the risk element to the exclusion of all others present or their subordination to it. *The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose."* (Emphasis added.) *Messerli v. Monarch Memorial Gardens, Inc.*, 88 Idaho 88, 103, 397 P.2d 34 (1964)

It seems clear that when a motor vehicle dealer sells an automobile to a

purchaser that it is the sale of the automobile rather than the warranty or "extended service agreement" that is the principal object of the contract. The extended service agreement would be a "promise" made by the seller to the buyer which relates to the goods (automobile) which becomes a part of the basis of the bargain. Such a warranty or "service agreement" is necessarily incidental and collateral to the sale of the motor vehicle. As such, it should be construed to be an "express warranty" within the meaning of *Idaho Code* § 28-2-313 rather than an insurance contract within the meaning of *Idaho Code* § 41-102.

IV.

In response to your second question, it appears that an automobile dealer who enters into an "extended service agreement" or warranty has a contractual risk contingency which may properly be the subject of miscellaneous "casualty insurance" as provided for in *Idaho Code* § 41-506(1) (q) unless otherwise contrary to law or to public policy. It appears clear that the eventuality that the motor vehicle dealer should insure his own risk of loss on the "extended service agreement" will not alter the contractual relationship between the automobile dealer and the purchaser of the motor vehicle. The "extended service agreement" is a contractual arrangement solely between the seller and the buyer, and is incidental and collateral to the sale, and would continue to constitute a "warranty" within the meaning of *Idaho Code* § 28-2-313.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 41-102, 41-103, 41-305, 41-506(1) (b), 41-506(1) (q), 28-2-313

2. 44 C.J.S. "INSURANCE" § 1(b) pp. 473-474; 77 C.J.S. "SALES" § 302(b) pp. 1117, 1118

3. *Ingard v. Barker*, 27 Idaho 124, 138, 147 P.293 (1915); *Roe v. Hopper*, 90 Idaho 22, 27, 408 P.2d 116 (1965); *Guaranteed Warranty Corp., Inc. v. State of Arizona, ex. rel. Humphrey*, 23 Ariz. App. 327, 533, P.2d 87 (1975); *State ex. rel. Duffy v. Western Auto Supply*, 16 N.E. 2d 256 (Ohio 1938); *Messerli v. Monarch Memorial Gardens, Inc.*, 88 Idaho 88, 103, 397 P.2d 34 (1964)

DATED this 10th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-37

TO: Max A. Boesinger, Administrator
Division of Public Works
Department of Administration
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Is the State of Idaho required to obtain building permits from cities or counties prior to commencing a construction project?

2. Is the State of Idaho required to obtain conditional use permits pursuant to local zoning laws from the city as each building is constructed?

3. Is the State of Idaho required to obtain approval of local planning and zoning commissions on building plans and specifications and approval of design and review committees for each State building?

CONCLUSIONS:

1. The State of Idaho is not required to obtain a building permit from a city or county prior to commencing a construction project absent specific legislation to the contrary.

2. In answer to questions two and three above, the State of Idaho is required to comply with all plans and ordinances adopted pursuant to the Local Planning Act of 1975 unless specifically exempted by law. No legislation has been found exempting the State of Idaho from the provisions of § 67-6528, *Idaho Code*. Therefore, the State of Idaho is required to obtain necessary conditional use permits and various approval from local planning and zoning commissions prior to construction of State building projects..

ANALYSIS:

The law is well settled that counties and municipalities in the State of Idaho draw their power and authority from the Idaho Constitution and Legislature. See Articles 12 and 18, *Idaho Constitution; Reynard v. City of Caldwell*, 53 Idaho 62 (1933); and *Strickfaden v. Greencreek Highway District*, 42 Idaho 738 (1926). Thus, within the parameters of constitutional limitations, the legislature may grant or take away powers from the various municipalities and counties within the State.

In Opinion of the Attorney General No. 75-77, it was concluded that the State of Idaho need not obtain a building permit from the various local governments prior to construction of State projects. Since that opinion, the law has not changed, and we believe that the rationale used therein still applies today. Additionally, in this regard, it is important to observe that the State of Idaho has

ample statutory authority relating to proper construction of State buildings. See generally § § 67-5705 to 67-5713, *Idaho Code.*

Under the existing framework, the Division of Public Works of the State Department of Administration constructs and remodels public buildings at the direction of the State legislature and only after design approval has been obtained from the Public Building Fund Advisory Council. In addition, all projects are under the supervision of either a licensed architect or a class A State certified building inspector or both. Obviously, design and safety of these buildings is provided for under existing State law.

Of course, adequate supervision of State building construction pursuant to State laws does not in and of itself strip local governments from similar jurisdiction. If the State legislature chose to do so, it could subject State office buildings to the requirements of local building authorities. However, this has not been done, and in fact, the Idaho Building Code Advisory Act, § 39-4101, *et seq.*, *Idaho Code* is authority to the contrary. Basically, the Advisory Act adopts various uniform building code requirements for the State of Idaho. The adopted codes apply equally to State, county and municipal governments. The Advisory Act provides that:

> "It shall be unlawful for any person, firm, co-partnership, association or corporation to do, or cause or permit to be done, after the adoption of this act, whether acting as principal, agent or employee, any construction, improvement, extension or alteration of any building, residence or structure coming under the purview of this act, in the State of Idaho without first procuring a permit from the appropriate agency authorizing such work to be done." § 39-4111, *Idaho Code.*

It is instructive to note that the above quoted section does not include the State of Idaho as an entity for which a permit is required. In fact, the word "person" used in § 39-4111, *Idaho Code* is defined in the "definitions" section of the Building Code Advisory Act, but it does not include the State of Idaho. Therefore it is apparent from this Act that the legislature did not intend the State to be bound by county and municipal building permit requirements.

As discussed earlier in this Opinion, counties and municipalities normally obtain their power from the State constitution and legislature. Thus, the legislature does have the power to bind State government to local ordinances and requirements unless it would conflict with the State constitution. Unlike the requirement for a local building permit, the legislature has subjected State government to local planning and zoning authorities. The Local Planning Act of 1975 grants this authority. See § 67-6528, *Idaho Code*, providing that:

> "The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law."

We have been unable to find any legislation exempting the State of Idaho from this requirement. In fact, § 67-6528, *Idaho Code* is a very recent enactment by the Idaho Legislature.

Although the Local Planning Act of 1975 subjects State government to local planning and zoning ordinances and plans, this does not mean that every such ordinance or plan at this time applies to the State of Idaho. Section 67-6528, *Idaho Code* only applies to plans and ordinances *adopted under this chapter.* Thus, if the plan or ordinance was not adopted pursuant to the Local Planning Act of 1975, then we believe that the rationale used in Attorney General Opinion No. 75-77 is still applicable. However, if the plan or ordinance was passed pursuant to the Local Planning Act, then the State of Idaho and all its agencies are bound thereby.

In summary, the State need not comply with local building permit requirements because (1) construction of State public works projects is closely safeguarded under existing State law, (2) counties and municipalities are, in effect, creatures of State government as directed by the Idaho Legislature, and (3) the State Building Code Advisory Act exempts by implication the State of Idaho from such requirements. However, the State and all its agencies are bound by plans and ordinances established pursuant to the Local Planning Act of 1975.

AUTHORITIES CONSIDERED:

1. Article 12, *Idaho Constitution.*
2. Article 18, *Idaho Constitution.*
3. §§ 67-5705 to 67-5713, *Idaho Code.*
4. § 39-4111, *Idaho Code.*
5. § 67-6528, *Idaho Code.*
6. *Reynard v. City of Caldwell*, 53 Idaho 62 (1933).
7. *Strickfaden v. Greencreek Highway District*, 42 Idaho 738 (1926).

DATED this 10th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General of Idaho

ATTORNEY GENERAL OPINION NO. 77-38

TO: Nathan D. Hult
Chief Deputy Prosecuting Attorney
Kootenai County, Idaho
P.O. Box 1241
Coeur d'Alene, Idaho 83814

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Does either a county or a highway district have any duty to keep open and free from private encroachments an easement or right-of-way dedicated to public use in an accepted plat where neither the county nor highway district nor anyone else has improved the easement?

2. As a corollary to the above, can the county or a highway district keep such a right-of-way open without incurring an obligation to develop and maintain it?

CONCLUSIONS:

1. Although Idaho law imposes a duty upon the governmental subdivisions of the State to improve and maintain the highways, the question of whether to open or construct a particular road or highway is a matter to be decided by the concerned county or highway district in the proper exercise of its discretion.

2. Once public funds have been used to open and develop a road, the county or highway district is responsible for keeping the thoroughfare free of private encroachment.

ANALYSIS:

The Idaho Legislature has declared:

> "The improvement of highways and highway systems is hereby declared to be the established and permanent policy of the State of Idaho and the duty is hereby imposed upon the State, and all counties, cities and villages in the State, to improve and maintain the highways within their respective jurisdictions as hereinafter defined, within the limits of the funds available therefor." Section 40-106, *Idaho Code*.

The County Commissioners are also enjoined by the legislature to "cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided." Section 40-501(2), *Idaho Code*. Although it is incumbent on the County Commissioners to open and develop highways as a matter of policy, the implementation of the policy is a matter within their administrative discretion:

> "The questions of the advisability of opening a road which has

> been formally established or dedicated to the public and of when it shall be opened rests largely in the discretion of the proper highway authorities, and the courts will not interfere with such discretion except in the case of abuse of discretion. The extent to which a public way should be opened or kept open is governed by the necessities of travel in each particular case . . . " 39 AmJur 2d, *Highways, Streets,* and *Bridges,* § 69.

As seen by Section 40-106, *Idaho Code,* supra, the exercise of the discretion in Idaho is also governed by the availability of funds.

Where, in the proper exercise of its discretion an agency refuses to open or construct a road or highway, even though the road or highway has been dedicated, the remedy of mandamus will not lie to compel them to do so. *People, ex rel Lyddy v. Rock Island,* (App. Ct. Ill., 1963) 194 N.E. 2d, 647. In *Lyddy* property owners had sued for mandamus to compel the city to take action which would result in the opening of a street bordering their property. The court held in denying the relief that, " . . . a municipality is permitted to wait its reasonable time for opening and improving its public streets, as its own resources and the public need may allow and require. Whether the interests of the public require that a street shall be improved or that repairs thereon are necessary is committed to the judgment and discretion of the governing board of the City." Supra at 652.

> "Although the power to maintain, repair or improve public streets and highways is in its nature legislative, yet it is conferred for the benefit of the public and whenever the necessity for its exercise is so apparent, obvious, and imperative that refusal to act is the result of a determination not to discharge a plain duty, rather than a mistake in judgment as to the existence of the necessity for acting, mandamus will lie." 52 AmJur 2d, *Mandamus,* § 223.

Under the prevailing view it appears that the counties or highway districts are not under an affirmative duty to open roads without a showing of the necessity therefor, and the funds being available. Obviously, the facts of each case must be examined to determine whether there has been an improper exercise of the discretion of the agency in refusing to perform the action.

Section 40-709, *Idaho Code* provides procedures for the removal of fences on land "given, purchased, or condemned by order of a court for road or highway purposes . . . " Sections 40-901 through 40-906, *Idaho Code* provide for the removal of encroachments on a "highway duly laid out or erected". Section 40-901, *Idaho Code.* The language regarding the authority of the road overseer of the district is precatory, indicating that he may exercise discretion in deciding whether to order the removal of an encroachment.

No matter how long the encroachment remains in the public right-of-way the public's title will not be forfeited. *Thiessen v. Lewiston* (1914) 26 Idaho 505. The county or highway district, therefore, has the authority to require removal of the encroachment, whether it exercises that authority is a matter left within its discretion.

Where the exercise of this discretion is sought through mandamus it has been held that:

> [t]he duty of public officers to cause unauthorized obstructions or encroachments upon a street or highway to be removed may generally be enforced by mandamus, provided that it is shown that the street or highway is being maintained, at least in part, with public funds. 52 AmJur 2d, *Mandamus*, § 225.
>
> The established rule is that any unauthorized and unnecessary or unreasonable use of a highway such as an obstruction or an encroachment which materially impedes or interferes with its use by the public for travel and transportation is a public nuisance... In any event, it is one of the fundamental principles of the Common Law that no private interference with or purpresture in or upon the public highway will be tolerated. 39 AmJur 2d, *Highways, Street*, and *Bridges*, § 274.

The test was enunciated in *Board of County Commissioners of the County of Freemont v. Wyoming* (1962) 369 P.2d 537, where the court stated at page 542 that,

> [t]he undisputed rule applicable in situations relating to the maintenance of public highways [is that] mandamus is recognized as a proper remedy to compel public officers to take care of and keep in repair public highways only when the exercise is so apparent and obvious that the refusal to act is the result of a determination not to discharge a plain duty. Thereunder, the obligation to work the road depends on the exercise of sound discretion by the board, considering the best interests of [the] county as a whole, taking into consideration the extent of the roads anticipated use, its importance in relation to other roads, the practicability of maintenance, and the availability of county finances for that purpose.

In the above case, the Plaintiffs were suing to force the Board of County Commissioners to take action to remove fences and obstructions from a County road that the commissioners argued had never been built or maintained by the county.

In summary, the local highway agency can be compelled to exercise its discretion to remove obstructions from a public road or highway if the best interests of the public will be served thereby, and there are funds available. The argument in favor of the mandamus writ becomes stronger when public funds have been used in the past to open, maintain or repair the roads. However, the court will not go so far as to compel the direction that the agency's discretionary act should take.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 40-106, 501, 709, 901-906.

2. 39 AmJur 2d, *Highways, Streets,* and *Bridges*, Sections 69 and 274.

3. 52 AmJur 2d, *Mandamus*, Sections 223 and 225.

4. Annotation, 46 A.L.R. 257 and 260.

5. *People ex rel Lyddy v. Rock Island*, (App. Ct. Ill., 1963) 194 N.E.2d 647.

6. *Thiessen v. Lewiston* (1914) 26 Idaho 505.

7. *Board of County Commissioners of the County of Fremont v. Wyoming* (1962) 369 P.2d 537.

DATED this 10th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. MacCONNELL
Deputy Attorney General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 77-39

TO: JERRY L. EVANS
Deputy State Superintendent
Department of Education
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"The last legislative session passed House Bill 194 pertaining to advance refunding of bonds. It makes possible a situation where school districts (and others) might resell their bonds and secure a more favorable interest rate; thus effecting considerable savings for those who must pay the proper y tax bill.

Since the legislative session, the question of whether or not this advance refunding requires another special election has arisen. We are not certain how to advise our school districts. Would you advise us on this matter and also outline any other requirements that may or may not make this provision operable. There are several school districts interested in refinancing their bond issues so the matter is of some urgency."

CONCLUSION:

Advance refunding bonds may be issued without calling a special election. This conclusion is based on the following assumptions as to the nature of the proposed refunding plan:

> (1) That the principal amount of refunding bonds will not exceed the principal amount of bonds to be refunded.
>
> (2) That the refunding bond proceeds will be placed in escrow or a trust fund for the purpose of paying off existing indebtedness, and will not finance any new project;
>
> (3) That the refunding bond proceeds will be invested only in federally guaranteed securities until such time as the existing debt is callable;
>
> (4) That the interest received from the federal securities will exceed the interest paid on the refunding bonds.

ANALYSIS:

Article 8, § 3, Idaho Constitution provides in pertinent part:

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

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

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

> We therefore conclude that the issue of a refunding bond by a

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

In *Sebern v. Cobb*, 41 Idaho 386, 238 Pac. 1023 (1925), the Court upheld the issuance of refunding bonds by a drainage district. The Court said at 41 Idaho 400-401:

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

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

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

Marsing v. Gem Irrigation Dist., 56 Idaho 29, 48 P.2d 1099 (1935), held that extending the due date of refunding bonds for 40 years, (beyond the then 20-year provision in Art. 8, § 3, Idaho Constitution), did not amount to the incurring of indebtedness within the meaning of Art. 8, § 3. The Court says at 56 Idaho 32:

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

This case thus sanctions a significant restructuring of the repayment terms of the indebtedness upon refunding, finding that such a change in terms does not amount to an added liability or indebtedness.

The Idaho cases thus make it clear that refunding bonds are not considered to be an indebtedness or liability within the meaning of Art. 8, § 3, Idaho Constitution. This is true even though there may be a period of time in which both the old bonds and refunding bonds are outstanding, assuming that due safeguards are established to assure that the refunding bonds will be used to refund the existing debt and will not be diverted to some other purpose. In this regard, the Court presumes that officials will see that the proceeds are properly applied. Finally, the Court will allow significant restructuring of the terms of repayment of refunding bonds.

The Idaho Supreme Court has never considered the specific question of the validity of refunding bonds issued a number of years in advance of the date on which the old bonds are callable. Nevertheless, from a reading of the Idaho cases cited above, it appears that the Court would uphold advance refunding bonds where due safeguards are established to insure that the refunding bond proceeds are not diverted to some purpose other than refunding the original bonds.

This conclusion is reinforced by the case law of other states whose courts have specifically considered the validity of advance refunding under similar constitutional restraints. While there are many different approaches to the question, the great majority of courts would uphold advance refunding.

In the early case of *Doon Township v. Cummins*, 142 U.S. 366 (1892), the United States Supreme Court, in construing a debt limitation in the Iowa State Constitution, distinguished between exchanging new bonds for old bonds, and the sale of bonds and application of the proceeds of the sale to the payment of outstanding bonded indebtedness. The court pointed out that if the refunding bonds are issued without a simultaneous cancellation of the old bonds, the aggregate debt outstanding is necessarily increased, and that the increase will be permanent unless those handling the proceeds properly pay off the old bonds. This reasoning was also adopted by the Supreme Court of North Dakota in *Birkholz v. Dinnie*, 6 N.D. 511, 72 N.W. 931 (1897).

However, the Idaho Supreme Court specifically repudiated the reasoning of *Doon Township* in the case of *Veatch v. City of Moscow, supra.* Even the Supreme Court of Iowa later repudiated the interpretation the United States Supreme Court gave to the Iowa Constitution. *Banta v. Clarke County*, 260 N.W. 329 (1935). Early cases in Kentucky and Washington followed the *Doon Township* reasoning, but later cases in those states abandoned the *Doon Township* reasoning, as noted infra. Thus, it now appears that only the state of North Dakota would follow the reasoning of *Doon Township v. Cummins.*

The states of Iowa and Washington have upheld refunding plans over objection that the refunding unconstitutionally increased debts of counties. The courts reasoned that the cash assets received from the sale of refunding bonds must be considered as an offset against the refunding debt incurred and thus the net debt was not increased. *Banta v. Clarke County, supra; Eaton v. Thurston County*, 95 P.2d 1024 (1939).

In *Holt v. City of Covington*, 286 Ky. 727, 151 S.W.2d 780 (1941), the Court of Appeals of Kentucky held that advance refunding bonds may be issued provided that the depository for the proceeds of the refunding bonds pays interest at least equal to the interest accruing on the refunding bonds until the old bonds are retired.

In *Kalber v. Stokes*, 9 S.E.2d 785 (1940), the South Carolina Supreme Court faced the question of how far in advance of the maturity date of outstanding bonds refunding bonds may be issued. The Court suggested a "rule of reason" with the answer depending apparently on the practical likelihood that the proceeds of the refunding bonds might be misapplied. The Court stressed the need for adequate safeguards. The Court upheld the particular advance refunding plan stressing that safeguards such as an irrevocable trust fund had been established. A Texas refunding plan was upheld on similar reasoning in *City of McAllen v. Daniel*, 211 S.W.2d 944 (1948).

The states of Oklahoma and Florida have upheld advance refunding plans challenged on grounds other than constitutional debt limitations. *Application of Oklahoma Turnpike Authority*, Okla. 416 P.2d 860 (1966); *State v. City of Orlando*, Fla. 82 So.2d 874 (1955).

In addition, the states of Wyoming, New Mexico, Alabama and Louisiana have all specifically approved the issuance of advance refunding bonds as not increasing public indebtedness or liability in the face of challenges that such fonds violate constitutional debt restrictions. *Robin v. State*, Wyo. 447 P.2d 180 (1966); *City of Albuquerque v. Gott*, 389 P.2d 207 (1964); *Taxpayers and Citizens of Shelby Co. v. Shelby County*, 20 So.2d 36 (1944); *State v. Cave*, 190 So. 631 (1939).

Thus, it appears from both Idaho cases and extensive authorities from other jurisdictions, that advance refunding bonds amount to a restructuring of indebtedness and do not violate constitutional restrictions on increasing public indebtedness or liabilities.

Consequently, advance refunding plans in which the financial arrangements are structured as you have indicated, may be issued without calling a special election.

AUTHORITIES CONSIDERED:

1. Article 8, § 3, Idaho Constitution.

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

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

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

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

6. *Doon Township v. Cummins*, 142 U.S. 366 (1892).

7. *Birkholz v. Dinnie*, 6 N.D. 511, 72 N.W. 931 (1897).

8. *Banta v. Clarke County*, 260 N.W. 329 (1935).

9. *Eaton v. Thurston County*, 95 P.2d 1024 (1939).

10. *Holt v. City of Covington*, 286 Ky. 727, 151 S.W.2d 780 (1941).

11. *Kalber v. Stokes*, 9 S.E.2d 785 (1940).

12. *City of McAllen v. Daniel*, 211 S.W.2d 944 (1948).

13. *Application of Oklahoma Turnpike Authority*, Okla. 416 P.2d 860 (1966).

14. *State v. City of Orlando*, Fla. 82 So.2d 874 (1955).

15. *City of Albuquerque v. Gott*, 389 P.2d 207 (1964).

16. *Taxpayers and Citizens of Shelby Co. v. Shelby County*, 20 So.2d 36 (1944).

17. *State v. Cave*, 190 So. 631 (1939).

18. *Rodin v. State*, Wyo. 447 P.2d 180 (1966).

DATED this 17th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-40

TO: Virginia Ricketts
Jerome County Clerk
P.O. Box 407
Jerome, Idaho 83338

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does *Idaho Code* § 31-2103 prohibit a county from receiving federal revenue sharing funds from the Office of Revenue Sharing directly into the county treasury by means of "direct deposit — electronic funds transfer"?

CONCLUSION:

The existing, applicable Idaho statutes, in particular *Idaho Code* § 31-2103, would prohibit a county from receiving federal revenue sharing funds directly into the county treasury by means of "direct deposit — electronic funds transfer".

ANALYSIS:

As your opinion request indicates, the Office of Revenue Sharing recently notified county officials that the United States Treasury was implementing "direct deposit — electronic funds transfer" procedures for general revenue sharing payments. 31 C.F.R. § 210 (1976). Under "direct deposit — electronic funds transfer" procedures, a county's quarterly payments would be deposited directly to the county's account in the county depository bank, as opposed to the county actually receiving a check through the mail. In order for this procedure to be implemented, federal regulations require that both the recipient of recurring federal payments and the recipient's financial depository must specifically authorize the procedure by executing and filing Standard Authorization Form. 31 C.F.R. §§ 210.4 and 210.7. Thus, the use of "direct deposit — electronic funds transfer," in lieu of receiving a check, is left to the choice of the recipient. The question posed is whether such a direct deposit into the county treasury is prohibited by *Idaho Code* § 31-2103.

In order to analyze this question, it is necessary to look at both the act regulating county treasurers and the act regulating county auditors. *Idaho Code* § 31-2103 provides: "He [the county treasurer] must receive no money into the treasury unless accompanied by the certificate of the auditor." (Brackets added). *Idaho Code* § 31-2104 then provides:

> When any money is paid to the county treasurer he must give to the person paying the same a receipt therefor, which must forthwith be deposited with the county auditor, who must charge the treasurer therewith and give the person paying the same a receipt.

In the act relative to county auditors, there are two statutes which are applicable to your question. *Idaho Code* § 31-2303 states:

> The auditor must examine and settle the accounts of all persons indebted to the county, or holding moneys payable into the county treasury, and must certify the amount to the treasurer, and upon the presentation and filing of the treasurer's receipt therefor, give to such person a discharge and charge the treasurer with the amount received by him.

Idaho Code § 31-2304 provides:

> The auditor must keep accounts current with the treasurer, and when any person deposits with the treasurer any receipt given by the treasurer for any money paid into the treasury, the auditor must file such receipt and charge the treasurer with the amount thereof.

There appear to be no Idaho cases which clearly establish or explain what procedures are created by these applicable statutes. Fortunately, California law provides guidance, since California has virtually identical statutes governing the duties of county auditors and county treasurers. With respect to county treasurers, *California Government Code* § 27008 is virtually identical to I.C. § 31-2103 and *California Government Code* § 27009 is virtually identical to I.C. § 31-2104. With respect to the statutes governing county auditors, *California Government Code* § 26900 is virtually identical to I.C. § 31-2303 and *California Government Code* § 26904 is virtually identical to I.C. § 31-2304. In explaining the procedure established by the California statutes, the California Supreme Court has stated:

> In such case [when money is to paid into the county treasury] it is manifest that all that the auditor has to do in the first instance is to examine the account and settle the amount due, and give a certificate thereof. The inquiry is simply as to the amount due, and not as to whether the party is in actual possession of the money. After this first operation is over, the party takes the auditor's certificate to the treasurer, and, after delivering the certificate and the money to him [the treasurer], receives his [the treasurer's] receipt, which he takes back to the auditor, who enters a charge against the treasurer, and a discharge of the person paying. *Butte County v. Morgan*, 76 Cal. 1, 18 p. 115, at 116 (1888). (Brackets added.)

Even when the person making the payment to the county treasury is the treasurer himself, the same procedure must be generally followed, although it may be possible to dispense with the treasurer's receipt as an idle ceremony. *Butte County v. Morgan, supra*, at 116 (1888).

The Idaho Supreme Court has looked at the applicable statutes, but has never clearly stated the procedures to be followed. In *Power County v. Fidelity &*

Deposit Co., 44 Idaho 609, 260 P. 152 (1927), sheriff's fees which had been collected were paid directly to the auditor, rather than the county treasurer, as provided by law. The court ruled:

> C.S., sec. 3564 [presently *Idaho Code* § 31-2103], provides that the county treasurer must receive no money into the treasury unless accompanied by a certificate of the auditor. The sheriff and his deputy, instead of following the statutory procedure by obtaining from the auditor a certificate and themselves paying the money to the treasurer, paid it to French [the auditor], who, just prior to the expiration of his term, delivered his check as auditor for the amount to the county treasurer, receiving her receipt on the certificate; but the check was not paid for lack of funds.
>
> There was no authority of law for the sheriff to pay to French [the auditor], or for French [the auditor] to receive these amounts. 44 Idaho at 616. (Brackets added.)

In *County of Fremont v. Salisbury*, 48 Idaho 465, 285 P. 459 (1929), the Idaho Supreme Court dealt with a situation where a county treasurer was also the county tax collector. The issue to be determined was whether the tax collector had properly transferred tax moneys to the county treasurer. The Idaho Supreme Court stated:

> No notation or entry was made on the official record of the treasurer or tax collector, indicating transfer of these funds from the tax collector's account to that of the treasurer. There was no auditor's certificate authorizing the transfer of these funds from the office of tax collector, as required by C.S., sec. 3325 [presently *Idaho Code* § 63-2103]. For the treasurer to have received the funds without such certificate, would constitute a clear violation of C.S., sec. 3564 [presently *Idaho Code* § 31-2103], in which it is provided he must receive no money into the treasury unless accompanied by the certificate of the auditor. 48 Idaho at 470. (Brackets added.)

Based upon the foregoing, it is the opinion of the Attorney General that the existing, applicable Idaho statutes, in particular *Idaho Code* § 31-2103, would prohibit a county from receiving federal revenue sharing funds directly into the county treasury by means of "direct deposit — electronic funds transfer."

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§ 31-2103, 31-2104, 31-2303 and 31-2304.
2. *California Government Code*, §§ 26900, 26904, 27008 and 27009.
3. 31 C.F.R. § 210 (1976).

4. *Butte County v. Morgan*, 76 Cal. 1, 18 P. 115 (1888).

5. *County of Fremont v. Salisbury*, 48 Idaho 465, 285 P. 459 (1929).

6. *Power County v. Fidelity & Deposit Co.*, 44 Idaho 609, 260 P. 152 (1927).

DATED this 17th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-41

TO: Representative Larry W. Harris
1925 Montclair Drive
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the State Tax Commission regularly make available, upon request, the names of those companies who receive seller's permits and the numbers of those permits?

CONCLUSION:

No.

ANALYSIS:

The State Tax Commission is the executive agency of the State of Idaho charged with the responsibility of enforcing the major revenue statutes of this state. In order to discharge this responsibility, the Tax Commission must receive and review tax returns, financial statements, applications and other documents containing information which most people consider to be of a highly personal and private nature. In order to protect taxpayers' privacy and yet provide for the efficient administration of the tax statutes, the legislature — while requiring taxpayers to submit this information — has provided for protection of the

privacy of it by placing the information under a strict cloak of confidentiality. The Tax Commission, its deputies and employees are charged with the duty to protect this privacy. *Idaho Code* § 63-3076 provides:

> 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, or permit any return or copy thereof, or any paper or book so obtained, to be seen or examined by any person except as provided by law; . . .

This is a very broad statute. It prohibits the Tax Commission from making known "any information . . . except as provided by law." The importance which the legislature placed upon protecting the privacy of information which the taxpayers are required to submit is reflected by the severity of the penalties imposed upon the Tax Commissioner or Tax Commission employee who may violate the statute. The penalty is:

> A fine of not less than $100 nor more than $5,000, or . . . imprisonment for not more than five years.

Because of the breadth of the statute, all information in the possesion of the State Tax Commission must be considered to be confidential unless a specific statutory basis for disclosure can be found. There are several provisions which permit disclosure in specific circumstances. For example, the taxpayer himself is entitled to obtain information relating to his own tax return or tax liability. Disclosure may be made in the course of judicial proceedings, criminal or civil, relating to a taxpayer's obligations under the tax statutes. Within certain limitations, information may be exchanged with taxing authorities in other states and with the Internal Revenue Service. The Tax Commission may release copies of returns to committees of the legislature upon request of those committees. The Commission may make and publish statistical studies based upon tax information received by it. When delinquent taxes become a lien upon the property of a taxpayer, public notice of the fact may be given by recording a tax lien at the office of the county recorder in the county in which the taxpayer resides or has property. There are other limited circumstances in which the Tax Commission may disclose information, but in each instance the disclosure is squarely based upon a statutory or judicial authorization in order to be a disclosure which is, in the words of the statute, "as provided by law." Without such authorization, no disclosure can be made.

In searching the Idaho Code and the Sales Tax Act in particular, we find no specific authorization which permits the Tax Commission to disclose lists of all retailers applying for and receiving seller's permits under the Sales Tax Act or the numbers of those permits. Without such a specific authorization, the disclosure is not provided by law, and the Tax Commission is specifically prohibited from disclosing it.

The statutory provision relating to seller's permits (*Idaho Code* § 63-3620) does provide:

> The applications, or any information contained thereon, may be made available by the tax commission to authorize representatives of state or local agencies.

The existence of this provision permitting a disclosure to a limited class of persons — representatives of authorized state and federal agencies — must be construed to mean that persons who are not members of that limited class are not entitled to receive the information.

It is, of course, true that the recipient of a seller's permit is required to display the permit in a conspicuous place on his business premises. This, however, is a disclosure by the retailer and not by the Tax Commission. Additionally, the disclosure is made only to a limited class of people, i.e., those who are physically present upon the business premises.

Accordingly, we conclude that the State Tax Commission is not authorized to disclose to persons not otherwise authorized specifically by statute to receive such information, lists of companies who receive seller's permits and the numbers of those permits.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 63-3076; 63-3620.

DATED this 22nd day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-42

TO: Paul W. Worthen
Representative, District 16
6414 Robertson Drive
Boise, Idaho 83705

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Do professional engineering services fall within the personal services exemption of *Idaho Code*, § 31-4002, thereby exempting said service from bidding requirements when those services are furnished to the State of Idaho or political subdivisions thereof?

CONCLUSION:

Yes, engineering services are considered to be personal services and therefore exempt from State bidding requirements.

ANALYSIS:

Although competitive bidding is required on public works contracts, there is a well known exception which considers bidding to be inappropriate when conducted in connection with the rendering of personal services, with pa ticular emphasis on those of a technical or professional nature. The State of Idaho recognizes this exception in §§ 31-4002 and 54-1903, *Idaho Code*.

Idaho Code, § 54-1903(h), exempts "duly licensed architects and civil engineers when acting solely in their professional capacity" from the public works licensing laws. Thus, the legislature has seen fit to place architects and engineers in a different category from builders and tradesmen. Section 31-4003, *Idaho Code*, provides that competitive bids shall be required when expenditures by any county of the state of Idaho exceed $5,000. However, in the same chapter there is an exception to this bidding requirement found at § 31-4002, *Idaho Code*. This section reads as follows:

> 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 "expenditures" does not include disbursement of county funds to any county employee, official or agent or *to any person performing personal services for the county.* [emphasis added]

A similar provision is found at § 50-341, *Idaho Code*, dealing with the letting of contracts by municipalities within the state. It is therefore apparent that competitive bidding is not required when dealing with "personal service " such as engineering services to the various subdivisions of the State.

While there are no Idaho cases directly in point, numerous cases from other jurisdictions support out conclusions. These cases reiterate with consistency, the basic premise that when services contracted for involve the exercise of special skills, training, taste, or discretion, then competitive bidding for public works should not control. See: *Vermeule v. Corning*, 186 App. Div. 206, 174 N.Y.S. 220 (1919), *aff'd* 230 N.Y. 585, 130 N.E. 903; *Flottum v. City of Cumerland*, 291 N.W. 777 (Wis. 1940); *City & County of San Francisco v. Body*, 110 P.2d 1036

(Cal. 1941); *Kennedy v. Ross*, 170 P.2d 905 (Cal. 1946); *Hunter v. Whitacker & Washington*, 230 S.W. 1096, 1098 (Tex. Civil App.); *City of Hazard v. Salyers*, 224 S.W.2d 420 (Ky. App. 1949); *Modjeski & Masters v. Pack*, 388 S.W.2d 144, 147, (Tenn. 1965); *Parker v. Panama City*, 151 So.2d (Fla.App. 1963).

In conclusion, engineering services have long been considered personal services throughout the various jurisdictions of this country and continue to be considered so today. As a result, professional engineering services fall within the personal services exemption of *Idaho Code*, § 31-4002, thereby exempting said services from bidding requirements when those services are furnished to the State of Idaho or political subdivisions thereof.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 31-4002.

2. *Idaho Code*, § 54-1903.

3. *Idaho Code*, § 31-4003.

4. *Idaho Code*, § 50-341.

5. *Vermeule v. Corning*, 186 App.Div. 206, 174 N.Y.S. 220 (1919), *aff'd* 230 N.Y. 585, 130 N.E. 903.

6. *Flottum v. City of Cumerland*, 291 N.W. 777 (Wis. 1940).

7. *City & County of San Francisco v. Boyd*, 110 P.2d 1036 (Cal. 1941).

8. *Kennedy v. Ross*, 170 P.2d 905 (Cal. 1946).

9. *Hunter v. Whitacker & Washington*, 230 S.W. 1096, 1098 (Tex.Civil App.).

10. *City of Hazard v. Salyers*, 224 S.W. 420 (Ky.App. 1949).

11. *Modjeski & Masters v. Pack*, 388 S.W.2d 144, 147 (Tenn. 1965).

12. *Parker v. Panama City*, 151 So.2d (Fla. App. 1963).

DATED this 23rd day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-43

TO: Larry G. Looney
Commissioner
Idaho State Tax Commission
P.O. Box 36
Boise, Idaho 83722

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the Department of Health and Welfare obtain relevant information from the tax returns filed with the State Tax Commission for the purpose of locating individuals with respect to the support of his or her dependents?

CONCLUSION:

Yes.

ANALYSIS:

The Commissioners, employees, etc., of the State Tax Commission have strong restrictions as to the disclosure of information obtained in the course of their duties or from tax returns filed with the Commission. *Idaho Code* § 63-3076 provides:

> 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, or permit any income return or copy thereof, or any paper or book so obtained, to be seen or examined by any person except as provided by law; provided, that in any action or proceeding brought for the collection, remission, cancellation or refund of the whole or any part of a tax imposed under the provisions of this act, or for enforcing the penalties prescribed for making false or fraudulent returns, any and all information contained in such returns may be furnished or made accessible to the officers or representatives of the state or county charged with the duty of prosecuting or defending the same, under such rules and regulations as the state tax commission shall prescribe; and all such returns and the statements and correspondence relating thereto may be produced in evidence in any action or proceeding, civil or criminal, directly pertaining to such returns or the tax imposed on the basis of such return.
>
> (b) Any officer, agent, clerk or employee violating any of the

> provisions of this section shall be guilty of a felony and, upon conviction thereof, be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than five (5) years. Such officer, agent, clerk or employee upon such conviction shall also forfeit his office or employment and shall be incapable of holding any public office in this state for a period of two (2) years thereafter.

The above cited statute does allow the State Tax Commission to disclose information if it is provided by law, such as court decisions or statutes.

The Department of Health and Welfare is seeking information in order to locate individuals in respect to the support of his or her dependents. Their reliance in obtaining such information from the State Tax Commission is in *Idaho Code* § 56-231 which states:

> Public assistance in locating parents and other persons liable for support of dependents. — To assist in locating parents who have deserted their children and other persons liable for support of dependents, the department of health and welfare and county prosecuring attorneys may request and shall receive information from the records of all departments, boards, bureaus or other agencies of this state and the same are authorized to provide such information as is necessary for this purpose. Only information directly bearing on the identity and whereabouts of a person owing or asserted to be owing an obligation of support shall be requested and used or transmitted by the department of health and welfare and county prosecuting attorneys pursuant to the authority conferred by this act. The department of health and welfare and county prosecuting attorneys may make such information available only to public officials and agencies of this state, other states and the political subdivisions of this state and other states seeking to locate parents who have deserted their children and other persons liable for support of dependents for the purpose of enforcing their liability for support.

Clearly the above quoted statute provides that the Department of Health and Welfare is entitled to receive information from all state agencies regarding the location of parents who have deserted their children.

The exception to *Idaho Code* § 63-3076 is met by *Idaho Code* § 56-231 and the State Tax Commission, Commissioners, employees, delegates, etc., may disclose information to the Department of Health and Welfare regarding the location of child support parents.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 63-3076.

2. *Idaho Code*, Section 56-231.

DATED this 24th day of June, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DEAN W. KAPLAN
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-44

TO: Mr. Marshal T. Keating, Ed.D.
Superintendent
Moscow School District 281
P.O. Box 8459
Moscow, Idaho 83843

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Whether, in view of the open meeting law, *Idaho Code*, Sections 67-2341, et seq, as amended by House Bill 257, the latter effective July 1, 1977, a school board may consider and place a person on probationary status in executive session and thereby avoid public disclosure of the person's probationary status.

CONCLUSION:

The consideration, evaluation, and details of personnel matters, including probationary status, are appropriate for executive sessions. However, any final action or decision must be made in open session.

ANALYSIS:

Your letter quotes *Idaho Code*, Section 33-1212, *Renewable Contract*, as follows:

> "Before a board of trustees can determine not to renew the contract of any certified person whose contract would otherwise be automatically renewed, or to renew the contract of any such person at a reduced salary, such person shall be entitled to a probationary period. This period of probation

> shall be preceded by a written notice from the board of trustees with reasons for such probationary period and with provisions for adequate supervision and evaluation of the person's performance during the probationary period. Such period of probation shall not affect the person's renewable contract status."

The Open Meeting Law, Idaho Code 67-2345(b) expressly authorizes personnel matters to be discussed in executive sessions:

> "Executive sessions — when authorized. — (1) Nothing contained in this act shall be construed to prevent upon a two-thirds vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session during any meeting, after the presiding officer has identified the authorization under this act for the holding of such executive session. An executive session may be held:
>
> > (b) to consider the evaluation, dismissal, disciplining of, or to hear complaints or charges brought against, a public officer employee, staff member or individual agent, or public school student . . . "

Thus, the legislature established an exception which would allow a school board to consider personnel matters, including probationary status, in executive session. Moreover, Section 67-2344(2) declares:

> "Minutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of 67-2345, *Idaho Code*, but shall contain sufficient detail to convey the general tenor of the meeting."

This provision allows the governmental agency or board to avoid disclosure of the considerations or evaluation of personnel matters such as probationary status of teachers. The provision does require that the minutes of the executive sessions disclose the general tenor of the meeting, including the fact that probation of a teacher was considered.

It should be emphasized, however, that § 67-2345(3) states: "No executive session may be held for the purpose of taking any final action or making any final decision." Hence, any final action or final decision on personnel matters must be made in an open meeting.

Your question asks whether there is any means by which the school board may avoid public disclosure of the probationary status of a teacher. Although this question has not been raised before the Idaho Supreme Court, courts of other states have considered the issue. In the case of *Canney v. Board of Public Instruction of Alachua County*, the District Court of Appeal of Florida ruled in favor of the school district that neither the public nor the press had any right to enter the deliberations of the school board on personnel matters. However, the

Florida Supreme Court disagreed and held that legislative intent must control. That Court concluded that the school board must comply with the express directive of the state legislature and make such final decisions in open session. 231 South 2d 34 (1970), reversed 278 South 2d 260. In the Florida case the school board contended that personnel might be harmed if hearings concerning charges of misconduct were aired publicly and proved ill-founded. But the court responded that the public at large was as interested in the good quality of school personnel as was the school board. The court further noted that the legislature made no exclusion for personnel matters from the final decision clause of the act.

In another case, *Gillies v. Schmidt*, 556 Pac.2d 82 (Colo. App. 1976), the Colorado court provides a thorough review of pertinent law on this issue. The decision notes:

> "Courts resolving cases brought under public meeting laws have uniformly required open meetings, and even where the relevant statute has authorized executive sessions, the courts have consistently required that final or binding action be taken in meetings open to the public [Numerous citations omitted].
>
> Indeed, the only cases where courts have favored legislatively created rights of confidentiality over statutes requiring open meetings have been those involving the attorney-client privilege. [Citations omitted]."

The central issue in this entire procedure is whether the teacher will be prejudiced by the actions of the board. To protect the school district, I suggest that a teacher placed on probation should stipulate with the board that he had proper and timely notice of the complaint or charge against him, that he had full opportunity to defend himself, and that the minutes of the executive session shall constitute a record of the disciplinary evaluation in the event the board later suspends or terminates the teacher.

In conclusion, the open meeting law provides for the consideration of personnel matters including probationary status of teachers in executive session but requires that the final decision thereon be made in open session.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 33-1212; 67-2338 as amended by House Bill No. 257.

2. Annotation, "Validity, Construction, and Application of Statutes Making Public Proceedings Open To the Public: 38 ALR 3rd 1070."

3. *Canney v. Board of Public Instruction of Alachua County*, 231 South 2d 34, reversed 278 South 2d 260 (Florida, 1970).

4. *Gillies v. Schmidt*, 556 Pac.2d 82 (Colo. App. 1976).

5. Attorney General Opinion No. 7-75.

DATED this 5th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCK
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-45

TO: Mr. Milton G. Klein
Director
Department of Health & Welfare
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Do Idaho Statutes authorize the Board of Health and Welfare through its regulatory authority to require owners of public water systems to give public notification of violation of state primary drinking water regulations. If so, to what extent may the requirements go?

2. Do Idaho Statutes authorize the Board of Health and Welfare to adopt and enforce regulations as stringent as the *National Interim Primary Drinking Water Regulations* promulgated by the Environmental Protection Agency?

3. Do Idaho Statutes authorize the Department of Health and Welfare or the Board of Health and Welfare to issue variances and exemptions to primary drinking water regulations in a manner no less stringent than the conditions set out in the *Federal Safe Drinking Water Act*?

CONCLUSIONS:

1. § 37-2102, *Idaho Code*, and the *Idaho Environmental Protection and Health Act of 1972* (§ 39-101 through § 39-119, *Idaho Code*) authorize the Board of health and Welfare through its regulatory authority to require owners of public water systems to give public notification of violation of state primary drinking water regulations.

2. § 37-2102, *Idaho Code*, and the *Idaho Environmental Protection and*

Health Act of 1972 (§ 39-101 through § 39-119, *Idaho Code*) authorize the Board of Health and Welfare to adopt and enforce regulations as stringent as the *National Primary Drinking Water Regulations.*

3. *Idaho's Environmental Protection and Health Act of 1972* (§ 39-101 through § 39-119, *Idaho Code*) authorizes the Board of Health and Welfare to issue variances and exemptions to primary drinking water regulations in a manner no less stringent than the conditions set out in the *Federal Safe Drinking Water Act.*

ANALYSIS:

This opinion request was forwarded at the urging of the U.S. Environmental Protection Agency Regional Counsel's Office in an effort to determine whether the State of Idaho has enacted the statutory authority necessary to assume responsibility for regulations under the *Federal Safe Drinking Water Act* and the regulations promulgated pursuant thereto.

Idaho has two major statutory provisions regarding public water systems within the State. § 37-2102, *Idaho Code*, requires all domestic water supplies to be protected. This statute grants the State Board of Health and Welfare the authority to promulgate health-related regulations by providing that:

> The standards for protection from impurities and the standards for chemical and bacterial purity in the state of Idaho shall be promulgated by the state board of health and welfare and shall be consistent with this section of the Drinking Water Standards of the United States public health service, which standards are suitable for use in evaluating the quality and safety of water and water supply systems . . . § 37-2102, *Idaho Code.*

The preamble to the *National Interim Primary Drinking Water Regulations* (40 Fed Reg 59566, Dec. 24, 1975) notes that the maximum contaminant levels of the *Federal Safe Drinking Water Act* (hereinafter "the Act") are based on the Public Health Standards of 1962. Thus, adoption by Idaho of standards required under the Act would be consistent with the statutory requirement of § 37-2102, *Idaho Code.*

In addition, the *Idaho Environmental Protection and Health Act of 1972* (§ 39-101 through § 39-119, *Idaho Code*) gave the Department of Health and Welfare broad authority with regard to water pollution and public water systems in furtherance of the policy of the State "to provide for the protection of the environment and the promotion of personal health." (§ 39-101, *Idaho Code*). Under § 39-105(2), *Idaho Code*, the Director of the Idaho Department of Health and Welfare has the authority to formulate and recommend to the Board of Health and Welfare rules, regulations, codes, and standards, as may be necessary to deal with problems related to personal health and water pollution, among others. The rule-making and hearing functions are vested in the Board of Health and Welfare, under § 39-105(1), *Idaho Code*, and pursuant to § 39-107(8), *Idaho Code*, the Board may adopt, amend, or repeal the regulations,

rules, codes, and standards of the Department that are necessary and feasible to carry out the purposes and provisions of the *Environmental Protection and Health Act of 1972, supra.* § 39-107(8), *Idaho Code*, further provides:

> The regulations, rules, and orders so adopted and established shall be a part of this code and shall have the force and effect of law and may deal with any matters deemed necessary and feasible for protecting the environment or the health of the State . . . 39-107(8), *Idaho Code.*

Finally, § 39-105(e), *Idaho Code*, empowers the Director of Health and Welfare to enforce standards, rules, and regulations relating to public water supplies.

1. Idaho statutes that authorize the Board of Health and Welfare, through its regulatory authority, to require owners of public water systems to give public notification of violation of state primary drinking water regulations to the extent set forth in the *National Interim Primary Drinking Water Regulations* 40 C.F.R. 142.16.

As noted above, both § 37-2101 and § 39-101 through § 39-119, *Idaho Code*, give broad authority to the Department of Health and Welfare to promulgate health-related regulations with regards to domestic water systems. More specifically, with regards to domestic water systems. More specifically, under § 37-2102, *Idaho Code*, the standards for protection of domestic water are those promulgated by the Board of Health and Welfare. This Section of the *Idaho Code* mandates that these standards must be consistent with the U.S. Public Health Service drinking water standards, which, according to the preamble to the *National Interim Drinking Water Regulations* (40 Fed Reg 59566, Dec. 24, 1975), form the basis for the Implementation Regulations. Since the Implementation Regulations require owners of public water systems to give notification of violation of state primary drinking water regulations under 40 C.F.R. 142.16, an identical requirement could be promulgated consistently with § 37-2102, *Idaho Code.*

Under § 39-105 and § 39-107, *Idaho Code*, there is adequate authority for the Director and the Board of Health and Welfare to promulgate and adopt such public notification requirements. The Director, pursuant to § 39-105(2), *Idaho Code*, is empowered to recommend to the Board regulations "necessary to deal with problems related to (inter alia) personal health and water pollution". The Board has authority under § 39-105(2), *Idaho Code*, to adopt regulations "necessary and feasible for . . . the maintenance and protection of personal health", as well as authority under § 39-107, *Idaho Code*, to adopt regulations that are necessary and feasible to carry out the purposes and provisions of . . . [*the Idaho Environmental Protection and Health Act of 1972*] and to enforce the laws of this State". Since public notification as required by the *National Interim Primary Drinking Water Regulations* is an important enforcement tool, which also serves to inform the public of variances or exemptions which have a direct bearing of the health of a potential consumer of the water, the Board of Health and Welfare can require public notification of violation of state primary drinking water regulations to the extent set forth in the federal regulations through its regulatory authority, pursuant to the aforementioned statutes.

2. Idaho statutes that authorize the Board of Health and Welfare to adopt and enforce regulations as stringent as the *National Primary Drinking Water Regulations.*

The *National Primary Drinking Water Regulations* were promulgated pursuant to the *Safe Drinking Water Act* which was enacted by Congress in 1974 as an amendment to the Public Health Service Act "to assure that the public is provided with safe drinking water . . . " The Board of Health and Welfare's expansive authority to promulgate and enforce regulations that are necessary to protect the public health pursuant to *Idaho's Environmental Protection and Health Act of 1972, supra*, authorize it to adopt and enforce regulations as stringent as the *National Primary Drinking Water Regulations.* Such regulations could also be promulgated under § 37-2102, *Idaho Code, which authorizes the Board of Health and Welfare to promulgate standards for the protection of domestic water supplies which are consistent with the drinking water standards of the United States public health service. As noted above, the Primary Drinking Water Regulations* are based on the *Public Health Service Standards of 1962*, thus, adoption of these regulations by Idaho would satisfy the statutory requirement of § 37-2102, *Idaho Code.*

3. Idaho statutes that authorize the Board of Health and Welfare to issue variances and exemptions to primary drinking water regulations in a manner no less stringent than the conditions set out in the *Federal Safe Drinking Water Act.*

Idaho, to qualify for primary enforcement responsibility under the *Federal Safe Drinking Water Act*, must have procedures to issue variances and exemptions to primary drinking water regulations in a manner no less stringent than the conditions set out in the *Safe Drinking Water Act.* Since qualifying under this act bears a direct relation to the maintenance and protection of persona, the Board of Health and Welfare's authority to promulgate rules, regulations, codes and standards "as may be necessary to deal with problems related to personal health . . . " pursuant to § 39-105, and § 39-107, *Idaho Code*, authorizes the Board to issue variances and exemptions to primary drinking water regulations in a manner no less stringent than that set out in the *Safe Drinking Water Act.* This conclusion is supported by § 39-105(2), *Idaho Code*, which provides that such regulations may be " . . . limited as to times, places, circumstances, or conditions in order to make due allowance for variations therein . . ."

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 37-2101 and 39-101 through 39-119.
2. *National Interim Primary Drinking Water Regulations*, 40 C.F.R. 142.16.
3. *Federal Safe Drinking Water Act*, 88 Stat 1660, 42 USC 300 f.

DATED this 7th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. MacCONNELL
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-46

TO: Pete T. Cenarrusa
Secretary of State
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does the amendment of *Idaho Code* § 28-9-403(5) by Session Laws 1977, Chapter 220, which increases the standard fee for a financing statement from one dollar ($1.00) to two dollars ($2.00) amend by implication the fee of two dollars ($2.00) listed in *Idaho Code* § 28-9-405(1) for filing of a financing statement which also indicates an assignment therein.

CONCLUSION:

No. The legislature did not expressly amend *Idaho Code* § 28-9-405(1) by its amendment of *Idaho Code* § 28-9-403(5). Nor can an amendment by implication be assumed since the amended section and unamended section are not so inconsistent that they cannot now exist together.

ANALYSIS:

Chapter 220 of the 1977 Session Laws amended *Idaho Code* § 28-9-403(5) which read, prior to the amendment, as follows:

> The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be one dollar ($1.00).

This section as amended now reads:

> The uniform fee for filing, indexing and furnishing filing data for an original financing statement shall be two dollars ($2.00) if it is in the standard form prescribed by the Secretary of State and otherwise shall be three dollars ($3.00). The uniform fee for filing, indexing and furnishing filing data for a continuation statement shall be one dollar ($1.00).

You state in your letter that "A number of county clerks in the state take the position that the increase in the standard fee for a financing statement in §28-9-403(5) by implication worked an increase of the fee in § 28-9-405(1) to three dollars ($3.00)." This position is based, as your letter states, on the argument "that the fee in § 28-9- 405(1) should be equal to the standard fee for a financing statement from § 28-9-403(5) [which is now two dollars ($2.00) as amended] plus the fee for filing of an assignment as indicated in § 28-9-405(2)" [which is one dollar ($1.00)].

Although this position may be logical, the legislature did not amend *Idaho Code* § 28-9-405(1), nor does there appear in the amending act any intention on the legislature's part to do so. Since an express amendment to *Idaho Code* § 28-9-405(1) was not made, only by implying an amendment can its terms be changed by the legislature's action in amending *Idaho Code* § 28-9-403(5). Sutherland in his treatise on statutory construction defines the rule of amending by implication and its application:

> An implied amendment is an act which purports to be independent of, but which in substance alters, modifies, or adds to a prior act. To be effective, an amendment of a prior act ordinarily must be express. Amendments by implication, like repeals by implication, are not favored and will not upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together. Sutherland, *Statutory Construction,* § 22.13, 4th Ed.

As Sutherland notes, and as the Idaho Supreme Court held in *Harding v. Mutual Benefit Health & Accident Association*, 55 Idaho 131, 39 P.2d 306 (1934), amendments by implication are not favored. The rule will generally be applied only in a situation where the amendment and prior law are so inconsistent that they cannot exist together. We do not find the above situation here. Upon the amendment's effective date of July 1, 1977, the filing fees for financing statements will be two dollars ($2.00) under *Idaho Code* § 28-9-403(5) and the filing fees for financing statements indicating an assignment will be two dollars ($2.00) under *Idaho Code* § 28-9-405(1). There is nothing so inconsistent in requiring the same filing fee for a financing statement with an indication of an assignment as one without the assignment to result in the conclusion that the legislature impliedly amended *Idaho Code* § 28-9-405(1) by its amendment of *Idaho Code* § 28-9-403(5).

From the foregoing, it is the opinion of this office that the legislature's

amendment of *Idaho Code* § 28-9-403(5) does not amend or affect the provisions of *Idaho Code* § 28-9-405(1) and that the correct filing fee under the unamended section remains two dollars ($2.00) as stated therein for a financing statement with an indication of assignment.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 28-9-403(5) and 28-9-405(1).

2. Chapter 220, 1977 Idaho Session Laws.

3. *Harding v. Mutual Benefit Health & Accident Association*, 55 Idaho 131, 39 P.2d 306 (1934).

4. Sutherland, *Statutory Construction* § 22.13, 4th Ed.

DATED this 7th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

H. THOMAS VANDERFORD
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-47

TO: Representative Lyman G. Winchester
Legislative District #19

Representative Wendy A. Ungricht
Legislative District #18

Representative James D. Golder
Legislative District #16

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does § 63-202, *Idaho Code*, pertaining to revenue and taxation, require that county assessors base their determination of appraisal for market value of real property, on the actual and functional use of the property being assessed?

CONCLUSION:

Section 63-202, *Idaho Code*, specifically provides that actual and functional use shall be a "major consideration" in determining market value of agricultural and commercial property in this State. While county assessors may include other factors in this determination, they must understand that such factors are secondary to the "actual and functional use" test required by law for agricultural and commercial property.

ANALYSIS:

Under Idaho law, assessment of property within the State for purposes of taxation depends on the market value of that property as determined by recognized appraisal methods. Appropriate methods and techniques for these appraisals are set forth by the State Tax Commission as required by statute. Language relevant to this opinion is found in § 63-202, *Idaho Code* as follows:

> "The rules and regulations promulgated by the state tax commission shall require each assessor to find market value of all property within his county according to recognized appraisal and techniques as set forth by the state tax commission; *provided, that the actual and functional use shall be a major consideration when determining market value of commercial and agricultural properties.*"

The legislative mandate could not be clearer. Whenever the county assessor is considering market value of commercial or agricultural property, he must give major consideration to the actual and functional use to which the property is being applied. An example is agricultural property in the vicinity of an urban area. A land speculator, contemplating a burgeoning need for residential expansion, may be willing to pay many times what the land is worth for agricultural purposes. But the value to the speculator would not be the test. If the land is, in fact, being used for agricultural purposes within the meaning of law, the assessor must make this fact his prime consideration in determining market value for purposes of taxation. This does not mean that other factors may not be used. Actual and functional use is not the *sole* test, but it is a major test. Any other factor used by the assessor in determining market value of property must take a secondary role to the primary test involved. If land is being used as a farm, it must be appraised under its agricultural value regardless of the price that some speculator could command based on some future projection of highest and best use. Similarly, the local grocery store, if a commercial establishment, must be appraised accordingly even though conditions in the area indicate that another use would greatly increase the market value of that property.

In short, when agricultural and commercial property is involved, appraisals for fair market value must place major reliance on the actual and functional use of that property at that time. Other factors used in accordance with recognized appraisal methods and techniques, while not prohibited by statute, must be viewed in light of the prime consideration, which is actual and functional use.

AUTHORITIES CONSIDERED:

I. Section 63-202, *Idaho Code.*

DATED this 11th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Acting Chief Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-48

TO: Mary Kautz
County Auditor
Washington County
Weiser, Idaho 83672

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May a fire protection district formed pursuant to Title 31, Chapter 14, *Idaho Code*, choose to levy taxes upon either real or personal property or both or against agricultural lands and not dry grazing? If such a choice can be made, is it required to be included in the order establishing the district?

CONCLUSION:

The Commissioners of the Fire Protection Board have by statute the discretion to levy tax uniformly upon all of the land, or all of the improvements, or all of the taxable personal property located within the district, or upon any combination of those categories. The levy cannot be imposed upon some land while excluding other land nor upon some improvements while excluding other improvements nor upon some personal property while excluding other personal property.

The discretion granted to the Commissioners of the Fire Protection Board may be exercised by a resolution of the Board but must be exercised prior to the 1st day of January of the taxable year.

ANALYSIS:

Idaho Code § 31-1420 generally empowers the Board of Commissioners of the Fire Protection District to levy taxes, within certain limits imposed therein, in order to raise revenue to support the district. Included in that section is a discretionary power:

> . . . Provided, however, that it shall be discretionary with such boards to levy said tax uniformly within said district upon the land or the improvements, or the taxable personal property, or upon some or all of said categories.

We read the language, "upon some or all of said categories" to mean that the Board of Commissioners of the Fire Protection District may exclude one or more of the listed categories in their entirety from the district's tax base. It does not mean that the Board may exclude from taxation some of the property included within one of the listed categories but not all of the property within the listed categories. In other words, the language of the statute provides the Commissioners of the Fire Protection District with seven options. They may include in the tax base any of the following: (1) All land, improvements and personalty; (2) land and improvements; (3) improvements and personalty; (4) personalty and land; (5) land; (6) improvements; and (7) personalty. The Board of Commissioners of the Fire Protection District may *not* tax agricultural lands and exclude grazing lands.

The discretion granted to the Board of Commissioners of Fire Protection District by § 31-1420 may be exercised by the Commissioners in the form of a resolution properly presented and passed upon by the Board. However, since under § 63-102 all property must be taxed "as of 12:01 a.m. on the 1st day of January in the year in which such taxes are levied, except as otherwise provided," the resolution establishing the taxable or nontaxable status of the property located within the Fire Protection District must be passed prior to the 1st day of January in the year in which the taxes are levied. A resolution passed in the year 1977 could not affect 1977 taxes but could only affect taxes levied for the year 1978 and thereafter. Where there is no express statement of an exercise of the discretion, it must be presumed that all of the taxable property located within the district, whether land, improvements or personal property, is subject to the tax.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 31-1420, Section 63-102.

DATED this 19th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-49

TO: Representative Gary Ingram
Chairman, Legislative Council Committee on Capitol Facilities
3530 Highland Drive
Coeur d'Alene, Idaho 83814

Bart Brown, Director
Department of Administration
Building Mail

Per Request for Attorney General Opinion.

Requests for an Opinion of the Attorney General have been received from Representative Gary Ingram as Chairman of the Legislative Council Committee on Capitol Facilities and Bartell Brown as Director of the Idaho Department of Administration concerning certain questions regarding the Idaho Building Authority. Since all questions presented turn on the same analysis, they will be incorporated into this single opinion.

QUESTIONS PRESENTED:

1. Does Idaho statutory law presently require that ownership of buildings erected by the Idaho Building Authority transfer at some point to the State?

2. If the answer to question one is no, is it possible to incorporate into the statutes governing the Idaho State Building Authority a provision that the State of Idaho will own such buildings at the completion of the bond redemption period?

3. If transfer of ownership in the buildings to the State of Idaho is required by statute, would such provision impair the constitutionality of the Idaho Building Authority?

4. If a provision for ownership of the above-referred to buildings is in the future included in the Idaho laws, could it be made applicable to the buildings previously authorized by concurrent resolution of the legislature?

5. Can the Department of Administration, acting on behalf of the State of Idaho, and the Idaho Building Authority execute a contract which states that buildings erected by the Idaho Building Authority will become the property of the State of Idaho upon the retirement of the construction bonds?

CONCLUSIONS:

1. Idaho law does not presently require transfer of ownership of buildings erected by the Building Authority to the State of Idaho.

Questions 2 and 3. Although it is possible to include within the statutes creating the Idaho Building Authority a provision requiring transfer of ownership in the buildings to the State of Idaho at the completion of the bond redemption period, such a provision may well impair the constitutionality of the Idaho Building Authority and is, therefore, discouraged.

4. Ownership provisions referred to above could also adversely affect the constitutionality of previous authorizations made by concurrent resolution of the legislature.

5. Execution of a contract by the Department of Administration and the Idaho Building Authority whereby the State will own the buildings following the retirement of the construction bonds may well impair the constitutionality of the Idaho Building Authority and is, therefore, discouraged.

ANALYSIS:

In 1974, the legislature passed the Idaho State Building Authority Act, § 67-6401, *et seq., Idaho Code.* The Authority created through this legislation is designated as "an independent public body corporate and politic" and is referred to as a public instrumentality exercising public and essential governmental functions. The purpose of the Authority is to finance and erect buildings for occupancy by the State of Idaho. Funds required by the Authority in fulfilling its duties under the law are obtained by issuing notes and bonds in sums sufficient to cover total costs of construction. The notes and bonds so issued are repaid by the money obtained from the State for rental of the buildings.

The Supreme Court of Idaho has conceptually sanctioned entities such as the Building Authority. In *State ex rel Williams v. Musgrave*, 84 Idaho 77 (1962), the Court found valid the State Insurance Fund on the grounds that it was a State-created entity which was not a corporation or a State agency subject to all the restrictions of the Idaho Constitution. The concept of "quasi-state agencies" was recently reaffirmed in *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498 (1975). The Court in that case drew a distinction between prohibited corporations and "independent public bodies politic and corporate" by looking at the extent of involvement of private parties in the entity involved. The Court went on to say that the Health Facilities Authority is a public body but is not directly an agency of the State. Additionally, the Court concluded that the Health Facilities Authority, under the existing facts, did not violate prohibitions on loaning or pledging the credit of the State contained in Art. VIII, §§ 3 and 4, *Idaho Constitution.*

Review of the case law discussed above and decisions on point from other jurisdictions reveal that, *in concept*, quasi-state entities such as the Building Authority are within the parameters of the Constitution. The real issue then

becomes simply a question of fact — is the entity involved truly an independent public body corporate and politic [which we have referred to as a quasi-state agency], or is it, in reality, an agency of the State.

The key to answering this question is autonomy. If the facts reveal that the Authority is truly independent and is not merely a camouflaged arm of State government, we believe the Court would rule in favor of constitutionality. On the other hand, if facts suggest that the Authority is actually a State agency clothed as an independent body in order to circumvent the debt limitation ceiling, we believe that the Court would strike it down as violative of Art. VIII, §§ 1 and 2, *Idaho Constitution.*

We may now apply this analysis to the questions you have presented. Initially, there is definitely no provision in the present statutory framework requiring ownership of the buildings by the State of Idaho upon completion of the applicable bond redemption period. This raises the second question: Is it possible to incorporate into the statutory law a provision that the State will own the buildings when the bonds have been redeemed? In our view, this question must be answered in the negative, because to do so would in all likelihood dissolve the arms length lessor-lessee relationship between the Authority and the State. This, in turn, could dissolve the necessary autonomy for the Authority and establish it as a legal fiction for avoiding the Constitution. In other words, the more independent the Authority, the better chance it has to be held constitutional by the Idaho Courts. A pristine year to year lease suggests much more independence than a situation whereby the State simply buys the buildings on an installment contract. A recent case from Oregon is very close in point.

In the Matter of the Constitutionality of Chapter 280 Oregon Laws 1975, Martin v. Oregon Building Authority, 554 P.2d 126 (1976), striking down the Oregon Building Authority, was decided by the Supreme Court of Oregon less than a year ago. As in Idaho, the Building Authority was created as "an independent public body politic and corporate" with certain enumerated corporate powers. Also as in Idaho, the bonds to be issued by the Authority were not to constitute a debt or liability of the State as defined in Oregon's constitutional or statutory law. Money to pay off the bond indebtedness would come from proceeds obtained by renting the buildings to the State of Oregon. Thus, the Oregon Building Authority was designed in a fashion quite similar to that existing in Idaho, although there are certain substantial differences existing between the two.

The Court in Oregon had before it for review three different plans for erection of buildings by the Authority. Under one plan, the building was to be conveyed to the State of Oregon without charge upon payment of the bonds. Under the other two plans, the State would have the option to purchase the property for $1,000.00 following payment of bonds. The Court concluded that, in effect, a lease-purchase and a lease-option to purchase were created, and this element resulted in a holding of unconstitutionality. The Court said that the difference between a lease and a financed purchase depends on the actual intent of the parties. The Court, in considering when a lease is, in fact, a conditional sales contract, relied on a test established in a federal revenue ruling as follows:

> "It would appear that in the absence of compelling persuasive factors of contrary implication an intent warranting treatment of a transaction for tax purposes as a purchase and sale rather than as a lease or rental agreement may in general be said to exist if, for example, one or more of the following conditions are present:
>
> (b) the lessee will require title upon the payment of a stated amount of 'rentals' which under the contract he is required to make.
>
> (e) the property may be acquired under a purchase option at a price which is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when compared with the total paymentsre required to be made." 554 P.2d at 135.

Applying this test, the Court concluded that there was no genuine lease involved, and found that the State was simply retiring an obligation incurred on its behalf. In short, the Court concluded that the Oregon Building Authority performed no functions other than that of a mere financing vehicle and existed as a legal fiction to avoid the Constitution. Similar approaches have been taken in other jurisdictions. See, for example, *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Association*, 408 P.2d 818 (Ariz. 1965).

An analysis of the Oregon case has been provided by bond counsel for the Authority by letter dated November 12, 1976. Due to the significance of this interpretation, and its applicability to the questions presented, the letter is being attached as an addendum to this opinion. As bond counsel points out, the present state of Idaho law is different from the situation addressed by the Oregon Supreme Court concerning the Authority there. For one thing, the Idaho Building Authority apparently has no claim to any State money beyond the payment of rentals under a lease. Additionally, rentals are limited to amounts obtained from yearly appropriations, and the lease is designated as one from year to year. Bond counsel underscores the fact that the relationship between the Building Authority and the State of Idaho was intended to be that of a lessor-lessee. This was done, he says, to insure constitutionality. Bond counsel's summary in the November 12, 1976 letter is directly pertinent here:

> "In addition to the year-to-year feature discussed above, other provisions were specifically included in this lease to insure its being characterized as a true lease rather than an installment purchase contract. The amount of rentals have been specifically the state and the authority as representing the 'fair rental value' of the lease property and the obligation of the state to pay rentals is not unconditional. In addition, there is no provision in the lease for the vesting of the leased property in the state at such time as the authority's bonds are paid nor is there any provision in the lease granting the state the option to

> purchase the property. It is therefore clear from the lease that the authority and the state of Idaho intended a true lease rather than an installment purchase contract."

Obviously, the finding that a true lessor-leasee arrangement existed between the Building Authority and the State of Idaho weighed heavily in bond counsel's earlier conclusions that the arrangement was constitutional. We agree. Guaranteeing future ownership of the buildings in the State of Idaho would result in a lease-purchase or lease-option purchase, and would hinder the arms length dealing contemplated by bond counsel from the inception. In addition, such a guarantee would definitely take away some of the autonomy maintained by the Authority, and could well be taken by the Court as an indication that the Authority is really a legal fiction designed to circumvent the debt limitation ceiling in the Idaho Constitution. Although the Idaho Supreme Court has not specifically ruled, we feel that the analysis in the case striking down the Oregon Building Authority and the summary presented by bond counsel suggest a strong likelihood that a lease-purchase or lease-option purchase would be viewed with disapproval by the Supreme Court. Therefore we must discourage any statutory amendment or language in a lease which would permit this result.

In summary, we believe that the concept through which the Authority exists as a quasi-state agency has been sanctioned by the Idaho Supreme Court. However, in order to maintain this status it is necessary for the Authority to maintain sufficient autonomy to be considered an "independent public body corporate and politic". Determination of this question necessitates a review of the facts. Any facts suggesting that the Idaho Building Authority is really an arm of the State or that it was created simply as a fiction to avoid the debt limitation ceiling reflects unfavorably upon its constitutionality. We believe that guaranteed future ownership of the buildings erodes the independent nature of the Authority and should be avoided.

AUTHORITIES CONSIDERED:

1. Article VIII, §§ 1 and 2, *Idaho Constitution.*

2. Section 67-6401, *et seq., Idaho Code.*

3. *State ex rel Williams v. Musgrave*, 84 Idaho 77 (1962).

4. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 488 (1975).

5. *In the Matter of the Constitutionality of Chapter 280, Oregon Laws 1975, Martin v. Oregon Building Authority*, 554 P.2d 126 (Oregon 1976).

6. *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Association*, 408 P.2d 818.

DATED this 27th day of July, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Chief Deputy Attorney General

ADDENDUM TO ATTORNEY GENERAL OPINION NO. 77-49

Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, N.Y. 10005
212/422-6767

November 12, 1976

Idaho State Building Authority
c/o W. Anthony Park, Esq.
Park & Meuleman
P.O. Box 2762
Boise, Idaho 83701

Dear Sirs:

We have reviewed the recent Oregon Supreme Court decision entitled "In the Matter of the Constitutionality of Chapter 280, Oregon Laws 1975" in which the Oregon Building Authority Act was held unconstitutional.

In our opinion, this case has no effect on the legality of the Idaho State Building Authority, its lease with the State, the notes presently outstanding or its financing program and will have no effect on the validity of its bonds. Our opinion is based on the following clear distinctions between the holding of the Oregon Supreme Court and the legal basis and proposed financing for the Idaho State Building Authority:

1. The Oregon court "pierced the corporate veil" of the Oregon Building Authority to hold that it was not a separate and distinct entity from the State. This was based in part on the fact that the Authority performed no functions other than that of a mere financing vehicle. The Idaho Building Authority, however, performs functions other than mere financing. It acquires land for its projects, hires architects to design its projects, lets its own construction contracts and will be responsible for construction of its projects.

2. In piercing the corporate veil, the Oregon Court also held that the debts of the Authority were really the debts of the State. This holding was based on the fact that the leases between the Authority and the State were for a 20 year period,

without a right of earlier termination, and that rental payments were not subject to yearly appropriation but were full faith and credit obligations of the State. The court felt, therefor, that the State's role went beyond mere leasing; it was retiring an obligation, incurred on its behalf, which it was obligated to pay through its "lease rental" payments. In the case of the Idaho Building Authority, however, the relationship between it and the State is quite different. The Authority has no claim to any State money beyond the rentals payable under the lease with the State, which rentals are specifically limited to amounts available therefor from yearly appropriations by the legislature. In addition, the lease is a year to year lease which is renewed each year if and only if the State legislature makes an appropriation for the next year's rent. This lease, therefore, does not create any present obligation of the State to make any payment of lease rentals in any future year and hence does not create the type of obligation found objectionable by the Oregon court. The obligations of the Idaho Building Authority on its bonds are therefore not the obligations of the State of Idaho. Great care was taken in drawing the lease between the Building Authority and the State to insure this result as we were well aware that a long term lease, in which the State of Idaho would be presently obligated to make rental payments beyond the present year, would be subject to the same attack as presented in the Oregon case.

3. The Oregon court also held that, even if the Oregon Building Authority were an entity separate and apart from the State, the Leases between it and the State of Oregon constituted a type of indebtedness of the State not contained within the Oregon constitutional exception for long term leases. The court found that this exception, which permits the State of Oregon to enter into long-term leases not exceeding 20 years, contemplated true leases and not installment-purchase transactions. The court concluded that the intent of the parties was to enter into an installment purchase transaction. The court's conclusion as to intent was based upon the fact that at the conclusion of the lease term, the property reverted to the State for a nominal consideration, the rents payable during the lease term were geared to the debt service on the Authority's bonds and not the use or market value of the property, and, assuming the premises were available for occupancy, the State was unconditionally obligated to pay rent notwithstanding any acts of the Authority. This, again, is quite different from the nature of the lease between the Idaho Building Authority and the State of Idaho. In addition to the year-to-year feature discussed above, other provisions were specifically included in this lease to insure its being characterized as a true lease rather than an installment purchase contract. The amount of rentals have been specifically found by the State and the Authority as representing the "fair rental value" of the leased property and the obligation of the State to pay rentals is not unconditional. In addition, there is no provision in the lease for the vesting of the leased property in the State at such time as the Authority's bonds are paid nor is there any provision in the lease granting the State the option to purchase the property. It is therefore clear from the lease that the Authority and the State of Idaho intended a true lease rather than an installment purchase contract.

I hope this letter will have answered any questions the Oregon case may have raised. If I may be of any further assistance, please do not hesitate to let me know.

Very truly yours,

ROBERT E. FERDON

ATTORNEY GENERAL OPINION NO. 77-50

TO: J. L. "Mike" Clark
Ada County Assessor
Ada County Courthouse
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

You have written us a number of letters in relation to the Ada County revaluation as required by the Idaho Tax Commission. You state that you believe the County Board of Equalization only has the power to review protests properly made and that they cannot review all valuations while they sit. Thus you are asking us if the County Commissioners when they sit as a County Board of Equalization can review all valuations in the County or only those protested.

You also presented a question relating to the properiety of the County Commissioners' policy statement of June 30, 1977, as to whether they were usurping your duties, whether they could create a new separate office and as to the use of funds. Since that time the Board of County Commissioners has amended its statement of policy in such a way as to delete all of these issues. We believe these questions have become moot and are not now issues. Thus, it would appear that there is no reason to answer them. If they again become issues you may at that time wish to ask the Prosecuting Attorney of Ada County about them, or possibly this office.

CONCLUSION:

The County Board of Equalization has a constitutional duty to review and equalize *all* property assessments within the County and it does not lose this jurisdiction until it turns the tax rolls over to the County Clerk and Auditor.

ANALYSIS:

Important in this matter and determinative of it is an Idaho case. A quotation from *McGoldrick Lumber Co. v. Benewah Co.*, 54 Idaho 704, 35 P.2d 659, is as follows:

* * *

> [4] Section 61-402, I.C.A., requires the county board of equalization, to equalize all assessments within the county, on a full cash value basis and section 61-406, I.C.A., limits them to such equalizing function. In other words, the county boards are to determine whether the assessments have been made on a full cash value and whether all such assessments have been made on an equal basis throughout the county, and if so they are correct. If any of the property has been assessed too high or too low as compared with other assessments and its assessment is above or below the full cash value it must be increased or decreased by the board, as the case may be, to bring it in line with other property. If all of the property has been assessed above or below its full cash value, it must all be increased or decreased accordingly.
>
> [5] The county board of equalization has potentially before it all the property in the county for equalization purposes (sec. 61-322, I.C.A.; 61 C.J. 849, n.67); . . .

* * *

Art. 7, § 12, *Idaho Constitution*, provides in part that the State Tax Commission has "the supervision and coordination of the work of the several county boards of equalization and that the board of county commissioners of the several counties of the state, shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county, under such rules and regulations of the State Tax Commission as shall be prescribed by law."

The County Board of Equalization has a constitutional duty as spelled out above and by case law above cited to review and equalize *all* property assessments within the County and it does not lose this jurisdiction until it turns the tax rolls over to the County Clerk and Auditor. *In re Felton's Petition*, 79 Idaho 225, 316 P.2d 1064.

AUTHORITIES CONSIDERED:

1. *McGoldrick Lumber Co. v. Benewah Co.*, 54 Idaho 704, 35 P.2d 659.
2. *In re Felton's Petition*, 79 Idaho 225, 316 P.2d 1064.
3. *Idaho Constitution*, Art 7, § 12.

DATED this 2nd day of August, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-51

TO: Mr. Bill Webster
Superintendent
Idaho State Liquor Dispensary
Statehouse Mail

Per Request for Attorney General Opinion.

The following Attorney General's Opinion is in response to your letter of 11 May, 1977 concerning the disposition of idle fund revenues of the Idaho State Liquor Dispensary.

QUESTION PRESENTED:

Is the Idaho State Liquor Dispensary entitled to interest earned from idle funds held by the State Treasurer in connection with state liquor dispensary funds held by the State Treasurer?

CONCLUSION:

Yes, the Idaho State Liquor Dispensary is entitled to interest earned on idle funds held by the State Treasurer's office for the State Liquor Dispensary.

ANALYSIS:

Idaho Code § 67-1210 outlines the duties of the State Treasurer in investing idle moneys of the state government. That Code section specifically states:

> It shall be the duty of the state treasurer to invest idle funds in the state treasury, other than moneys in public endowment funds, in any of the following:
>
> * * *
>
> The interest received on all such investments, *unless specifically required by law, shall be paid into the general fund* of the state of Idaho. (Emphasis added).

The above-cited Code section further defines "idle moneys" to mean the "balance of cash and other evidences of indebtedness which are accepted by

banks as cash in the ordinary course of business, in demand deposit accounts, after taking into consideration all deposits and withdrawals, on a daily basis."

In 1975, the Idaho legislature provided that the provisions of the above-cited section, defining idle funds and specifying their use, should apply to the interest from all surplus and idle funds received from investments by the State Treasurer on or after March 29, 1974. (Idaho Session Laws, Chapter 2, Section 2, 1975).

Idaho Code § 23-401 created the Idaho Liquor Fund. This Code section makes the State Treasurer the custodian for the Liquor Fund and specifies what moneys are to be the property of such funds.

> All moneys, property, buildings, plants, apparatus, real estate, securities acquired by or through the moneys belonging to the liquor fund, *including interest earned thereon, shall be the property of the liquor fund.* (Emphasis added).

From an analysis of the two above-mentioned Code sections, it appears the italicized portions of *Idaho Code* § 23-401 specifically exempts the State Treasurer from applying interest earned on state liquor depository funds to the State General Fund. Since *Idaho Code* § 67-1210 specifically contemplates the exclusion of such specifically earmarked funds from the general fund, it is my opinion that the State Liquor Dispensary is entitled to the interest earned from such idle funds.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 23-401, 67-1210.

DATED this 18th day of August, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-52

TO: Michael B. Kennedy
Prosecuting Attorney
Madison County Courthouse
Rexburg, Idaho 83340

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Is a county ambulance service legally bound to release to a news media the names, addresses, and provisional diagnosis and/or medical condition of the people it attends to on medical emergencies and/or circumstances?

CONCLUSION:

A county ambulance service is *not* legally bound to release to a news media the names, addresses, and provisional diagnosis and/or medial condition of the people it attends to on medical emergencies and/or circumstances. This is because data taken from ambulance patrons is not considered "public records" or "public writings" within the meaning of the *Idaho Code.*

ANALYSIS:

The question at hand presents an interesting legal problem which, in its most reduced form, presents the classic confrontation of "an individual's right to privacy versus the public's right to know."

The two primary *Idaho Code* sections in the area of public disclosure of public documents are I.C. § 9-301 and I.C. § 59-1009.

I.C. § 9-301 states: "Public writings — Right to inspect and take copy. — Every citizen has a right to inspect and take a copy of any public writing of the state, except as otherwise expressly prohibited by statute."

I.C. § 59-1009 reads:

> Official records open to inspection — 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.

Since there is little or no case law or legislative pronouncements clearly defining what is intended by these two *Code* sections, a detailed analysis of this area of law is needed. The threshold question is determining whether the material, recorded by the county ambulance service in connection with the entry of patients, is the type of material which would constitute "public record and/or public writings."

I.C. § 9-311 divides public writings into four classes: (1) laws, (2) judicial

records, (3) other official documents, and (4) public records kept in this state of private writings. Laws and judicial records are clearly inapplicable. The term "private writings" as used in I.C. § 9-311(4) is nowhere defined in the *Idaho Code*. From a reading of Chapters 3 and 4, Title 9, *Idaho Code*, one gets the impression that "private writings" are writings made by a lay person as opposed to writings made by state officials acting in the capacity of state officials. Since the forms involved are filled out by ambulance personnel, I.C. § 9-311(4) also is not applicable. "Other official documents" are "private writings" and become public records if such writings are required by statute to be made and are of such a nature as can be retained by the State as official memoranda. Case law from other jurisdictions supports this definition of public record. *State v. Brantley*, 211 P.2d 668 Or. (1954); *Emmertson v. State Tax Commission of Utah*, 72 P.2d 467 Utah ( ). On the other hand, every memorandum made by a public officer is not a public record. *Steiner v. McMillan*, 195 P. 836 Mont. ( ).

Previous Attorney General's Opinions have touched on the area of disclosure of public records. An opinion based upon the above-cited Code sections stated that information contained on public assessor roles is information that can be classified as part of the "public record" and thus must be made available to the public. This opinion, issued on January 6, 1972, can be distinguished from the present question because the county tax assessor was specifically required by law to record the information in question. I.C. § 63-307; I.C. § 63-308.

The other opinion, issued on December 30, 1971, suggests a "balancing of interest test" by which agencies of government are to determine, on a case-by-case basis, what constitutes a public record. This opinion cites cases from a California statute identical to I.C. § 59-109 holding that preliminary matters recorded by public officers do not constitute a public record. *Coldwell v. Board of Public Works*, 202 P. 897 Cal. (1921). The opinion also cites a broader approach adopted by the State of Oregon in *MacEwan v. Holm*, 359 P.2d 413 Or. (1961). This well-reasoned case rejects the distinction between "ultimate and preliminary data" and bases the disclosability of information upon a more modern "balancing of interest" approach. In balancing the interest referred to, the Oregon case cited above states that the scales in play must reflect the fundamental right of a citizen to have access to the public records as compared with the incidental right of the agency to be free from unreasonable interference.

Any well reasoned opinion attempting to define "public records" under the "balancing of interest" approach must also consider the rights of privacy of the person supplying the state with information. The *Idaho Code* specifically authorizes non-disclosure of certain information by means of confidential communication statutes. I.C. § 9-203 provides that physicians cannot be compelled to testify concerning information received from patients. This Code section further states that public officers cannot be examined as to communications made to them in official conference when the public interest will suffer by disclosure. The establishment of a privileged relationship applies only to witnesses testifying in court. The situation at hand is somewhat different, because public medical personnel are requested to disclose information to the press.

The policy behind the granting of privileged communication relations is, however, identical to the policy behind privileged communications in civil court actions. This policy is that one will be more open in disclosures to medical officials and public officials if that person realizes such information will not be generally disclosed to the public. If the "balancing of interests" test is applied to the fact situation at hand to determine what writings are "public records," it is my opinion that in this situation the right of privacy of the injured persons outweighs any right to know which the public may claim. This is because the public does not have a justifying reason to discover personal data of a sensitive nature when such information involves medical-ambulance records of private citizens.

Secondly, rules and regulations of the Idaho Emergency Medical Services Act, as authorized by I.C. § 39-145, direct that ambulance service records include the following information:

(a) Name of ambulance service;

(b) Date of run;

(c) Time call received;

(d) Time arrival at scene;

(e) Time arrival at hospital;

(f) Location of incident;

(g) Description of illness/injury;

(h) Description of patient management;

(i) Patient destination;

(j) Ambulance unit identification;

(k) Identification of ambulance personnel on run and certification.

Nowhere in the above listed information requirements is there a requirement to keep records of the name of the party the ambulance served. Furthermore, the Idaho Emergency Medical Services Department states the intent and purpose for supplying such information is purely statistical. Because naming the person receiving ambulance services is not required, it cannot be said that information received from persons being rendered ambulance service is information for the public record. On the contrary, on forms provided ambulance companies to establish rescue records, information concerning the patient's name, address and other information together with the names of rescuers and other relevant data is not provided to the State of Idaho. Because such information is not a part of the record required to be kept by ambulance service companies, such information does not constitute public writings or public records and therefor is not required to be disclosed as a public writing or public record.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 9-203, 9-301, 9-311, 39-145, 59-1009, 63-307, 63-308.
2. Attorney General Opinions dated December 30, 1971 and January 6, 1972.
3. *State v. Brantley*, 211 P.2d 668 Or. (1954).
4. *Emmertson v. State Tax Commission of Utah*, 72 P.2d 467 Utah ( ).
5. *Steiner v. McMillan*, 195 P. 836 Mont. ( ).
6. *Coldwell v. Board of Public Works*, 202 P. 897 Cal. (1921).
7. *MacEwan v. Holm*, 359 P.2d 413 Or. (1961).

DATED this 24th day of August, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-53

TO: Pete T. Cenarrusa
Secretary of State
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Is a mutual savings bank a for-profit corporation?

2. If so, what basis is to be used for computing the annual license tax, which under § 63-603, *Idaho Code*, is based on the authorized capital stock?

CONCLUSIONS:

1. A mutual savings bank is a for-profit corporation within the meaning of § 63-602.

amounts as may have been transferred from surplus upon the allotment of stock dividends in shares having no par value.

The problem of course is that a "mutual bank", such as those incorporated under the laws of the State of Washington which have prompted your request, do not issue and are not authorized to issue any capital stock. The Revised Code of Washington § 32.04.010 et seq. relate to the formation and operation of "mutual savings banks". Under that statutory system each depositor has an interest in the bank and is entitled to participate in distribution of earnings in the form of dividends. But the savings deposit can not be considered to be value given in exchange for capital stock. Nevertheless, § 30-603 clearly and unambiguously provides that the measure of the license fee shall be the amount of capital stock the corporation is authorized to issue. There appears to be no provision in the statute justifying the use of a different measure of the fee. Accordingly, the language of this section must be read literally and applied to the mutual banks which do business within the state.

As quoted above § 30-603 provides that the amount of tax shall be $20.00 "when the authorized capital stock does not exceed $5,000". If a corporation is not authorized to issue capital stock then its authorization does not exceed $5,000. It follows that the annual license fee is $20.00.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 30-603.
2. *Idaho Code*, Section 30-602
3. *Idaho Code*, Section 30-101
4. Internal Revenue Code, Section 501.
5. Revised Code of Washington, Section 32.04.010.

DATED this 29th day of August, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

2. A mutual savings bank, by definition, has no authorized capital stock and therefore is authorized capital stock does not exceed $5,000. Accordingly, its annual license fee under § 63-603 is $20.

ANALYSIS:

Section 30-602 requires that any corporation doing buisness in Idaho must pay an annual license tax to the Secretary of State unless it is one of the corporations specifically exempted by that section. One of the exemptions listed therein is:

> . . . [A]ssociations, and all other corporations which are not organized for pecuniary profit, Providing [sic] that such corporation which is not organized for pecuniary profit shall exhibit as evidence thereof a letter of [or] certificate of exemption from federal income taxes under the Internal Revenue Code, § 501, sub-section (c), paragraphs (3), (4), (6), (7) and (8) . . .

An examination of § 501 of the Internal Revenue Code and specifically the sub-sections and paragraphs referred to reveal none which can be construed to include a mutual savings bank. These sub-sections deal generally with organizations engaged in charitable, scientific, literary, religious, and recreational purposes not producing income for the organization or for any of its private shareholders. In any event it is clear under § 30-602 that as a condition precedent to qualifying for the exemption the organization must present the Secretary of State with documentation that the Internal Revenue Service has granted an exempt status to the organization for federal income tax purposes. We assume that no mutual savings bank has or can present such documentation. It must therefore be considered to be an organization which is organized for pecuniary profit.

The amount of the annual license tax must be computed in accordance with the schedule contained in § 30-603, *Idaho Code*. That schedule provides for graduated fee the amount of which depends upon the amount of capital stock the corporation is authorized to issue. The license fee ranges from a low of $20.00 "when the authorized capital stock does not exceed $5,000" to a high of $300.00 "when the authorized capital stock exceeds $2,000,000". The term "capital stock" is defined in § 30-101(10):

> 10. The "capital stock" of a corporation at any time is:
>
> a. The aggregate amount of the par value of all allotted shares having a par value, including such shares allotted as stock dividends; and,
>
> b. The aggregate of the cash, and the value of any consideration other than cash, determined as provided in this act, agreed to be given or rendered as payment other than paid in surplus, for all allotted shares having no par value, plus such

ATTORNEY GENERAL OPINION NO. 77-54

TO: The Honorable Monroe C. Gollaher
Director of the Department of Insurance
Department of Insurance
State Office Building
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

(1) Is an insurer transacting "credit disability insurance" as defined in *Idaho Code* § 41-2304(2) prohibited from including policy provisions to cover the debtor's obligation to his creditor for inability to pay his debt because of loss of earnings due to *involuntary* loss of employment?

(2) Is an insurer transacting "credit disability insurance" as defined in *Idaho Code* § 41-2304(2) prohibited from including policy provisions to cover the debtor's obligation to his creditor for inabiity to pay his debt because of loss of earnings due to *voluntary* loss of employment?

CONCLUSION:

An insurer transacting "credit disability insurance" as defined in *Idaho Code* § 41-2304(2) may not include policy provisions to cover the debtor's obligation to his creditor other than for disabilities resulting from accident or accidental means or from sickness or appertaining thereto. This excludes insurance for loss of employment not arising through accident, accidental means, or sickness.

ANALYSIS:

In your opinion request, you referred us to *Idaho Insurance Code* § 41-503 and also to § 28-34-103 of the Uniform Consumer Credit Code (UCCC), including the Comments to the Official Text of the National Conference of Commissioners on Uniform State Laws.

We observe that § 28-34-103 of the UCCC provides the following definitions:

> "28-34-203. Definitions — 'Consumer credit insurance' — 'Credit Insurance Act' — In this act 'consumer credit insurance' means insurance, other than insurance on property, by which the satisfaction of debt in whole or in part is a benefit provided, but does not include
>
> > (a) insurance provided in relation to a credit transaction in which a payment is scheduled more than 10 years after the extension of credit;
> >
> > (b) insurance issued as an isolated transaction on the part

of the insurer not related to an agreement or plan for insuring debtors of the creditor; or

(c) insurance indemnifying the creditor against loss due to the debtor's default.

(2) *'Credit Insurance Act'* means title 41, chapter 23, Idaho Code."
(Emphasis added.)

The scope of the UCCC in relationship to the "Credit Insurance Act" (Title 41, Chapter 23, *Idaho Code*) is set out as follows:

"28-34-102. *Scope — Relationship to Credit Insurance Act — Applicability to Parties.* — (1) Except as provided in subsection (2), this chapter applies to insurance provided or to be provided in relation to a consumer credit sale (section 28-34-104), a consumer lease (section 28-32-106) or a consumer loan (section 28-33-104).

(2) . . .

(3) *This chapter supplements and does not repeal the Credit Insurance Act (title 41, chapter 23, Idaho Code).* The provisions of this act concerning administrative controls, liabilities, and penalties do not apply to persons acting as insurers, as defined by title 41, Idaho Code, or the rules and regulations prescribed by the director of the department of insurance."
(Emphasis added.)
Idaho Code § 28-34-102

The comments to the official text of the UCCC Code were inserted in the *Idaho Code* to accompany the corresponding sections of the UCCC through the courtesy of the National Conference of Commissioners on Uniform State Laws. The official comment to *Idaho Code* § 28-34-103, Definitions — "Consumer Credit Insurance" — "Credit Insurance Act" — provides in pertinent part as follows:

"2. The usual forms of consumer credit insurance provide benefits conditioned on the death or disability of the debtor, the contracts being described as credit life insurance and credit accident and health insurance. The insured event might also be a loss of earnings in other ways, as by loss of employment."

The foregoing comment to the official text of the UCCC by the National Conference of Commissioners on Uniform State Laws is entitled to serious consideration, and is of considerable persuasive power, but is not controlling. We assume that the legislators considered the Comments to the Official Text to the UCCC, but just what consideration was given to the Comments to that portion of the UCCC comprising *Idaho Code* § 28-34-103 prior to the enactment of the UCCC is unknown. The Idaho legislature in 1971 obviously enacted the Uniform Consumer Credit Code rather than the Comments to the

Official Text. In any event as *Idaho Code* § 28-34-102(3) indicates, it appears that the UCCC chapter relating to insurance was intended merely to supplement, and not in any manner to repeal the "Credit Insurance Act". We must, therefore, look to the "Credit Insurance Act" as found in the Idaho Insurance Code *(Idaho Code*, Title 41, Chapter 23) to determine the scope of the insurance coverage which may be transacted under that act.

The short title for *Idaho Code*, Title 41, Chapter 23, is "the model law for the regulation of credit life insurance and credit disability insurance". (*Idaho Code* § 41-2302.) The purpose of this chapter is to promote the public welfare by regulating credit life insurance and credit disability insurance . . . *Idaho Code* § 41-2302. The text of the "model law for the regulation of credit life insurance and credit disability insurance" was enacted in 1961 by the Idaho legislature in the "Idaho Insurance Code" (*Idaho Code,* Title 41, *Idaho Sessions Laws,* 1961, Chapter 330 § 536-551). The text of the act as enacted by the Idaho legislature appears to be essentially the text proposed by the Credit Life and Credit Accident and Health Model Bill Legislation Subcommittee of the National Association of Insurance Commissioners on November 30, 1959, as reported in the "1960 Proceedings of the National Association of Insurance Commissioners", Volume I, pp. 180-186. The language of the act as found in the Idaho Insurance Code (except as amended subsequent to 1961) closely parallels the language proposed by the National Association of Insurance Commissioners subcommittee in 1959. However, one distinction between the "model law for the regulation of credit disability insurance" as enacted by the Idaho legislature in 1961 and the "Model Act for the Regulation of Credit Life Insurance and Credit Accident and health Insurance" as proposed by the NAIC subcommittee in 1959 is the substitution by the Idaho legislature of the term "disability" in lieu of the term "health and accident". As we take an overview of the Idaho Insurance Code, however, we observe that as the general rule the term "disability" is consistently employed in lieu of the term "health and accident". We find this to be the case in *Idaho Code,* Title 41, Chapter 20, relating to "disability insurance policies" and again in *Idaho Code,* Title 41, Chapter 22, relating to "group and blanket disability policies". We again find the term "disability" used in Section 41-312 of the *Idaho Code* which prevents a life insurer from writing kinds of insurance other than life and disability, such as property, casualty, marine and transportation, surety or title insurance.

> "*Combinations of insuring powers — One insurer.* — an insurer which otherwise qualifies therefor may be authorized to transact any one kind or combination of kinds of insurance as defined in chapter 5 of this code, except:
>
> (1) A life insurer may grant annuities and may be authorized to transact in addition *only disability* insurance; except that the commissioner (director) shall, if the insurer otherwise qualifies therefor, continue so to authorize any life insurer which immediately prior to the effective date of this code was lawfully authorized to transact in this state a kind or kinds of insurance in addition to life, and disability insurances and annuity business.

(2) . . .

(3) . . ." (Emphasis added.)
Idaho Code § 41-312

The use of the term "disability" in lieu of the term "health and accident" appears to be common to many of our sister states as well as to the State of Idaho. Many of the insurance regulatory statutes of the states we have examined use the term "disability insurance" rather than "accident and health insurance", or "accident and sickness insurance" or "health insurance" in establishing their classes or kinds of insurance, and in defining their credit disability insurance. Yet, we note that the definitions of insurance of the various states by and large closely parallel Idaho's definition of "disability insurance" and "credit disability insurance". In fact, it appears that the terms "disability", "accident and health", "accident and sickness" and "health" are interchangeable when applied to insurance classifications or definitions and mean effectively the same thing. We are of the opinion that it was the intent of the legislature that the term "disability" as defined in *Idaho Code* § 41-503 be used throughout the Idaho Insurance Code in lieu of the term "health and accident" so as to be consistent with the definition given in § 41-503, *Idaho Code.*

> "*'Disability insurance' defined.* — 'Disability insurance' is insurance of human beings against bodily injury, disablement, or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting from sickness, and every insurance appertaining thereto. Disability insurance does not include workmen's compensation coverages." *Idaho Code* § 41-503

The term "credit disability insurance" is defined for purposes of Idaho Insurance Code, Title 41, Chapter 23, as follows:

> "'Credit disability insurance' means insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction while the debtor is *disabled as defined in the policy.*" (Emphasis added.) *Idaho Code* § 41-2304(2)

> Note: the foregoing definition is the same as the definition for "Credit Accident and Health Insurance" found in the "Model Act for the Regulation of Credit Life Insurance and Credit Accident Insurance" proposed by the NAIC in 1959.

We do not construe the phrase "disabled as defined in the policy" (*Idaho Code* § 41-2304(2)(supra)) to mean that the term "disabled" can acquire whatever definition a credit disability insurance policy assigns to it, including loss of earnings through loss of employment arising out of causes unrelated to accident

or sickness. Although *Idaho Code* § 41-2301 declares that the provisions of the chapter regulating "the model law for the regulation of credit life insurance and credit disability insurance" are to be "liberally construed", we do not believe that the term "disabled" can be construed to mean whatever the policy defines it to mean if such a definition exceeds the scope of "disability insurance" as defined in *Idaho Code* § 41-503(supra).

The Idaho Supreme Court has on several occasions indicated that statutes dealing with the same subject matter are *in para materia* and should be construed together and reconciled whenever possible.

> "Secs. 542, 551 and 573 were thus re-enacted by the same session of the legislature and are *in para materia.* They should be construed together and reconciled if possible." *State v. Dunbar*, 39 Idaho 691, 697-98, 230, P.33 (1924)
>
> and
>
> ". . . it is the duty of the court, if it is possible to do so, to so construe these acts as to carry out the will of the legislature, and if possible harmonize these statutory provisions so that both may stand." *Archenbach v. Kincaid*, 25 Idaho 768, 775, 140 P.000 (1925)

The foregoing rule is particularly applicable when statutes are passed at the same session of the legislature, especially statutes passed on the same day, and dealing with the same subject matter.

> ". . . These two acts, however, were passed upon the same day, and relate to the same subject matter; hence, they are according to a well-settled rule of interpretation, to be read together, as parts of the same act." *Chandler v. Lee*, 1 Idaho 349, 350-351 (1870)
>
> "Two statutes passed on the same day and relating to the same subject matter are to be read together as if they were part of the same act." (Citing authorities) *State v. Casselman*, 69 Idaho 237, 239, 205 P.2d 1131 (1949)

It would seem that the foregoing rules would be all the more compelling when we observe, as in the instant case, that *Idaho Code* §§ 41-503 and 41-2304 not only deal with the same subject matter, i.e. disability insurance, and were enacted on the same day, but that in fact they were included together in the same act. (H.B. No. 182; *Idaho Session Laws,* 1961, Chapter 300, pp. 696 and 910).

We observe that *Idaho Code* § 41-503 defines "disability insurance" in essentially two parts as:

> (A) insurance of human beings against bodily injury,

> disablement, or death (1) *by accident*; or (2) *by accidental means*, or the expense thereof, and;
>
> (B) insurance against disablement or expense *resulting from sickness*, and every insurance appertaining thereto."

The first would ordinarily be considered "accident" insurance, whereas the second is generally considered as "health" or "sickness" insurance.

Couch, George J., LL.B., *Couch, Cyclopedia of Insurance Law, 2nd Ed. by* Ronald A. Anderson, Vol. 10, § 41:799, pp. 630 and 631, distinguishes between accident insurance and health insurance as follows:

> "Distinguishing between health or sickness benefit and accident insurance, it has been declared that the latter applies to cases of disability which are the natural and ordinary results of external physical injury due to accident, whereas sickness benefit insurance applies to all cases of disability which are the natural and ordinary results of disease arising from a pathological condition." *Couch, Cyclopedia of Insurance Law*, Vol. 10, pp. 630, 631 (supra)

We also observe that "accident" insurance (Part A) is defined as insurance of human beings against bodily injury, disablement, or death (1) *by accident, or* (2) *by accidental means* (supra). Regarding the distinction between the terms "by accident" and "by accidental means", *Couch, Cyclopedia of Insurance Law*, reports:

> "In most jurisidictions a distinction is made between accidental injury or death and injury or death by accidental means — that is between 'accident' or 'accidental result' and 'accidental means'. By this view where the death is not designed and not anticipated by the deceased, though it is in consequence of some act voluntarily done by him, it is accidental death; but where death is caused by some act of the deceased not designed by him or not intentionally done by him, it is death by accidental means. In other words, accidental death is an unintended and undesigned result arising from acts voluntarily done, whereas death by accidental means is a result arising from acts unintentionally done, or events undesignedly occurring.
>
> The term 'accidental means' refers to the occurrence or happening which produces the result, rather than the result, it is concerned with the cause of the harm rather than the character of the harm."

but that

> "In an increasing number of jurisdictions, the distinction between the term 'accidental means' and the terms 'accident',

> 'accidental results', 'accidental injury', 'accidental death', and the like, has been rejected or repudiated, and the terms are regarded as legally synonymous." COUCH, George J. LL.B., *Couch, Cyclopedia of Insurance Law*, 2nd Ed. by Ronald A. Anderson, Vol. 10 §§ 41-28 and 41-30, pp. 47-50 and 53.

The Idaho Supreme Court rejected the proposition that there was a distinction between "accident" and "accidental means" in *Rowert v. Loyal Protective Insurance Co.*, 61 Idaho 677, 106 P.2d 1015, 1018 (1940), and again in *O'Neil v. New York Life Insurance Co.*, 152 P.2d 707, 709 (1944), but regardless of whether the State of Idaho would find itself with the majority or the minority of her sister states on the issue of whether accident or accidental means are distinctive or synonymous, it is in any event apparent from the foregoing discussion that the term "disability insurance" as defined in *Idaho Code* § 41-503 was intended to provide insurance coverage for loss to the individual arising from loss due to accident, accidental means, or sickness.

Another means in determining whether the term "credit disability insurance" as defined in § 41-2304, *Idaho Code*, can be construed to include voluntary or involuntary loss of employment as a disability is use of the statutory rule of construction given in *Idaho Code* § 73-113.

> "*Construction of words and phrases.* — Words and phrases are construed according to the context and approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law or are defined, in the succeeding section are to be construed according to such peculiar and appropriate meaning or definition." *Idaho Code* § 73-113.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, (Unabridged) 1967, indicates that it is an "archaic" use of the word "disability" to define it as an "inability" to do something. Webster defines "disability" as "the condition of being disabled; deprivation or lack esp. of physical, intellectual, or emotional capacity or fitness;" and "the inability to pursue an occupation or perform services for wages because of physical or mental impairment", and again as "a physical or mental illness, injury or condition that incapacitates in any way". WEBSTER'S (supra) also defines "disability insurance" as "insurance against loss of income due to partial or total disability — compare ACCIDENT INSURANCE, HEALTH INSURANCE". We find that accident insurance is defined by WEBSTER's (supra) as "insurance against loss through accidental bodily injury to the insured —", and "health insurance" as "insurance against loss through illness of the insured". DAVIDS, Lewis E. *Dictionary of Insurance*, 1962 p. 68 defines "disability insurance" as "coverage which generally provides non-occupational weekly benefits payable to employees for accident or sickness not within the scope of workmen's compensation laws".

In 1963, the National Association of Insurance Commissioners Committee on Insurance Covering Installment Sales and Loans authorized a questionnaire to

be sent to insurance companies in connection with a study of a subcommittee to study credit life insurance and health insurance experience in which "Credit Accident and Health insurance" was defined as "that form of insurance under which a borrower of money or purchaser of goods is indemnified in connection with a specific loan or credit transaction against loss of time resulting from *accident or sickness*". (Emphasis added.) "1963 Proceedings of the National Association of Insurance Commissioners", Vol. II, p. 588.

The foregoing dictionary definitions of the terms "disability" and "disability insurance", and example of the usage of the term by the National Association of Insurance Commissioners are persuasive. It appears that the common usage of the term "disability" denotes a physical, intellectual, or emotional incapacity, and that use of the term by the regulators of the insurance industry indicates incapacity resulting from accident or sickness. As the Supreme Court of California held in 1942:

> "Disability insurance is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of the capacity to earn his living. (Citing authorities) *It does not insure against loss of income.*" (Emphasis added.) *Erreca v. Western States Life Insurance Co.*, 121 P.2d 689, 695 (1942)

The Idaho Supreme Court has stated:

> "Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them." *State v. Omaecherviaria*, 27 Idaho 797, 804, 152 P.280 (1915) (See also *Adams v. Lansdon*, 18 Idaho 483, 510, 110 P.280 (1910)).

We conclude that the ordinary and commonly understood meaning of the term "disability" should be applied to *Idaho Code* § 41-2304(2). Whether the terms "disability insurance", and "disabled" are given the approved usage of the language, or given meaning peculiar to the insurance industry, it would be inappropriate to construe "disabled" as either a voluntary or involuntary loss of employment on the theory that because one has lost his job, he is "unable" to work.

One might ask, "Why then is the phrase 'disabled as defined in the policy' included in the definition of 'credit disability insurance' provided by *Idaho Code* § 41-2304?"

> "In the construction of a statute it is an invariable rule to start out with the assumption that some effect is given, if possible, to every provision of the statute." *Chandler v. Lee*, 1 Idaho 349, 350 (1870)

and as the Idaho Supreme Court has consistently maintained:

> "We must agree with the general proposition that the courts must give effect to a statute wherever it is possible to do so and keep within the terms of the language used." (Citing authorities) *State v. Hahn*, 92 Idaho 265, 268, 441, P.2d 714 (1968).

It seems reasonable to construe the phrase "disabled as defined in the policy" as intended for the purpose of permitting an insurer to limit its exposure to risk under the policy by limiting the scope of the term "disability" as defined in the policy provisions.

> "The parties to a contract of accident insurance may limit the coverage of the policy and the consequent liability of insurer to certain particular accidents and risks or causes of loss, and may expressly except or exclude particular classes of risks or causes of loss, and the accident must come within such bounds in order that indemnity may be recovered. The object of an exception is to exclude a risk which otherwise would be included within the policy, and, therefore, the language must be clear and unequivocal, and the expected accidents or injuries must be definite and capable of being identified in the excepted class."
> 45 C.J.S. § 753(c) pp. 781, 82

Therefore, for example an insured who lost only one foot would not be entitled to recover double indemnity under an accident policy which provided for such payment only in the event the insured lost both feet. *Rachel v. Life & Casualty Insurance Co. of Tennessee*, 145 So. 779, 780 (Louisiana 1933), and an insured who suffered a partial disability through a "disease" of his eyes was not entitled to recover under a policy which allowed benefits for "partially disabling *accidents*". *Croft v. Massachusetts Protective Association, Inc.*, 149 So. 367, 68 (Louisiana 1933), and a policy provision insuring against death, or loss of hands, feet, or vision resulting from bodily injuries effected through external violence and accidental means does not cover death resulting from any and all causes including disease. *Empire Insurance Company of Texas v. Cooper*, 138 S.W. 2d 159, 163 (Texas 1940). "The object of an exception in the contract is to exclude that which otherwise would be included in it, . . ." *M'Glother v. Provident Mutual Accident Co.*, 89 F.685, 687, Cir. Ct. of Appeals, 8th Cir., (1898); *Estabrook v. Eastern Commercial Travelers Accident Assn.*, 32 N.E. 2d 250, 252 (Mass. 1941).

In summary, we conclude that an insurer transacting "credit disability insurance" as defined in *Idaho Code* § 41-2304 (2) is limited by the definition of "disability insurance" as defined in *Idaho Code* § 41-503 to policy provisions providing coverages for loss resulting from accident, or accidental means, or from sickness, or appertaining thereto, and that the policy may not insure against loss of employment arising out of causes other than accident, accidental means, or sickness.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 41-503, 28-34-102, 28-34-103 (including the Comment to the Official Text of the National Conference of Commissioners on Uniform State Laws), 41-2301, 41-2302, 41-2304(2), 41-312, 73-11, and *Idaho Code*, Title 41, Chapter 20; *Idaho Code*, Title 41, Chapter 22.

2. *State v. Dunbar*, 39 Idaho 691, 697-98, 230 P.33 (1924)

3. *Achenbach v. Kincaid*, 25 Idaho 768, 775 140 P.000 (1925)

4. *Chandler v. Lee*, 1 Idaho 349, 350-51 (1870)

5. *State v. Casselman*, 69 Idaho 237, 239, 205 P.2d 1131 (1949)

6. *Rowert v. Loyal Protective Insurance Co.*, 61 Idaho 677, 106 P.2d 1015, 1018 (1940)

7. *O'Neil v. New York Life Insurance Co.*, 152 P.2d 707, 709 (Idaho 1944)

8. *Erreca v. Western States Life Insurance Co.*, 121 P.2d 689, 695 (Calif. 1942)

9. *State v. Omaecherviaria*, 27 Idaho, 797, 804, 152 P.280 (1915)

10. *State v. Hahn*, 92 Idaho 265, 268, 441 P.2d 714 (1968)

11. *Rachel v. Life & Casualty Insurance Co. of Tennessee*, 145 So. 779, 780 (Louisiana 1933)

12. *Croft v. Massachusetts Protective Association, Inc.*, 149 So. 367, 68 (Louisiana 1933)

13. *Empire Insurance Company of Texas v. Cooper*, 138 S.W. 2d 159, 163 (Texas 1940)

14. M'Glother v. Provident Mutual Accident Co., 89 F.685, 687, Cir. Ct. of Appeals, 8th Cir. (1898)

15. *Estabrook v. Eastern Commercial Travelers Accident Assn.*, 32 N.E. 2d 250, 252 (Mass. 1941)

16. 1960 Proceedings of the National Association of Insurance Commissioners, Vol. I, pp. 180-186

17. 1963 Proceedings of the National Association of Insurance Commissioners, Vol. II, p. 588

18. COUCH, George J., LL.B., *Couch, Cyclopedia of Insurance Law*, 2nd

Ed. by Ronald A. Anderson, Vol. 10, § 41:799, pp. 630 & 631; and §§ 41-28 and 41-30, pp. 47-50 and 53 respectively.

19. *Webster's Third New International Dictionary of the English Language,* (Unabridged) 1967 pp. 11, 642, 1044

20. DAVIDS, Lewis E. *Dictionary of Insurance,* 1962 p. 68

21. 45 Corpus Juris Secundum, § 753(c) pp. 781

DATED This 30th day of August, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-55

TO: The Honorable Pete T. Cenarrusa
Secretary of State
STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTION PRESENTED:

"In those cities which have adopted Title 34 registration practices pursuant to Sec. 50-423, I.C., which registration cut-off is in effect — the 5 day deadline in Sec. 34-408, I.C., or the 2 day deadline in Sec. 50-412, I.C."

CONCLUSION:

Cities which have adopted Title 34 registration practices may use the 5 day cut-off for registration provided in section 34-408 *Idaho Code.*

ANALYSIS:

Section 50-423, *Idaho Code,* provides:

> Adoption of state registration procedures — Joint registration. — Any municipal corporation or political subdivision of the state of Idaho which is, or may be, required to conduct elections may, upon

> resolution of its governing body, elect to conform its practices for registration of qualified electors to those contained in title 34, Idaho Code. If the governing body approves such a resolution, it shall conform its practices in such a way that registration for general elections shall be a sufficient registration for elections of the municipal corporation or political subdivision, and vice-versa. For the purposes of this act, registration forms may be required to establish qualifications of electors. The original of each registration form, when joint registration is adopted, shall be forwarded to the county clerk wherein the registrant resides, and a copy shall be retained by the municipal corporation or political subdivision conducting registration.

Thus a city has the option of conforming its practices for registration to those contained in Title 34, *Idaho Code*. The registration provisions of Title 34 are contained in Chapter 4, and the time limit for closing the register is given in § 34-408(1), *Idaho Code*, which provides:

> 34-408. Closing of Register — Time Limit. — (1) No elector may register with official precinct registrars within ten (10) days preceding any election held throughout the county in which he resides for the purpose of voting at such election. No elector may register in the office of the county clerk within five (5) days preceding any election held throughout the county in which he resides for the purpose of voting at such election.

If these limits for the closing of the register are "practices for registration of qualified electors" within the meaning of § 50-423, *Idaho Code*, then these time limits apply to municipalities which have adopted Title 34 registration practices.

"Practices" has been variously defined. In *Missouri-Kansas-Texas R. Co. of Texas v. Ashlock*, 136 S.W.2d 943 (1940), it is said:

> The work "practice" was intended in the sense of custom and used in its popular sense, synonymous with "mode," or "course of action," frequently exercised.

And in *Wells Lamont Corp. v. Bowles*, 149 F.2d 364 (1945), it was held:

> According to the dictionaries, both lay and legal, a practice is a custom or usage, a customary usage, something habitually and uniformly performed. It implies uniformity and continuity. 149 F.2d at 366.

In *State v. Department of Public Service*, 150 P.2d 709 (1944), the Washington Department of Public Service had been empowered to fix reasonable rules, regulations, acts and practices to be followed by public utilities. In construing this power, the Supreme Court of Washington defined "practices" as follows:

> (5) Appellants argue that the refusal or failure of the power company to file rate schedules constitutes unreasonable "acts" or "practices," as those terms are employed in the foregoing section of the statute. The work "acts," as therein used, denotes affirmative, voluntary action or performance, as distinguished from mere omission. The word "practices" conceivably has a broader significance and may include inaction or failure to act, as well as affirmative action; however, the term "practices" connotes habit or custom, something done or left undone, with a degree of regularity, not occasionally or sporadically. [citations omitted] 150 P.2d at 715.

"Practices" has been similarly defined in *McClure v. E.A. Blackshere Co., 231 F. Supp. 678, 682 (D.C. Md. 1964) and McComb v. C.A. Swanson & Sons,* 77 F.supp. 716, 734 (D.C. Neb. (1948).

From these cases it is evident that "practices" is a term which is sufficiently broad to include time limits for cut-off of registration of electors.

Consequently, § 50-423, *Idaho Code,* which allows cities to adopt Title 34 registration practices, does allow cities to adopt the 5-day deadline for registration contained in § 34-408, *Idaho Code.*

AUTHORITIES CONSIDERED:

1. *Idaho Code,* §§ 34-408, 50-412, 50-423

2. *Missouri-Kansas-Texas R. Co. of Texas v. Ashlock,* 136 S.W.2d 943 (1940)

3. *Wells Lamont Corp. v. Bowles,* 149 F.2d 364 (1945)

4. *State v. Department of Public Service,* 150 P.2d 709 (1944)

5. *McClure v. E.A. Blackshere Co.,* 231 F.Supp. 678, 682 (D.C. Md. 1964)

6. *McComb v. C.A. Swanson & Sons;,* 77 F.Supp. 716, 734 (D.C.Neb. 1948)

DATED This 1st day of September, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO
WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-56

TO: Gordon W. Petrie
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816 ½ 2 1st Street
Lewiston, Idaho 83501

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"Whether or not counties may enter into service contracts with nonprofit organizations to provide beneficial services outside of the specific authorization of *Idaho Code* 31-866, e.g., Boys' Clubs, Girls' Clubs, Volunteer Bureaus."

CONCLUSION:

Counties may contract for performance of a service with any one capable of performing a function for it that the county is required to or is authorized by law to carry out, such as care of indigents, welfare, aged, abused and neglected children. A county may not contribute funds for the support of charities or benevolent or service organizations other than as noted in the preceding sentence, since taxes must be paid and spent for public purposes, as distinguished from private purposes, and government in Idaho is prohibited from supporting private individuals, corporations or associations whether there is a profit motive involved or not.

ANALYSIS:

Vol. 15, McQuillan on Municipal Corporations at p. 31, § 39.19, states as follows:

> All appropriations or expenditures of public money by municipalities and indebtedness created by them, must be for a public and corporate purpose, as distinguished from a private purpose . . . This includes indebtedness created by the issuance of bonds. So taxes levied by a municipality must be for a public purpose . . .
>
> . . . a municipality has no power, unless expressly conferred by constitutional provision, charter or statute, to donate municipal moneys for private uses to any individual or company, not under the control of the city and having no connection with it, although a donation may be based upon a consideration. And in several of the states, constitutional provisions exist, differing more or less in phraseology, but in effect prohibiting the giving of any money or property by a municipality, or the loaning of its money or credit to or in aid of any individual, association or corporation or embarking upon any private enterprise . . .

> . . . the test is whether the work is required for the general good of all the inhabitants of the city . . .
>
> What is a public municipal purpose is not susceptible of precise definition . . . While the question of what is and what is not a public purpose is initially a legislative responsibility to determine, in its final analysis, it is for the courts to answer. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare . . .

Vol. 16, of McQuillan at pp. 96-97, § 44.35, states as follows:

> Taxes cannot be imposed except for public purposes. This is elementary and applies to taxes by municipal corporations as well as other taxes. The authority of the local corporation to raise revenue by taxation is limited to taxation for municipal or corporate purposes, namely, purposes which are germane to the objects of the creation of the municipal corporation or which have a legitimate connection therewith.
>
> . . . Hardly any project of public benefit is without some element of peculiar personal profit to individuals, hardly any private attempt to use the taxing power is without some colorable pretext of public good. Each case must be judged on its own facts, and any attempt at fixed definition must result in confusion and contradictions.
>
> In deciding whether, in a given case, the object for which municipal taxes are assessed is or is not a public purpose, courts must be governed mainly by the course and usage of the government, the objects for which the taxes have been levied, and the objects or purposes which have been considered necessary to the support and for the proper use of the municipal government . . .

There is much material on this subject in McQuilllan, supra, sections 39.19 to 39.30, pp. 31 to 92, and sections 43.29 to 43.33, Vol. 15, and sections 44.35 to 44.40 pp. 96 to 110, Vol. 16.

A very recent Idaho case had this to say in regard to a similar subject.

> Art. 3 of the Constitution of Idaho does not specifically mention a requirement of a public purpose for legislation authorizing a state-created public entity to expend funds. However, in the case of *Village of Moyie Springs, Idaho v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P. 2d 767, this court declared that 'municipal corporations . . . are limited to functions and purposes which are . . . public in character as distinguished from those which are private in character. . .' If this rule is a restriction upon the cities' powers, it must be so because it is also a restriction upon the state's power, for the cities are not singled out for unique treatment in this regard by statute or constitutional provision. Therefore, this restriction must be inherent

> throughout state government and must be a fundamental limitation upon the power of the state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the State can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity... *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P. 2d 588

As one can see from pursuing the words "public purpose" in Volume 35 *Words and Phrases*, there are many, many definitions for "public purpose." To this office, it appears that some of the better considered definitions are as follows:

> To constitute a 'public purpose' for which money in a state treasury may be appropriated, the purpose must not only be affected with a public interest, but must be performed by the state in the exercise of its governmental functions. *Veterans of Foreign Wars of the United States, Department of Oklahoma v. Childers*, 171 P.2d 618, 197 Okla. 331.

A decision by the Federal Supreme Court along this line states as follows:

> Though the line which distinguishes the public purpose for which taxes may be assessed from the private use for which they may not be assessed is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose, when properly called on, for the protection of the rights of the citizens, and aid to prevent his private property from being unlawfully appropriated to the use of others. In deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been by long usage levied, what objects and purposes have been considered necessary for the support of the proper use of the government, whether state or municipal. *Citizens Savings & Loan Ass'n. v. Topeka*, 87 U.S. 655, 22 L.Ed. 455, 20 Wall. 665.

In *Gem Irrigation District v. Van Deusen*, 31 Idaho 779, 176 P. 887, the State Supreme Court quotes with approval from a Kentucky case:

> 'Appropriations of public funds and levying taxes to raise funds for the same end rest upon the same principle. If an object cannot have a tax levied for it,... then no appropriation of public money can be made to it. Where the constitution forbids the levying of a tax for a given purpose, it must be held that it withholds the power of making appropriations for that purpose, ...' *Agricultural and Mechanical College v. Hager, Auditor*, 121 Ky. 1 87 S.W. 1125.

Section 18-5701, *Idaho Code*, provides in part that each officer of this State charged with the receipt or safekeeping or transfer or distribution of public monies who either without authority of the law appropriates the same or any

portion thereof to his own use or the use of another or uses the same for any purpose not authorized by law or knowingly keeps any false account or makes any false entry or erasure in any account of or relating to the same is punishable by imprisonment in the State prison for not less than one (1) nor more than ten (10) years and is disqualified from holding any office in the State of Idaho. It has been held under this statute a number of times that a specific intent to violate this law is not necessary. The State must only show that the law has been violated *State v. Brown*, 4 Id. 723, 44 P. 552; *In Re Houston*, 27 Id. 231, 147 P. 1064.

On January 17, 1977, Merlyn Clark wrote to the Nez Perce Board of County Commissioners as follows:

> There are two basic questions to be answered:
>
> 1. Do the Idaho Constitutional restrictions prohibiting counties from loaning credit or donating funds to private organizations or corporations prohibit contributions to private non-profit organizations performing public services in the County? It is my opinion that the constitutional restrictions do not apply when the non-profit corporations perform public services.
>
> 2. If not constitutionally prohibited, do the state statutes authorize the county to donate funds or to enter into service contracts with such organizations? It is my opinion that the statutes do authorize contributions to or service contracts with Senior Citizens and the Volunteer Bureau who perform services for the aged, but do not authorize contributions to or service contracts with other organizations.

CONSTITUTIONAL RESTRICTIONS

Idaho Constitution, Article 8, Section 4, prohibits counties from loaning or giving its credit, directly or indirectly, in any manner, to, or in aid of any individual, association, or corporation, for any amount or for any purpose whatever. Although the language of both sections appears to be all encompassing the Idaho Supreme Court has interpreted both sections to mean that counties cannot make donations to or lend credit to individuals, corporations or associations involved in private enterprise.

The court has held that the restrictions of Article 8, Section 4, and Article 12, Section 4, of the Idaho Constitution are not applicable to a public enterprise. *Boise Redevelopment Agency vs. Yick Kong Corp.* (1972), 94 Id. 876. The court has also held that the leasing of a fairground building to a private horse racing corporation and expenditures for extension of a water line to the building and access road work were not in violation of the constitutional prohibitions of the expenditure of county funds for private benefit in view of the "primary public benefit from such expenditures." *Hansen vs. Kootenai County Board of Commissioners*, 93 Idaho 655.

It should be noted that there are no Idaho cases involving contributions to agencies listed above or similar non-profit agencies performing public services. In other states where the question has been raised involving similar agencies, the courts have taken the position that similar constitutional restrictions do not apply to county charity donations so long as the purpose of the agency is to perform a public service and not a private enterprise. 142 A.L.R. 1076. In view of the Idaho cases cited above and the treatment accorded the problem by other states, it is my opinion that the Idaho Supreme Court would find that the Idaho constitutional prohibitions would not apply to these organizations.

This view is further supported by *Idaho Code*, § 31-866, adopted in 1973, by the Idaho Legislature, which specifically authorizes Boards of County Commissioners to enter into contracts with private non-profit corporations to promote, maintain and administer projects and programs that the Board of County Commissioners considers to be of public benefit, *and* the purpose of which is to carry out programs concerning the aged. Although this particular statute has not been constitutionally challenged, it is my opinion that the Supreme Court would uphold it so long as the projects are solely or primarily of public benefit.

The next aspect of the question is much more complicated in view of the many and varied organizations in question, and in light of the approaches that can be taken, i.e., whether a service contract would be permitted, even though an outright donation would not be allowed.

Before reviewing the statutes as they apply to each organization involved, it must first be pointed out that under the Idaho Constitution, Article 18, Section 11, The County Commissioners have only such power as is expressly or impliedly conferred on them by statute. *Shillingford vs. Benewah County*, 48 Idaho 447; *Prothero v. Board of County Commissioners*, 22 Idaho 598. In other words, the Board of County Commissioners cannot donate funds to any agencies or enter into service contracts with such agencies unless there is some specific or implied statutory authority authorizing the same. There is absolutely no statutory authority authorizing counties to expend funds "for the public good," or "for the general welfare of the county." As stated by the Supreme Court, in *Clayton v. Barnes*, 52 Idaho 418 at p. 423; "It cannot be doubted that one who demands payment of a claim against a county must show some constitutional or statutory authority therefor, or that it arises from some contract, express or implied, which finds authority in law. (Citations omitted.) It is also a well-settled rule that payment of such claim cannot be allowed upon the theory that the services performed for which compensation is claimed were beneficial to the county."

Finally, it should be pointed out that although the Board may have express power to perform an act or render a service, that does not mean that the Boad has authority to delegate the authority to a non-profit agency or corporation to perform the act or service unless authorized by statute to do so. The Board of Commissioners cannot delegate its authority to another, unless authorized to do so.

The Board of Commissioners is the chief executive authority of the county government, and, although it does have incidental powers and duties under § 31-828, to do and perform all other acts and things required by law not in Title 31 enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government, the Board cannot delegate this authority to another unless specifically authorized.

The Boys Club: It is my understanding the Boys Club offers recreational and guidance services to persons under 18 years of age. Under *Idaho Code* § 63-908, the Board of Commissioners is authorized to acquire, maintain and operate public parks or public recreational facilities. I can find no other authority authorizing the Board to expend funds for or perform services normally offered by the Boys Club. Although the County can perform this service, I cannot find any law authorizing the Board to donate funds to a boys club or to enter into a service contract with the Boys Club. The only other statutes relating to juveniles are the provisions under Title 56 (Public Assistance Act), authorizing contracts with the Department of Health and Welfare, relating to juvenile services, and Title 16, § 16-1820, authorizing contracts with public or private individuals to act as probation officers. Neither of these provisions can be stretched to cover the Boys Club. § 67-2333 authorizes joint or cooperative action in contracts with other public agencies, but this is limited to public agencies, and does not include a private, non-profit corporation performing a public service, as is the case with the Boys Club. In summary, it is my opinion that, although the County can perform the service under § 63-908, it cannot donate funds to, nor enter into a service contract with the Boys Club. This would not, however, prohibit the County from acting as a designated grantee for the Boys Club under § 31-866(2) of the Idaho Code. § 31-866(1) authorizes the Board to enter into contracts with private, non-profit corporations to administer projects and programs that the Board considers to be of public benefit *and* the purpose of which is to carry on programs concerning the aged. This provision is restricted to the "aged." However, Subsection (2) authorizes the Commissioners to become the designated grantee and receive funding to sponsor, promote and administer "such public activities as they may deem beneficial." There is no limitation on subsection (2). It is strictly within the Board's discretion as to what the Board considers to be "beneficial" insofar as using funds received from some other agency as a designated grantee. This would *not*, however, include revenue sharing funds, which can be used only for the purposes that the tax monies can be used.

The Girls Club: It is my understanding that the Girls Club offers recreational facilities and recreational and guidance services to persons under the age of 18. A donation or service agreement would be prohibited for the same reasons set forth above regarding the Boys Club.

Booth Memorial Hall. It is my understanding that Booth Memorial Hall offers guidance services and residential facilities and services to unwed mothers. A donation or service contract would be prohibited for the same reasons set forth above regarding the Boys Club with one possible exception. Under § 51-5401, the Board of County Commissioners, in their respective counties, may contract for the care, protection and maintenance for the medically indigent, sick, or otherwise indigent of the county. The Board must require the contractor to enter into a bond to the county, with two or more approved sureties, in such sum as the Board may fix, conditioned for the faithful performance of his duties and obligations and require him to report to the Board quarterly all persons committed to his charge. This must be done on a case-by-case basis and would have to be noted that under § 56-204(a) the Department of Health and Welfare is required to provide the services for unmarried mothers under the age of 18 years.

The Children's Home: It is my understanding that the Children's Home is a licensed foster or shelter home for persons under the age of 18, but that it is not a "detention home," as defined under *Idaho Code,* § 16-1802(j). A detention home is for the temporary care of children who require secure custody for their own or the community's protection and the physically restricting facilities pending court disposition. The Board of Commissioners does have a duty to provide detention accommodations under *Idaho Code,* § 16-1812, and authority to enter into private contracts for the same. A foster home or shelter home, however, is the responsibility of the Department of Health and Welfare, under Title 56 of the Idaho Code. I can find no authority for the Board of Commissioners to provide foster homes or shelter homes with private, non-profit agencies. Under *Idaho Code,* § 56-217, the County could enter into a cooperative agreement with the Department of Health and Welfare to such services, but I can find no law authorizing the same with private organizations.

Senior Citizens (SCAT): It is my understanding that this program provides transportation and other services for senior citizens. There is specific authority under *Idaho Code,* § 31-866, empowering the Board of Commissioners to enter into contracts with private, non-profit corporations to promote, maintain and administer projects and programs that the Board of County Commissioners considers to be of public benefit, *and* the purpose of which is to carry on programs concerning the aged. Under this statute you do have authority to enter into a contract and expend funds for the Senior Citizens SCAT program.

Volunteer Bureau: It is my understanding that this program includes services to senior citizens. Under *Idaho Code*, § 31-866, you do have authority to enter into contracts with the Volunteer Bureau for services relating to and for the benefit of senior citizens.

Lewis-Clark Animal Shelter: It is my understanding that the animal shelter provides animal control in the County as well as in the City of Lewiston. Under Title 25 of the *Idaho Code*, it is clear that the duty of controlling stray animals and unlicensed dogs in the county rests upon the Sheriff. I can find no authority for the Board to delegate this responsibility to any other agency, nor can I find any authority for the Board to donate funds or enter into a service contract with a non-profit corporation to provide this service. The statutes are clear that it is the duty of the Sheriff to perform this service. Under Article 18, Sections 6 and 7 of the *Idaho Constitution*, and under Sections 31-2003 and 31-3107 of the *Idaho Code*, the Sheriff is allowed deputies and clerical assistance to assist him in the performance of his duties. I can find no authority, however, authorizing the delegation of this authority to a private non-profit organization. In view of this, it is my opinion that the Board does not have authority to donate funds to, nor the authority to enter into a service contract with the Lewis-Clark Animal Shelter for the control of animals in the County.

In summary, it is my opinion, as stated above, that you have authority to enter into service agreements with the Senior Citizens and that portion of the Volunteer Bureau relating to senior citizens ("the aged"), but do not have authority to donate funds to nor enter into service agreements with the other organizations. This would not, however, preclude you from acting as a designated grantee for the other organizations, under *Idaho Code*, § 31-866(2), should you deem them to be of benefit to the County.

. . . My research has included the *Idaho Constitutions*, the Idaho Statutes and Supreme Court decisions and the various encyclopedias and other reference works. I have completely reviewed all of the statutes relating to county law in Title 31, Title 56 (Public Parks and Recreation), Title 16 (Child Protective Act and Youth Rehabilitation Act), Title 25 (Animals), and others in an effort to completely review all of the law with the hope of finding the desired authority. I regret that I have been unsuccessful and would welcome any authority that others may find that would change the result. To this end, I would recommend that you request an official opinion from the office of the Attorney General. Should the Attorney General be unable to find authority, the only resource would be through the legislature.

. . . I would cite *Idaho Code*, § 31-855, which provides:

> 'Any commissioner who neglects or refuses, without just cause therefor, to perform any duty imposed on him, or

> who willfully violates any law provided for his government as such officer, or fraudulently or corruptly attempts to perform an act, as commissioner, unauthorized by law, *in addition to the penalty provided in the Penal Code*, forfeits to the county $500.00 for every such act.' (Emphasis added)

The above Nez Perce County opinion is correct, and contains a full discussion of these matters. A county may contract for the case of the indigent, aged, abused and neglected children or to carry out any of its other duties, it cannot, however, tax for or make donations to charities from public funds. This fulfills a private and not a public purpose.

AUTHORITIES CONSIDERED:

1. *Idaho Code, §§ 16-1802, 16-1812, 16-1820, 31-828, 31-855, 31-866, 31-2003, 31-3107, 51-5401, 56-204, 56-217, 63-908, 67-2333*

1. *Idaho Code*, §§ 16-1802, 16-1812, 16-1820, 31-828, 31-855, 31-866, 31-2003, 31-3107, 51-5401, 56-204, 56-217, 63-908, 67-2333

2. Idaho Constitution, Art. 8, §§ 4, 6, 7; Art. 12, § 4; Art. 18, § 11

3. *Village of Moyie Springs, Idaho v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767

4. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588

5. *Veterans of Foreign Wars of the United States, Department of Oklahoma v. Childers*, 171 P. 2d 618, 197 Okla. 331

6. *Citizens Savings & Loan Ass'n. v. Topeka*, 87 U.S. 655,22 L. Ed. 455, 20 Wall. 665

7. *Gem Irrigation District v. VanDuesen*, 31 Idaho 779, 176 P. 887

8. *Agricultural and Mechanical College v. Hager, Auditor*, 121 Ky. 187 S.W. 1125

9. *In Re Houston*, 27 Idaho 231, 147 P. 1064

10. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876 (1972)

11. *Hansen v. Kootenai County Board of Commissioners*, 93 Idaho 655

12. *Shillingford v. Benewah County*, 48 Idaho 447

13. *Prothero v. Board of County Commissioners*, 22 Idaho 598

14. *Clayton v. Barnes*, 52 Idaho 418

15. McQuillan on Municipal Corporations, Vol.s 15 & 16

16. *Words & Phrases,* Vol. 35

DATED This 1st day of September, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-57

TO: Honorable Dick Smith
State Senator
74 Ash Ave.
Rexburg, Idaho 83440

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"Since the inception of the Firemen's Retirement Fund in 1945, the Legislature has made numerous changes in the Fund both increasing benefits and providing formulas for employer and employee contributions. What is the potential civil liability of the state for the actions of the Legislature in failing to properly provide a mechanism for funding the system if it were to fail and be unable to meet its obligations to disabled and retired firemen?"

CONCLUSION:

If the Firemen's Retirement Fund's assets were insufficient to meet its obligations to disabled and retired firemen, the State would not be civilly liable beyond the monies in the fund and monies thereafter appropriated to the fund.

ANALYSIS:

The Act of 1945 creating the Firemen's Retirement Fund contained the following provision which was codified as § 72-1405, *Idaho Code:*

Administration of fund. — The firemen's retirement fund shall be

> administered by the director of the state insurance fund of the state of Idaho without liability on the part of the state, or of any of its officers, beyond the monies in said fund and accruing thereto. It shall be the duty of the said director to administer the said fund and conduct the business thereof, and the said director is hereby vested with full authority over the said fund, and may do any and all things which are necessary or convenient in the administration thereof as provided or as consistent with the provisions of this act and the general laws of the state.

This provision has remained unchanged to this time. Consequently, the State has not consented to be sued beyond the assets of the Firemen's Retirement Fund.

It is a longstanding principle of constitutional law, that the State is immune from suits brought against it by its own citizens without its consent. *Monaco v. Mississippi*, 292 U.S. 313, 329 (1933); *Re New York*, 256 U.S. 490 (1920); *Duhne v. New Jersey*, 251 U.S. 311 (1919); *Smith v. Reeves*, 178 U.S. 436 (1899); *Hans v. Louisiana*, 134 U.S. 1 (1889).

Consequently, the State would not be liable for any deficiencies in the Firemen's Retirement Fund, beyond the assets of the Fund.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 72-1405
2. *Monaco v. Mississippi*, 292 U.S. 313, 329 (1933)
3. *Re New York*, 256 U.S. 490 (1920)
4. *Duhne v. New Jersey*, 251 U.S. 311 (1919)
5. *Smith v. Reeves*, 178 U.S. 436 (1899)
6. *Hans v. Louisiana*, 134 U.S. 1 (1889)

DATED This 20th day of September, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-58

TO: Joseph C. Greenley, Director
Idaho Department of Fish and Game
P.O. Box 25
Boise, Idaho 83707

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Whether Idaho Department of Fish and Game personnel, acting in a law enforcement capacity, are authorized to operate motor vehicles without the use of headlights while engaged in night patrol and surveillance activities.

2. Whether Idaho Department of Fish and Game enforcement personnel are authorized to enter into high-speed chases in pursuit of individuals who have violated, or are suspected of violating, provisions of the Idaho Fish and Game Code.

CONCLUSIONS:

1. Although Idaho Department of Fish and Game personnel acting in a law enforcement capacity have peace officer status for purposes of enforcing the Fish and Game Code, the operation of their vehicles as police vehicles does not include the privilege of operating at night without the use of headlights while engaged in night patrol and surveillance activities on any publicly maintained road open to the use of the public for vehicular travel.

2. Idaho Department of Fish and Game enforcement personnel are authorized to enter into high-speed chases in pursuit of actual or suspected violators of the Fish and Game Code under the privileges established by Section 49-606. *Idaho Code* regarding the operation of authorized emergency vehicles, provided said personnel drive with due regard for the safety of all persons and utilize an audible siren or at least one flashing blue light, or both, while their vehicles are in motion during such extraordinary periods.

ANALYSIS:

Section 19-510 *Idaho Code* enumerates the "peace officer" of this state as county sheriffs and city or town constables, marshals and policemen. However, said listing is not all-inclusive. A peace officer is defined by I.C. § 19-510(d) to be:

> . . . any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivisions thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic, or highway laws of this state or any political subdivision.

This status is extended to all conservation officers of the Department of Fish

and Game for purposes of enforcing the Idaho Fish and Game Code by virtue of Section 36-1301(b), *Idaho Code* which states in pertinent part as follows:

> All conservation officers and all other classified employees appointed by the director shall have the power of peace officers limited to:
>
> 1. The enforcement of the provisions of title 36, Idaho Code, and commission regulations promulgated pursuant thereto.

As such, conservation officers acting in a law enforcement capacity must be considered as peace officers, and Department policies pertaining to their operation of motor vehicles must reflect the statutory requirements placed upon the operation of police vehicles by Title 49, *Idaho Code*. Under normal circumstances, the drivers of all vehicles, except road repairing machinery actually engaged in work (I.C. § 49-605), must comply with the general traffic laws of the State of Idaho when operating said vehicles on the state's highways. § 49-602, *Idaho Code*. Said statute must reasonably be construed to require compliance with these general laws by the drivers of state-owned vehicles when operating under normal circumstances.

However, there are instances when certain emergency and police vehicles must obviously be operated beyond the scope of the traffic laws. Such "authorized emergency vehicles" are defined by I.C. § 49-578(2) as follows:

> Vehicles operated by any fire department or law-enforcement agency of the state of Idaho or any political subdivision thereof, and ambulances of any public utility or public service corporation.

Because of the dangers inherent in operating authorized emergency vehicles during these extraordinary periods, Section 49-606, *Idaho Code* specifically establishes the following guidelines:

> (1) The driver of an authorized emergency vehicle, *when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law* or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated:
>
> (2) The driver of an authorized emergency vehicle may:
>
> (a) Park or stand, irrespective of the provisions of this title;
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> (c) Exceed the maximum speed limits so long as he does not endanger life or property;

> (d) Disregard regulations governing direction of movement or turning in specified directions.
>
> (3) *The exemptions* herein granted to an authorized emergency vehicle *shall apply only when such vehicle is making use of an audible signal* having a decibel rating of at least one hundred (100) at a distance of ten (10) feet *and/or is displaying a flashing light or lights* visible in a 360 degree arc at a distance of one thousand (1000) feet under normal atmospheric conditions or both. *Only a police vehicle operated as an emergency vehicle shall display at least one (1) blue light* and all other authorized emergency vehicles shall display at least one (1) red light meeting the above visibility requirements.
>
> (4) *The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons,* nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others. (Emphasis added.)

These privileges do not extend to operating authorized emergency vehicles at night without the use of headlights.

As a consequence, all enforcement personnel of the Department of Fish and Game, while operating motor vehicles upon the highways of this state, must comply with the general statutory requirement of I.C. § 49-802 regarding the use of headlights, regardless of night patrol and surveillance activities. Section 49-802, *Idaho Code* states:

> Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persona and vehicles on the highway at a distance of 500 feet ahead shall display lighted lamps and illuminating devices . . .

Said headlight requirement should reasonably extend to all highways as defined by the motor vehicle code. Under Section 49-26(4), *Idaho Code* this definition includes:

> The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

In *Brown v. Kreuser,* 560 P. 2d 105 (Colo. App. 1977), an action was brought against a deputy sheriff to recover for personal injuries sustained when the plaintiff's vehicle was struck by defendant's patrol car being driven in excess of the speed limit while responding to a burglary in progress. Replying to the defendant sheriff's contention that it was error to exclude testimony regarding his department's policy as to speed and the use of lights and sirens when officers are responding to crimes in progress, the Colorado Court of Appeals held:

> Exclusion of this testimony was not error, as such a policy could not supersede either the city traffic ordinances or state statutes. Since defendant was not using his lights and siren, and was not pursuing a traffic violator, he was subject to the same traffic provisions as all other drivers . . . ID. at 109.

Thus, any Department of Fish and Game policy allowing night surveillance patrols without the use of headlights to more readily detect violators, although desirable, must give way to the Idaho Code statute requiring the use of said lights when operating a vehicle at night on any publicly maintained road open to the use of the public for vehicular travel.

To answer your inquiry regarding high-speed chases, the threshold question of the Department's authority to make investigative stops of vehicles must be analyzed. In other words, can a Department conservation officer reasonably detain a person without infringing upon constitutional rights? In *State v. Hobson*, 523 P. 2d 523, 95 Idaho 920 (1974), the Idaho Supreme Court detailed the test which must be met by police officers in order to make an investigative stop. The Court said:

> First, the information underlying the initiation of the investigative stop must possess specificity and some indicia of reliability. In this regard the officer's conduct must be judged against an
>
> "Objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? (Citations omitted.) Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches * * * (Citations omitted.) And simple 'good faith on the part of the * * * officer is not enough' * * *. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Terry v. Ohio, supra, 392 U.S. at 22, 88 S. Ct. at 1880.
>
> . . . Next, not only the grounds for the stop but the conduct of the stop must also be reasonable. Thus, investigative stops must not be the acts of harrassment or unwarranted force. Id. at 528.

Only two days after rendering its decision in *Hobson*, the Idaho Supreme Court upheld an investigative stop made by a Department of Fish and Game law enforcement officer in *State v. Brumley*, 523 P.2d 522, 95 Idaho 919 (1974). In affirming the conviction for killing an elk out of season, the Court stated that the investigation of the appellant's vehicle, seen moving at night in rugged and remote country where poaching had occurred, and the subsequent . . . in *State v. Hobson* . . . Therefore, it may be concluded that Department enforcement

personnel are peace officers authorized to enforce the Fish and Game Code and to conduct reasonable investigative stops when warranted by particular circumstances.

As a consequence, it logically follows that said officers have the authority to enter into high-speed chases under the privileges, and subject to the conditions, established by the above-quoted provisions of Section 49-606, *Idaho Code* regarding the operation of emergency vehicles. However, it should be emphasized that I.C. § 49-606 does not grant unlimited authority to conservation officers, but rather said section concisely establishes guidelines for the operation of Department vehicles as police vehicles.

Conservation officers may operate these vehicles beyond the scope of the general motor vehicle laws under two circumstances — when responding to an emergency call or when in pursuit of an actual or suspected violator of the Fish and Game Code. § 49-606(1), *Idaho Code*. When responding to either of these situations, Department enforcement personnel may park their vehicles wherever necessary, may proceed past traffic signs and signals *but only after slowing down to a speed which will reasonably insure safe passage past the warning sign or signal*, may exceed established speed limits *but only to the extent that life and property are not endangered* and may disregard regulations regarding the directional movement of traffic. § 49-606(2), *Idaho Code*.

Although the utilization of these privileges is available, law enforcement personnel of the Department are not relieved from the responsibility to operate their vehicles with due regard for the safety of all persons, and employees who recklessly disregard said duty while exercising these privileges can be held accountable for the consequences. § 49-606(4), *Idaho Code*. In *Howe v. Jackson*, 421 P.2d 159, 18 Utah 2d 269 (1966), the Utah Supreme Court made the following statement regarding the operation of an ambulance as an authorized emergency vehicle:

> . . . even if the defendant's ambulance was being properly operated as an emergency vehicle, and thus exempted from heeding speed limits or traffic signals, he was nevertheless not excused from using reasonable care under the circumstances, and that any careless, arbitrary or unreasonable exercise of those privileges would be negligence. Id. at 161.

Obviously, Department policy regarding the operation of agency vehicles as police vehicles should emphasize that prudent judgment must also dictate the exercise of these police privileges, vis-a-vis the "due regard" test. Furthermore, the Department is hereby advised that any vehicle which is operated in fish and game enforcement efforts must be equipped with an audible siren or at least one flashing blue light, or both, which meets the statutory requirements of Section 49-606(3), *Idaho Code*.

In order to respond to an emergency call or pursue a suspected violator of fish and game laws, Department personnel must make use of said siren and/or blue light while their agency vehicle is in motion to effectuate the privileges granted in

I.C. §49-606(2) and to meet the due regard test for the warning of all persons that the vehicle is being operated in such manner. Most jurisdictions have statutory requirements similar to the State of Idaho's law regarding the use of warning devices on emergency and police vehicles. The common justification is due regard for the safety of the public. In *Witt v. Jackson*, 366 P.2d 641 (1961), the Supreme Court of California held:

> The "due regard" clause . . . requires the operator of an emergency vehicle to give a suitable warning to afford other users of public highways an opportunity to yield the right of way. Id. at 645.

This rationale was amplified in *Kirshenbaum v. City of Chicago*, 357 N.E. 2d 571, 43 Ill. App3d 529 (1976) wherein the Appellate Court of Illinois restated the following comment from a previous case in which it was held that a police officer had the duty to warn by siren of not only the approach of his vehicle, but also the approach of a vehicle he was pursuing:

> The purpose of the warning statute is obviously to warn anyone in the immediate vicinity that a danger was present, and alert them in order that they might take steps to preserve their own safety. Id. at 574.

Thus, Department enforcement personnel may enter into high-speed chases, provided sirens or blue lights equipped on their agency vehicles are being used, and said personnel operate their vehicles during such extraordinary periods with due regard for the safety of the public in general. All other vehicles and pedestrians must yield the right-of-way to Department vehicles being operated in such a manner. §§ 49-645, 49-730, *Idaho Code*.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 19-510, 19-5101, 36-1301, 49-602, 49-578, 49-606, 49-802, 49-526, 49-645, 49-730.

2. Idaho cases: *State v. Hobson*, 95 Idaho 920, 523 P.2d 523 (1974); *State v. Brumley*, 95 Idaho 919, 523 P.2d 522 (1974).

3. Other authorities: *Brown v. Kreuser*, 560 P.2d 105 (Colo. App. 1977); *Howe v. Jackson*, 18 Utah 2d 269, 421 P.2d 159 (1966); *Witt v. Jackson*, 366 P.2d 641 (1961); *Kirshenbaum v. City of Chicago*, 43 Ill. App.3d 529, 357 N.E. 2d 571 (1976).

DATED this 5th day of October, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO
WAYNE L. KIDWELL

ANALYSIS BY:
JOHN C. VEHLOW
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-59

TO: Jim Fleshman
Chief Electrical Inspector
City of Boise
Boise City hall
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does a city inspector violate state law by requiring an Electrical Engineer's stamp rather than an architect's on electrical plans for buildings larger than four-plexes?

CONCLUSION:

Although both engineers and architects are authorized to prepare electrical plans, a city does not violate state law by requiring by ordinance an engineer's stamp on certain electrical prints.

ANALYSIS:

A brief summary of background information helps to explain the nature of the problem. A city electrical inspector has a duty to approve only those plans which meet the standards of expertise and safety established by the local jurisdiction. The National Electrical Code directs that "approved" means acceptable to the authority which has jurisdiction, and the definition of "qualified person" is one familiar with the construction and operation of the equipment and the hazards involved. The City Electrical Inspector thus has a responsibility to enforce the standards set by the city in order to protect the city from liability.

Another code requirement is the inclusion of the fault current calculations (the amount of current a utility can supply in the event of a short circuit). When an electrical plan is submitted without a fault current calculation, or with an inaccurate fault current calculation, the city building department cannot issue a building permit until it obtains a plan which will satisfy the code requirements. The City of Boise avoids this delay by requiring an electrical engineer's stamp. The question is whether this requirement violates state law.

The authority of engineers to prepare electrical plans and related calculations stems from *Idaho Code* § 54-1202(a) and (b):

> § 54-1202(a). Engineer and Professional Engineer. — The terms "engineer" and "professional engineer" means a person who is qualified by reason of his knowledge of mathematics, the physical sciences, and the principles of engineering, acquired by professional education and practical experience, to engage in the practice of professional engineering.

> (b). Engineering and Professional Engineering. — The terms "engineering" and "professional engineering" include any professional service, such as consultation, investigation, *evaluation, planning, designing,* land surveying, construction, or responsible supervision of construction or operation, *in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the public welfare or the safeguards of life, health, or property is concerned or involved,* when such service is rendered in a professional capacity and requires the application of engineering principles and data. The work ordinarily performed by persons who operate or maintain machinery, or equipment, is not included within the terms "engineering" and "professional engineering" as used in this act.

The preparation of electrical plans for buildings larger than four-plexes concerns the " . . . safeguarding of life, health, or property . . . ", and therefore, engineers are authorized to prepare electrical plans.

The authority of architects is set forth in *Idaho Code* § 54-309, in the following sections:

> (c). "Practice of architecture" consists of rendering or offering to render any one or combination of the following services: advice, consultation, preliminary studies, *plans, drawings, specifications, designs,* including aesthetic and structural design, or responsible supervision of construction, wherein expert knowledge and skill are *required in connection with the erection, enlargement, alteration, or repair of any building* or buildings, as defined herein, *wherein the safeguarding of life, health, and property is concerned or involved.*
>
> (b). "Building" is a structure consisting of foundations, floors, walls, columns, beams, and roof, or other structural features, or a combination of any number of these parts and *may include related mechanical and electrical equipment and site, which are incidental thereto.*

Architects are thus authorized to prepare plans for buildings, which "may include related mechanical and electrical equipment and site, which are incidental thereto."

Neither of the above-quoted provisions prohibits a city electrical inspector from exercising its authority to require an electrical engineer's stamp on electrical plans for certain buildings. Nor has any Idaho statutory or Idaho case law been found prohibiting such a practice.

Moreover, *Idaho Code* § 54-1001B declares:

> Inspection provisions inapplicable when installation covered

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

I therefore conclude that the City of Boise does not violate state law by requiring by ordinance an electrical engineer's stamp on electrical plans for buildings larger than four-plexes.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 54-309(c), (b); 54-1001B; 54-1202(a), (b).
2. 82 A.L.R.2d 1026-1028, § 4.
3. *Aero Serv. Corp. v. Benson*, 84 Idaho 416 (1962).
4. *Johnson v. Delane*, 77 Idaho 172.
5. *Smith v. American Packing & Provision Co.*, 130 P.2d 951 (Utah, 1942).
6. 6 C.J.S. *Architects* §§ 5, 6, pp. 469-470.
7. *Pacific Digest*, V. 28, Licensing § 11-(1)-(4).
8. *Municipal Corp's.* V. 9, Licensing.
9. National Electric Code.

DATED this 7th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-60

TO: Mr. Donald L. Deleski
Executive Director
Idaho State Board of Medicine
411 West Bannock
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Does the mere definition of the term "nurse practitioner" in *Idaho Code* § 54-1402(d), together with the mere mention of the power of the Board of Nursing to "receive and collect additional reasonable fees for certification of nurse practitioners" in *Idaho Code* § 54-1404(7), without more specific enabling and licensing language, create a sufficient legislative grant of authority to establish the separate nursing practice of "nurse practitioner"?

2. Since the very definition of "nurse practitioner" at *Idaho Code* § 54-1402(d), covers areas of practice in medical diagnosis and presciption of drugs and therapeutic and corrective measures, all practices exclusively reserved to the profession of physician and surgeon under Chapter 18, Title 54, *Idaho Code*, and since the Board of Nursing consists only of persons who have only nursing or lay-person qualifications, may nurse practitioners be authorized to practice limited physician and surgeon skills under any authority other than that of the Idaho State Board of Medicine?

CONCLUSION:

1. The Idaho statutes relative to nurse practitioners do create a sufficient legislative grant of authority to establish and regulate the separate nursing practice of nurse practitioner.

2. Under existing statutory law, the authority to perform acts of medical diagnosis and prescription of drugs and therapeutic or corrective measures are no longer acts exclusively reserved to physicians and surgeons, and as a result, persons may be authorized to practice such acts under authority other than the Idaho State Board of Medicine.

ANALYSIS:

Question No. 1:

In order to analyze the questions presented, it is helpful to review the legislative history of the Idaho statutes defining the practice of professional nursing. The first act providing for the registration and licensure of nurses was adopted in 1951. At that time, the definition of the "practice of nursing" provided:

> A person practices professional nursing who for compensation or personal profit performs any professional services requiring the applications of principles of biological, physical or social sciences and nursing skills in the care of the sick, in the prevention of disease or in the conservation of health. Ch. 76, § 2e(1) [1951] Idaho Sess. Laws, p.131.

This statutory definition was amended in 1965 to read:

> 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 therapeutic or corrective measures.* (Emphasis added.) Ch. 92, § 1e(1) [1965] Idaho Sess. Laws, p.155.

Thus, in 1965, the Idaho legislature added the specific prohibition that professional nurses could not engage in acts of medical diagnosis or prescription of therapeutic or corrective measures.

Then, in 1971, the Idaho legislature again amended the definition of professional nursing as follows:

> 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 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.* (Emphasis added.) Ch. 17, § 1e[1971] Idaho Sess. Laws, pp.30-31 and Ch. 85, § 1e [1971] Idaho Sess. Laws, p.187. Recodified in Ch. 13, § 112e [1974] Idaho Sess. Laws, pp.228-229.

With the addition of the foregoing underlined exception, the Idaho legislature paved the way for allowing professional nurses to engage in acts of medical

diagnosis and prescription of medical therapeutic and corrective measures, subject to rules and regulations jointly promulgated by the Idaho State Board of Medicine and the Idaho State Board of Nursing. It should be noted that under these 1974 statutes, there is no reference to the title "nurse practitioner."

Finally, in 1977, the Idaho legislature again amended the definition of professional nursing which presently states:

> The practice of professional nursing means performance of any act in observation, care, and counsel of the ill, injured, and infirm persons; in maintenance of health and prevention of illness of others; in supervision and teaching of other health care personnel; and in administration of medications and treatments as prescribed by nurse practitioners, licensed physicians and licensed dentists; requiring substantial specialized judgment and skill based on knowledge and application of the principles of biological, physical and social science. *Idaho Code* § 54-1402(b)(1).

The 1977 legislature also adopted a separate definition of "nurse practitioner" which presently provides:

> "Nurse practitioner" means a licensed professional nurse having specialized skill, knowledge and experience authorized, by rules and regulations jointly promulgated by the Idaho state board of medicine and the Idaho board of nursing and implemented by the Idaho board of nursing, to perform designated acts of medical diagnosis, prescription of medical therapeutic and corrective measures and delivery of medications. *Idaho Code* § 54-1402(d).

Thus, after opening the door for expanding the role of professional nurses through the 1971 amendment, the Idaho legislature gave a name and title to the expanded role of qualified professional nurses in the 1977 amendment.

When interpreting statutes, it is a universal rule of statutory construction that a statute must be construed in light ot its intent and purpose. *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P. 2d 766 (1969). *DeRousse v. Higginson,* 95 Idaho 173, 505 P.2d 321 (1973). Further, the primary consideration in construing a statute is to ascertain the legislative intent, when the legislature amends a statute it is presumed that the legislature intended the statute to have a different meaning or application than it had prior to the amendment. *Leonard Construction Company v. State Tax Commission* 96 Idaho 893, 539 P.2d 246 (1975); *Totusek v. Department of Employment,* 96 Idaho 699, 535 P.2d 672 (1975); *DeRousse v. Higginson,* 95 Idaho 173, 505 P.2d 321 (1973).

Based upon the foregoing, it appears quite clear that the Idaho legislature, through its 1971 amendment, intended to modify the prior law which completely prohibited professional nurses from engaging in any acts of medical diagnosis or prescription of therapeutic or corrective measures. In like manner, the Idaho

legislature intended to provide, through the use of administrative rules and regulations, for expanding the role of qualified professional nurses and to establish a new, specialized area of nursing practice, now known as nurse practitioner. These expressions of legislative intent were then clarified in 1977 through the adoption of the separate, statutory definition of a nurse practitioner.

The question which has been presented is whether the statutory references to "nurse practitioners" constitute a sufficient legislative grant of authority to license qualified professional nurses as nurse practitioners. In other words, do the Idaho statutes lack such specificity and guidance that they result in an unconstitutional delegation of legislative authority. The constitutional authority involved in Article III, Section 1, *Idaho Constitution*, which provides that "the legislative power of the state shall be vested in a Senate and House of Representatives."

Initially, it might be noted that in almost every act dealing with the licensing of professionals the Idaho legislature has chosen to vest the respective administrative, licensing agencies with some discretion in establishing necessary qualifications and educational requirements, in outlining permissible acts and practices, etc. Within the realm of the Board of Medicine, for example, the Idaho legislature has empowered the Board of Medicine to license physician's assistants, but the statutes relative to physician's assistants provide no more guidance or specificity than the statutes relative to nurse practitioners.

It is properly a legislative function to determine whether a pursuit or occupation should be regulated, *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957); but, as was stated by the Idaho Supreme Court in *Abbot v. State Tax Commission*, 88 Idaho 200, 398 P. 2d 221 (1965):

> . . . It is an accepted rule of judicial decision that the legislative function has been complied with, where the terms of the statute are sufficiently definite and certain to declare the legislative purpose and the subject matter meant to be covered by the act; and that the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations. 88 Idaho at 205. See also, *State v. Taylor*, 58 Idaho 656, 78 P. 2d 125 (1938)/

The Idaho Supreme Court has also ruled that the legislature in enacting a law complete in itself, designed to accomplish the regulation of particular matters, may expressly authorize an administrative agency, within definite limits, to provide rules and regulations for the complete operation and enforcement of the law, and:

> [s]uch authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and

> enforcement of the same is not exclusively a legislative power, but is administrative in its nature. *State v. Heitz*, 79 Idaho 107, 112, 238 P. 2d 439 (1951). See also, *Abbot v. State Tax Commission*, 88 Idaho 200, 298 P. 2d 221 (1965).

It is the opinion of the Attorney General that the statutes relative to the nursing practice of nurse practitioners comply with these standards, and as a result, do not represent an unconstitutional delegation of legislative authority. First, with respect to compliance with the legislative function, the statutes are sufficiently definite and certain to declare the legislative purpose and the subject matter meant to be covered. As was previously discussed, through various amendments, it is quite clear that the legislative purpose and intent was to create a specialized classification of professional nurses known as nurse practitioners, and the statutes are designed to accomplish the regulation of this particular matter.

Second, the Idaho legislature has expressly authorized the Idaho State Board of Medicine and the Idaho State Board of Nursing to jointly promulgate rules and regulations for the complete operation and enforcement of the law, including the adoption of joint rules and regulations authorizing nurse practitioners to "perform designated acts of medical diagnosis, prescription of medical therapeutic and corrective measures and delivery of medications." *Idaho Code* § 54-1402(d). Further, the legislature has expressly empowered the Idaho State Board of Nursing to implement the joint rules and regulations.

Third, the Idaho legislature has provided definite limits to guide the Idaho State Boards of Medicine and Nursing in regulating nurse practitioners. A nurse practitioner must be a licensed professional nurse, *Idaho Code* § 54-1402(d), and thus, as a minimum, must meet the general qualifications for a license to practice professional nursing as set forth in *Idaho Code* § 54-1407. A nurse practitioner must then also have "specialized skill, knowledge and experience." *Idaho Code* § 54-1402(d). Further, the Idaho State Boards of Medicine and Nursing are then given discretionary power to designate specific acts which nurse practitioners may perform within the realm of "medical diagnosis, prescription of medical therapeutic and corrective measures and delivery of medications." *Idaho Code* § 54-1402 (d).

By way of providing further guidance in defining the contemplated role of nurse practitioners, within the general definition of professional nursing, the Idaho legislature amended that definition to provide that general professional nurses are empowered to administer medications and treatments as prescribed by not only licensed physicians and licensed dentists, but also prescribed by nurse practitioners. *Idaho Code* § 54-1402(b) (1). In addition, nurse practitioners are expressly prohibited from performing those specific functions and duties delegated by law to licensed pharmacists. *Idaho Code* § 54-1415. Finally, in the promulgation of their joint rules and regulations, the Boards of Medicine and Nursing must comply with the Administrative Procedures Act. *Idaho Code* § 54-1806(2) and *Idaho Code* § 54-1404(9).

In sum, it is the opinion of the Attorney General that the statutes relative to

§ 54-1803, the new Medical Practice Act, enacted by the 1977 legislature, specifically provides.

> Under the circumstances described and subject in each case to the limitations stated, the following persons, though not holding a license to practice medicine in this state, may engage in activities included in the practice of medicine:
>
> . . .
>
> (e) A person authorized or licensed by this state to engage in activities which may involve the practice of medicine; . . .
> I.C. § 54-1804 (e).

Thus, since acts of medical diagnosis and prescription of drugs and therapeutic and corrective measures are no longer practices exclusively reserved to licensed physicians and surgeons, nurse practitioners may be authorized to practice limited physician and surgeon skills under authority other than the board of Medicine. Although there appears to be no conflict between the statute defining "nurse practitioner" and the Medical Practice Act, this opinion of the Attorney General follows the fundamental rule of statutory construction that statutes pertaining to the same subject matter must, so far as reasonably possible, be construed in harmony with each other. *Christensen v. West,* 92 Idaho 87, 437 P. 2d 359 (1968).

In any event, from a practical standpoint, the Board of Medicine still maintains effective controls, since the Board of Medicine is empowered, in conjunction with the Board of Nursing, to authorize the acts and practices which nurse practitioners may perform. *Idaho Code* § 54-1402(d).

AUTHORITIES CONSIDERED:

1. Article III, Section 1, *Idaho Constitution.*

2. *Idaho Code* §§ 54-1402 (b) and (d); 54-1404 (7) and (9); 54-1407; 54-1415; 54-1803; 54-1804(e); 54-1806(2).

3. 1 Sutherland, *Statutory Construction* § 4.25 (4th ed. 1972).

4. Ch. 76 § 2e(1) [1951] Idaho Sess. Laws, p. 131.

5. ch. 92, § 1e(1) [1965] Idaho Sess. Laws, p. 155

6. Ch. 17, § 1e [1971] Idaho Sess. Laws, pp. 30-31.

7. Ch. 85, § 1e [1971] Idaho Sess. Laws, p. 187.

8. Ch. 13, § 112e [1974] Idaho Sess. Laws, pp. 228-229.

9. *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P. 2d 766 (1969).

10. *DeRousse v. Higginson,* 95 Idaho 173, 505 p. 2d 321 (1973).

11. *Leonard Construction Company v. State Tax Commission,* 96 Idaho 893, 539 P. 2d 246 (1975).

12. *Totusek v. Department of Employment,* 96 Idaho 699, 535 P. 2d 672 (1975).

13. *State v. Finch,* 79 Idaho 275, 315 P. 2d 529 (1957).

14. *Abbot v. State Tax Commission,* 88 Idaho 200, 398 P. 2d 221 (1965).

15. *State v. Taylor,* 58 Idaho 656, 78 P. 2d 125 (1938).

16. *State v. Heitz,* 79 Idaho 107, 112, 238 P. 2d 439 (1951).

17. *Douglas v. Noble,* 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923).

18. *Eye Dog Foundation v. State Board of Guide Dogs for the Blind,* 67 C. 2d 536, 63 Cal. Rptr. 21, 432 P. 2d 717 (1967)/

19. *State v. Spears,* 57 N.M. 400, 259 P. 2d 356 (1953).

20. *Hartfield v. New Mexico State Board of Registration for Professional Engineers and Land Surveyors,* 60 N.M. 242, 290 P. 2d 1077 (1956).

21. *State v. Briggs,* 45 Or. 366, 77 P. 750 (1904).

22. *Christensen v. West,* 92 Idaho 87, 437 P. 2d 359 (1968).

DATED This 7th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-61

TO: Miss Marjorie Ruth Moon
State Treasurer
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion.

The following Attorney General's Opinion is in response to your letter of October 20, 1977, requesting clarification whether moneys in the State Liquor Dispensary Rotary Account (Account No. 9566) can be considered "idle funds" available for investment by the State Treasurer as directed by Attorney General's Opinion No. 77-51.

QUESTION PRESENTED:

Are moneys held in rotary expense accounts created under the authority of *Idaho Code* § 67-2020 through § 67-2022 considered as part of the "liquor fund" defined in *Idaho Code* § 23-401? If so, are they to be invested for the benefit of the rotary expense account fund?

CONCLUSION:

No, funds held in conjunction with rotary expense accounts are specifically earmarked to accommodate day-to-day expenses of departments of state government and thus should not be considered idle funds as defined by *Idaho Code* § 23-401.

ANALYSIS:

As noted in Attorney General's Opinion No. 77-51, *Idaho Code* § 67-1210 outlines the duties of the State Treasurer concerning investing idle moneys of state government. The above-cited Attorney General's Opinion concludes that interest accumulated from "idle funds" shall be the property of the State Liquor Fund. The authority cities in the opinion is *Idaho Code* § 23-401, which specifically includes interest earned on all moneys of the State Liquor Fund.

The present opinion request seeks to determine the extent of "idle funds." *Idaho Code* § 67-1210 states:

> The term "idle moneys" means the balance of cash and other evidences of indebtedness which are accepted by banks as cash in the ordinary course of business, in demand deposit accounts, *after taking into consideration all deposits and withdrawals, on a daily basis.* (Emphasis added.)

The rationale in not including the moneys employed on a "daily basis" within the definition of "idle moneys" is obvious. A minimum amount of daily operating capital is required to meet ongoing expenses. Such funds are not "idle"

and should not be considered a part of any excess capital available for investment.

Effective July 1, 1977, the Idaho legislature established a "rotary expense account system." This system advances money to the State Treasury for the use of governmental departments. This system, akin to a checking account system, establishes a means whereby state department heads may requisition moneys for day-to-day expenses. *Idaho Code* § 67-2022 regulates expenditures from the rotary expense account. This Code section provides the procedure whereby amounts requisitioned are credited and debited in the revolving account. This procedure, and the requirement that unacceptable requisitions be replaced in the revolving account, further establishes the premise that the rotary expense account is a dedicated account with specifically earmarked funds. For this reason, moneys held in the rotary expense account should not be considered "idle funds," and interest earned from moneys held in that account, if any, need not be credited to the Idaho State Liquor Dispensary as outlined by Attorney General's Opinion No. 77-51.

AUTHORITIES CONSIDERED:

1. Attorney General Opinion No. 77-51.

2. *Idaho Code* §§ 23-401, 67-1210, 67-2022.

DATED This 10th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 77-62

TO: Mr. Dane Watkins
Senator — District 30
2975 Fieldstream Lane
Idaho Falls, Idaho 83401

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does *Idaho Code* § 30-1311 prohibit professionals from incorporating under an assumed corporate name when they incorporate as a professional service corporation?

CONCLUSION:

Idaho Code § 30-1311 requires that the legal corporate name of a professional service corporation must contain the last names of some or all of the shareholders. Notwithstanding, a professional service corporatio may adopt an assumed corporate name for the actual conduct of its business, but if an assumed corporate name is adopted, an assumed business name certificate must be filed with the county recorder.

ANALYSIS:

Idaho Code § 30-1311, a statute within the Professional Service Corporations Act, provides, in pertinent part:

> The corporate name of a corporation organized under this act *shall* contain the last names of some or all of the shareholders, *except that an assumed corporate name may be adopted* which does not include any of the names of the stockholders of the corporation if the corporation records a certificate with the county recorder of the county in which its principal office is located setting forth the assumed name and the names of each of its stockholders . . . (Emphasis added.)

It is the opinion of the Attorney General that, pursuant to *Idaho Code* § 30-1311, the legal corporate name under which a professional service corporation incorporates must contain the last names of some or all of the stockholders, but an assumed corporate name, different from the legal corporate name, may be adopted for the conduct of business, provided that an assumed business name certificate is filed with the county recorder in the county in which the principal office is located. Such an assumed corporate name does not have to include the names of any of the stockholders. This opinion is based upon the following reasons.

First, Idaho law recognizes a distinction between corporations doing business under a legal name and corporations doing business under an assumed name. In

Colorado Milling and Elevator Co. v. Proctor, 58 Idaho 578, 76 P.2d 438 (1938), the Idaho Supreme Court ruled that a general business corporation could incorporate under one name, creating its legal corporate name, but since there was no Idaho law prohibiting it, a business corporation could also adopt and conduct business under an assumed corporate name.

> A corporation, when it comes into existence, acquires a legal name by which it is known and identified, and by which in general it contracts and acts. Strictly speaking, this name is the only legal name which it can have, unless, of course, such name is subsequently changed by the state or under authority of the state. It seems quite well established, however, that *in the absence of statutory prohibition* a corporation may have and be known to the public by more than one name, and that, in addition to the name given it by its charter, it may acquire other names by user or reputation. Of course it cannot by usage or prescription acquire a legal name other than that conferred upon it by law, and "a corporation cannot, ex-as authorized by law, change its own name, either directly or by user." . . .
>
> . . . Like an 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 . . . (Emphasis added.) *Colorado Milling and Elevator Co. v. Proctor*, 58 Idaho at 583. Quoting with approval from Fletcher Cyclopedia, *Corporations,* Permanent Edition, vol. 6, p. 87, sec. 2442, now cited as 6 Fletcher Cyclopedia, *Corporations* §§ 2442-2442.1 (1968).

This distinction between legal business names and assumed business names is also acknowledged in Chapter 5, Title 53, *Idaho Code*, an act entitled "Assumed Business Name." Pursuant to the statutes in this act, if business is conducted under a name other than the true names of the owners, an assumed business name certificate must be filed with the county recorder in each county where business is transacted. It is noteworthy that corporations are generally exempt from filing an assumed business name certificate. *Idaho Code* § 53-504 provides:

> This chapter shall in no way affect or apply to any corporation, duly organized under the laws of this state, or to any corporation organized under the laws of another state and lawfully doing business in this state, . . .

In *Colorado Milling and Elevator Co. v. Proctor, supra*, the Idaho Supreme Court also stated as dicta that, pursuant to *Idaho Code* § 53-504, even when corporate business is conducted under an assumed corporate name, a corporation does not have to comply with the assumed business name certificate filing requirements of Chapter 5, Title 53, *Idaho Code*.

In comparing these legal principles with *Idaho Code* § 30-1311, it appears that the Idaho legislature intended to treat professional service corporations

differently from general business corporations. That is, a general business corporation may adopt an assumed corporate name and may conduct business under an assumed corporate name without being required to file an assumed business name certificate. In contrast, *Idaho Code* § 30-1311 specifically provides that a professional service corporation must file such a certificate if the corporation adopts, and conducts business under, an assumed corporate name. There would be no need for this statutory requirement if the Idaho legislature intended that professional service corporations should be treated the same as general business corporations with respect to corporate names.

Second, *Idaho Code* § 30-1311 was amended in 1965 to add the exception that a professional service corporation could adopt an assumed corporate name. Ch. 102, § 1 [1965] Idaho Sess. Laws, p. 188. Prior to this amendment, professional service corporations were completely prohibited from doing business under an assumed corporate name. When the legislature amends a statute, it is presumed that the legislature intended the statute to have a different meaning or application than it had prior to the amendment. *Leonard Construction Co. v. State Tax Commission*, 96 Idaho 893, 539 P.2d 246 (1975); *Totusek v. Department of Employment*, 96 Idaho 699, 535 P.2d 672 (1975); *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). In adding the exception by amendment, it appears that the Idaho legislature merely intended to modify the prior, complete prohibition against the use of an assumed corporate name and to allow professional service corporations to use an assumed corporate name if they so choose.

Third, in its amendment, the Idaho legislature maintained the general mandatory provision that the corporate name of a professional service corporation "shall" contain the last names of some or all of the shareholders, and added a discretionary exception that an assumed corporate name "may" be adopted. The word "shall," when used in a statute, is generally construed to create a mandatory provision. *Goff v. H.J.H. Co.*, 95 Idaho 837, 521 P.2d 661 (1974); Sutherland, *Statutory Construction* § 25.04. When a statutory provision is mandatory, exact compliance is required. Sutherland, *Statutory Construction* § 25.03 (1972).

There is also a seemingly contradictory rule of statutory construction which must be distinguished. The statutory provision allowing professional service corporations to adopt an assumed corporate name was enacted by the Idaho legislature as an "exception." Generally,

> [t]here is a vast difference between the function of an exception and that of a proviso. An exception excepts out absolutely; a proviso defeats conditionally. *Hodges v. Tucker*, 25 Idaho 563, 575, 138 P. 1139 (1914).

But, in the *Hodges* case, the Idaho Supreme Court also stated:

> The object of all interpretation is to ascertain the meaning and will of the law-making body, to the end that it may be enforced, and it is not permissible under the pretense of interpretation to

> make a law different from that which the law-making body intended to enact. 25 Idaho at 577-578.

Based upon this latter statement and based upon the three reasons previously discussed, it is the opinion of the Attorney General that the Idaho legislature did not intend the "exception" found in *Idaho Code* § 30-1311 to operate as an absolute exception. Rather, it is the opinion of the Attorney General that the actual legislative intent of *Idaho Code* § 30-1311 is to require that the legal corporate name of a professional service corporation must contain the last names of some or all of the stockholders, but an assumed corporate name, different from the legal corporate name, may be adopted for the conduct of business, provided certain filing requirements are complied with.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 30-1311; 53-504 and Title 53, Chapter 5, *Idaho Code.*

2. Ch. 102, § 1 [1965] Idaho Sess. Laws, p. 188.

3. Sutherland, *Statutory Construction* §§ 25.03, 25.04(1972).

4. 6 Fletcher Cyclopedia, *Corporations* §§ 2442-2442.1 (1968).

5. *Colorado Milling and Elevator Co. v. Proctor*, 58 Idaho 578, 76 P.2d 438 (1938).

6. *Leonard Construction Co. v. State Tax Commission*, 96 Idaho 893, 539 P.2d 246 (1975).

7. *Totusek v. Department of Employment*, 96 Idaho 699, 535 P.2d 672 (1975).

8. *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

9. *Goff v. H.J.H. Co.*, 95 Idaho 837, 521 P.2d 661 (1974).

10. *Hodges v. Tucker*, 25 Idaho 563, 575, 138 P. 1139 (1914).

DATED this 11th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-63

TO: Mr. David Leroy
Ada County Attorney
Ada County Courthouse
Boise, ID 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May the State Board of Education certify a tax to be levied by county commissioners pursuant to *Idaho Code* § 33-1011 despite the existence of *Idaho Code* § 63-922?

CONCLUSION:

The State Board of Education's certification of taxes for collection by county commissioners under *Idaho Code* § 63-922 is not prohibited by the legislature's enactment of *Idaho Code* § 32-1011.

ANALYSIS:

Idaho Code § 63-922 provides:

> From and after January 1, 1965 and in any period during which a sales tax is in force in this state, there shall be no levy of the general state ad valorem tax permitted by article VII, section 9 of the Constitution of the state of Idaho.

This section became law in 1965. That year's legislature also passed Chapter 36, Title 63, *Idaho Code*, The Idaho Sales Tax Act. Prior to its enactment, general revenue funds were collected through the imposition of statewide ad valorem tax assessments pursuant to Article 7, Section 9, of the Idaho State Constitution.

While there is no legislative history to consult, it must be presumed from the language contained in *Idaho Code* § 63-922 that the Idaho legislature intended the sales tax to replace *general* (emphasis added) ad valorem tax revenues raised under the authority of this constitutional provision. With the enactment of a statewide sales tax, the legislature obviously felt there was no longer a need to levy *general* state ad valorem taxes so long as the Sales Tax Act remains in full force and effect.

It does not appear, however, that specific (as opposed to general) property tax levies were intended to be eliminated by the legislature's passage of § 63-922. With respect to at least two statewide property tax levies, *Idaho Code* § 33-1326 (now repealed but in force at the time § 63-922 was passed) and *Idaho Code* § 59-1115, the 1965 legislature, through language added to each of these sections, specifically prohibited the imposition of these levies so long as the Sales Tax Act remained in force.

Such supplemental language was not added to *Idaho Code* § 63-1011. Therefore, one must surmise the legislature intended this particular levy to continue despite the creation of the sales tax and the legislature's intention to eliminate general ad valorem taxation.

To argue otherwise is further weakened by the 1970 legislature's enactment providing for funds to meet certain costs of water pollution control. Appendix, Volume 11A, *Idaho Code*. Funding required was exempted from § 63-922 again demonstrating legislative intent providing exceptions to the general prohibitions of § 63-922.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 32-1011; 59-1115; 63-922.

DATED this 10th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

CLINTON E. JACOB
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-64

TO: Dale R. Christiansen
Director
Idaho Department of Parks & Recreation
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. House Concurrent Resolution #55 adopted by the 2nd session of the 41st Legislature states that the Eagle Island property must be sold to the highest bidder. Does that Resolution supersede the laws governing the disposition of surplus property?

2. Can the property by law be transferred from one state agency to another without compensation? (If so, the federal guidelines clearly state that federal funds cannot be used to purchase the property).

3. Is there a state law that specifically states the agency transferring fee title must be reimbursed fair market value for the property? (If so, it may be possible to utilize 50% federal matching funds to purchase the property).

CONCLUSIONS:

1. House concurrent resolution No. 55 adopted by the Second session of the 41st Legislature declares the Eagle Island Property as "surplus property" and directs the State Land Board to appraise and "offer such property for sale at public auction." Generally, specific legislative directives supersede general legislative enactments. However, the specific directive in question is a concurrent resolution and although indicative of intent, it is not law.

2. *Idaho Code*, § 58-332, requires the State Land Board to *relinquish* control and custody of the surplus property to another state agency for "suitable use" but not ownership. This section does not *require* payment.

3. Since payment is not mandatory, the Idaho Department of Parks and Recreation cannot obtain federal funds for acquisition.

ANALYSIS:

House Concurrent Resolution No. 55 adopted by the second session of the 41st Legislature includes the following:

> WHEREAS, it is in the best interests of the State of Idaho that these properties be *appraised and sold*, and the proceeds used to complete the new Idaho State Penitentiary; . . .
>
> BE IT FURTHER RESOLVED that the State Land Board authorize the *appraisal of such property and subsequently offer such property for sale at public auction.*

This language demonstrates that the legislature intended that the Land Board sell the Eagle Island property at public auction. However, the usual rule of statutory interpretation that a specific legislative directive supersedes a general statement does not apply in this instance.

Resolutions show the intent and will of the legislature but are not regarded as law. *Sutherland Statutory Interpretation*, § 29.03 and cases cited therein. Therefore, the Land Board is not required to follow House Concurrent Resolution No. 55, 41st Legislature. In the absence of a specific *enactment* regarding the disposition of Eagle Island, the Land Board must dispose of this land according to the Surplus Real Property Act. *Idaho Code*, § 58-332.

Idaho Code, § 58-322, sets forth the requisites for disposal of surplus land:

> Upon transfer to it of such surplus real property the state board of land commissioners shall ascertain if such property is *suitable for state use*, and if it determines that suitable use can

> be had, then control and custody thereof *shall be relinquished* by said board to the agency . . .

This section indicates that the Land Board's initial step is to determine if the Department of Parks and Recreation has a "suitable use" for the property. Upon an affirmative determination of suitable use, the Land Board is directed to "relinquish" control and custody thereover but title remains in the Board pursuant to *Idaho Code*, § 58-331. "Relinguish" clearly implies that the property is transferred without compensation from the receiving agency. Payment is not precluded, but *Idaho Code*, § 58-332, clearly does not specifically *require* the receiving agency to give fair market value for the property. Thus, in the absence of a mandatory payment, the purchasing agency cannot obtain federal acquisition monies.

In summary, House Concurrent Resolution No. 55 of the second session of the 41st Legislature directs that the Eagle Island property be sold at public auction, but is advisory only. The Surplus Real Property Act requires that if another state agency has a suitable use for the property, the land board shall *relinquish* the property thereto. Finally, the act does not require a state agency to pay fair market value for the property, thus not qualifying for federal acquisition monies.

AUTHORITIES:

1. *Idaho Code*, §§ 58-331 and 58-332.

2. House Concurrent Resolution No. 55 of the 41st Legislature, 1972 Session Laws, pp. 1239-1240.

3. *Sutherland Statutory Interpretation*, § 29.03.

DATED this 17th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-65

TO: The Honorable Reed W. Budge
State Senator
District No. 32
231 S. 1st East
Soda Springs, ID 83276

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Should the State Water Plan with its policies as suggested by the Water Resource Board be passed by the State Legislature, would the present statutes governing the Board be superseded or replaced?

2. Does *Idaho Code*, § 42-1734(b) limit the activity of the Water Resource Board to "unappropriated water only"?

3. Does *Idaho Code*, § 42-1734(g) limit the activity of the Water Resource Board and staff to only the "unappropriated water"?

4. Does *Idaho Code*, § 42-1734(b)(1) infer and give legislative intent that Article 15, Section 3 of the Constitution of Idaho shall take precedence over Article 15, Section 7 of the Idaho Constitution?

5. Does *Idaho Code*, § 42-1738 (Vested water rights protected) prohibit the Water Resource Board or staff from coming out with a plan or act that would take away any water right or use of water?

CONCLUSIONS:

1. Legislative adoption of the State Water Plan by concurrent resolution pursuant to § 42-1736, *Idaho Code* will not supersede or replace any statutes governing the Water Resource Board.

2. *Idaho Code*, § 42-1734(b) directing the Water Resource Board to formulate a plan for all "unappropriated water" of the State, read in conjunction with other powers and duties given to the Board, indicates a legislative intent to protect all previously established water rights but does not prohibit the Board from taking such rights into consideration when formulating a state water plan.

3. *Idaho Code*, § 42-1734(g) grants the Water Resource Board authority to obtain permits, in accordance with state law, to appropriate unappropriated waters for Board projects. The provision does not concern Board powers or duties to formulate a state water plan.

4. No apparent conflict exists between Article 15, § 3 and Article 15, § 7 of the Idaho Constitution. The sections must therefore be read together with neither taking precedence over the other.

5. *Idaho Code,* § 42-1738 denies any power or authority in the Water Resource Board to modify, set aside or alter established water rights, except where done with the consent of the owner or under right of eminent domain, but does not prohibit the consideration of such rights within the State Water Plan.

ANALYSIS:

In 1965 the Idaho Legislature established the Idaho Water Resource Board in accordance with Art. 15, § 7, *Idaho Constitution.* See Session Laws, 1965, Ch. 320; am. 1974, Ch. 20; am. 1977, Ch. 172. The powers and duties granted to the Board appear at § 42-1734, *Idaho Code* and include the following:

> (b) To progressively formulate an *integrated, coordinated program* for conservation, development and use of all *unappropriated water resources* of this state . . . In adopting such program the board shall be guided by these criteria: [Emphasis supplied].
>
> (1) Existing rights, established duties, and the relative priorities of water established in article 15, section 3, of the constitution of Idaho, shall be protected and preserved;
>
> * * * *
>
> (g) To file applications and obtain permits in the name of the board, to appropriate, store, or use the *unappropriated waters* of any body, stream, or other surface or underground source of water for specific water projects. Such filings and appropriations by the board, or any water rights owned or claimed by the board, shall be made in the same manner and subject to all of the state laws relating to appropriation of water, [except as to fees] . . . [emphasis supplied].

ADOPTION OF THE STATE WATER PLAN WILL NOT SUPERSEDE EXISTING STATUTES

The question of whether any statutes governing the Idaho Water Resource Board would be superseded if the State Water Plan is adopted by the Legislature calls for an examination of the nature of the plan and of the method by which it is to be acted upon by the Legislature.

The State Water Plan as presently formulated has two parts. Part One contains thirteen objectives which express the general water resource planning goals to be followed under the plan. Part Two consists of a series of thirty-seven policies which propose specific legislative or administrative actions to be taken in furtherance of the general planning objectives. Taken together these objectives and policies form a comprehensive program for the conservation, development and use of all available and unappropriated waters within the

State. With a few exceptions, legislative action to change existing statutes or to appropriate funds will be required to implement each of the policies proposed in the plan.

The Board was ordered to formulate a state water plan by the directive contained in § 42-1734(b), *Idaho Code*. Section 42-1736, *Idaho Code* provides that the plan shall not become effective until submitted to the Legislature and adopted by a concurrent resolution.

A concurrent resolution is generally considered not to be equivalent to law. It has been stated that:

> Although a concurrent resolution speaks for the entire legislature, it has only limited legal effect and for most purposes is not law. *Sutherland Statutory Construction*, 4th Ed. § 29.03.

That a concurrent resolution does not have the effect of law in Idaho is made evident by the requirement of Art. 3, § 15, *Idaho Constitution*, stating that "[n]o law shall be passed except by bill..." Therefore, it is concluded that adoption of the State Water Plan by concurrent resolution pursuant to § 42-1736, *Idaho Code* will not supersede or replace any statutes governing the Water Resource Board.

Adoption of the State Water Plan by the Legislature will not constitute legislative approval of any specific projects or programs proposed in the plan without further legislative action. Nor will adoption of the plan prohibit the Legislature from subsequently enacting legislation not presently proposed in the plan.

THE STATE WATER PLAN MUST PROVIDE FOR THE PROTECTION AND PRESERVATION OF ESTABLISHED WATER RIGHTS

Two of the questions presented concern the limiting effect upon Board activities of the reference to "unappropriated waters" contained in subsections (b) and (g) of § 42-1734, *Idaho Code*.

First, it is observed that § 42-1734(g) does not concern the powers and duties of the Board with regard to the formulation of a state water plan. Rather, this provision describes a separate power vested in the Board under Art. 15, § 7, *Idaho Constitution*, which is the power "to appropriate public waters as trustee for Agency projects." No further discussion of subsection (g) is required beyond noting that the Board's power is specifically limited to the appropriation of unappropriated waters in accordance with state law.

Section 42-1734(b), on the other hand, does directly concern the powers and duties of the Board with regard to the formulation of a state water plan. It is noted that the program (or plan) which the Board is directed to formulate is described as an integrated and coordinated program. This language may reasonably be read to require that the state water plan present a program for the

utilization of unappropriated waters in a manner which is integrated and coordinated with existing appropriated water usage in the State. A state plan for the allocation of unused water resources in the public interest which does not take into account existing water uses would be of questionable value.

Also, the legislative guideline provided by § 42-1734(b)(1) as to rights established in Art. 15 § 3 of the constitution directs that such rights are to be protected and preserved under the plan, not ignored. As a further indication of what type of limitation was intended by the use of the term "unappropriated water resources" in § 42-1734(b), it is beneficial to look to the remaining provisions of the statute which set forth additional powers and duties of the Board. For example, § 42-1734(i) states that the Board has the power:

> (i) To acquire, purchase, lease, or exchange . . . *water rights* . . . and other property deemed necessary or proper for the construction, operation and maintenance of water projects. [emphasis supplied].

In granting the Board such a power it must be assumed that the Legislature did not limit the activity of the Board to a consideration of only unappropriated waters. Rather, the provision authorizes the Board to purchase or lease perfected water rights where necessary for water projects. Another provision leading to a similar conclusion is § 42-1734(j) granting the Board authority:

> (j) To exercise, in accordance with the provisions of title 7, chapter 7, *Idaho Code*, the right of eminent domain to acquire property necessary for the construction of projects, *both land and water*. [emphasis supplied].

Here the Board is empowered to exercise the powers of eminent domain to acquire established water rights if necessary for the construction of water projects.

Because of the Board's authority to acquire established water rights through purchase or eminent domain, it must be concluded that the Legislature did not intend in § 42-1734(b) to prohibit the Board from giving some consideration to waters already being utilized in accordance with state law. What is indicated by the statute is an intent that provision be made in the state water plan for the protection and preservation of established water rights.

ART. 15, § 3 AND ART. 15, § 7, IDAHO CONSTITUTION, ARE NOT IN CONFLICT

The fourth question addressed asked whether § 42-1734(b)(1), *Idaho Code* infers and gives legislative intent that Art. 15, § 3 *Idaho Constitution* shall take precedence over Art. 15, § 7? It is noted that § 42-1734(b)(1) appears as one of six criteria which shall guide the Board in adopting a state water plan. The provision states that existing rights, duties and water priorities established in Art. 15, § 3, shall be protected and preserved.

Art. 15, § 3, *Idaho Constitution* provides:

> § 3. *Water of natural stream — Right to appropriate — State's regulatory power — Priorities.* — The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Art. 15, § 7, *Idaho Constitution*, ratified in 1964, calls for the creation of a state water resource agency with the power to formulate and implement a state water plan:

> § 7. *State water resource agency* — There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature.

Art. 15, § 3 provides for the prior appropriation of water rights and establishes use priorities in time of shortage, subject to the exercise of eminent domain proceedings and the payment of just compensation. Art. 15, § 7 directs that a water resource agency be established by the legislature with the power to formulate and implement a state water plan. It lists specific powers to be exercised by the agency, under such laws as may be prescribed by the Legislature.

The two constitutional provisions do not appear to be in conflict. Since no particular controversy currently exists regarding the two provisions, it would be inappropriate to suggest that one takes precedence over the other. Regarding conflicts in constitutional provisions it has been said that:

> With respect to constitutional construction, distinct constitutional provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. 16 *Corpus Juris Secundum* § 24.

For an Idaho case holding that apparently conflicting provisions of a constitution will be reconciled whenever possible, see *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969).

It may thus be assumed that the guideline provided by § 42-1734(b)(1) is a legislative reminder to the Water Resource Board of the rights, duties and priorities contained in Art. 15, § 3 which are to be protected and preserved in the formulation of the state water plan. Such a guideline is appropriate since Art. 15, § 7 provides that the Board's power to formulate a state water plan shall be "under such laws as may be prescribed by the Legislature."

The statutory provision contained in § 42-1734(b)(1) should not be read, however, as a legislative indication that Art. 15, § 3 would take precedence over Art. 15, § 7 in case of conflict. The reason is because the constitution is the fundamental law of the state and would not be affected by such a legislative expression. If in the future an irreconcilable conflict should arise between the two constitutional provisions it will be up to the judicial branch of state government to settle the conflict.

CONSIDERATION OF VESTED WATER RIGHTS UNDER THE STATE WATER PLAN IS NOT PROHIBITED

The final question asks whether the protection given to vested water rights under § 42-1738, *Idaho Code* prohibits the Water Resource Board or its staff from coming out with a plan or act that would take away any water right or use of water? The pertinent language of § 42-1738 provides:

> The board shall have no power or authority to do, and shall be and is prohibited from doing, any thing or act which would modify, set aside or alter any existing right or rights to the use of water or the priority of such use as established under existing laws except where the board acquires the consent of the owner or exercises the right of eminent domain as herein provided.

The protection from Board action granted to vested water rights is well defined by the language of the statute. It states that the Board may take no action which would affect existing rights of water usage or priority, established under state law, except where such action is taken with the consent of the owner or

under the right of eminent domain. The two exceptions indicate that § 42-1738 was not intended as a complete bar to actions by the Board affecting vested water rights.

Furthermore, there is no indication that the provision was intended to apply to or limit the Board in its function of ascertaining the water needs of the state, and formulating a state water plan in response to those perceived needs. A consideration or review by the State Water Plan of existing water usage does not infringe upon the water rights protected by § 42-1738. Even if the plan were to propose a specific water project which would affect existing water rights there would be no violation of § 42-1738. What the provision prohibits is any action by the Board which would modify, set aside or alter those existing water rights without the owner's consent or without the use of eminent domain proceedings.

AUTHORITIES CONSIDERED:

1. Article 15, § 3 and § 7, *Idaho Constitution.*
2. Article 3, § 15, *Idaho Constitution.*
3. § 42-1734, *et seq., Idaho Code.*
4. §§ 42-1736 and 42-1738, *Idaho Code.*
5. *Engelking v. Investment Board*, 93 Idaho 217 (1969).
6. 16 *Corpus Juris Secundum* § 24.
7. *Sutherland Statutory Construction*, 4th ed. § 29.03.

DATED this 28th day of November, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PHILLIP J. RASSIER
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-66

TO: Stratton P. Laggis, Esq.
KNEELAND, LAGGIS, KORB & COLLIER
Saddle Road, Bigwood
Ketchum, Idaho 83340

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"May board members (up to full board attendance), the superintendent and/or the attorney for the district, get together informally to merely exchange information about school matters from an advisory standpoint, with no intention of becoming committed to a particular course of action or making any sort of decision?"

CONCLUSION:

Except when executive sessions are permitted by *Idaho Code*, § 67-2345, meetings should be open to the public when information is exchanged which relates to any matter on which some action by the Board is reasonably foreseeable.

ANALYSIS:

The policy of Idaho's Open Meeting Law is stated in § 67-2340, *Idaho Code*, which provides:

> Formation of public policy at open meetings. — The people of the State of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that *the formation of public policy is public business and shall not be conducted in secret.* [emphasis supplied]

This section states the legislative judgment that the process of formation of public policy should be open to the public.

Section 67-2342, *Idaho Code*, provides in pertinent part:

> All meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act.

"Meeting" is defined in § 67-2341(5), *Idaho Code*, as follows:

> "Meeting" means the convening of a governing body of a public agency to make a decision or *to deliberate toward a decision* on any matter. [emphasis supplied]

The definition of "meeting" thus raises the question as to what activities are included in the meaning of "deliberation," and specifically whether the exchange of information preliminary to a decision is a part of the deliberative process. While there is no Idaho precedent on this question, several cases from other jurisdictions hold that the exchange of information is a part of deliberation.

In *Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors*, 263 Cal.App.2d 41, 69 Cal. Rptr. 480 (1968), the court held that the term "meeting" in California's public meeting statute extended to informal sessions or conferences of the county board of supervisors.

The court particularly noted that the declaration of intent in the statute was that deliberation as well as action occur publicly. The court held:

> To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. (See Webster's New International Dictionary, 3d ed.) Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. [citations omitted] Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision. 69 Cal.Rptr. at 485.

The court went on to point out that California's open meeting law defined "legislative body" to include its committees. The court then reasoned:

> By specific inclusion of committees and their meetings, the Brown Act demonstrates its general applicability to collective investigatory and consideration activity stopping short of official action. 69 Cal. Rptr. at 486.

Similarly, Idaho's act applies to deliberation by a public agency. Also, § 67-2341 of Idaho's act defines "public agency" to include:

> (3)(d) any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.

And § 67-2341(4) provides:

> "Governing body" means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

Thus, Idaho's statute, like California's, applies to investigatory subagencies of a public body. This indicates that Idaho's act was intended to apply to investigatory activities of a public agency.

In *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla. 1969), the court considered an open meeting statute providing that "all meetings . . . at which official acts are to be taken are declared to be public meetings open to the public at all times." The court held that the legislative intent was to cover any gathering of the members where they would deal with some matter on which foreseeable action would be taken by the board.

In *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974) the court held:

> One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions as to a point just short of ceremonial acceptance . . . The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken. 296 So.2d at 477.

This language was cited with approval in the recent case of *Wolfson v. State*, 344 So.2d 611, 614 (Fla.App. 1977).

In *Accardi v. Mayor and Council of City of North Wildwood*, 145 N.J.Super. 532, 368 A.2d 416 (1976), the Superior Court of New Jersey held that New Jersey's "Sunshine Law" applied to all phases of the deliberation of public bodies. The Court then held:

> The term "deliberation" includes the discussion and evaluation of facts which the Avalon board insists it has the right to discuss in private session. 368 A.2d at 416.

A ruling contrary to the above was made in *Kessel v. Board of Supervisors for County of Nassau*, 394 N.Y.S.2d 763 (1977). There, the court held that informal meetings to exchange views were not covered by New York's public meeting law. The court noted that the statute defined meeting as the "formal convening of a public body for the purpose of officially transacting public business." Based upon this definition, the court ruled that informal meetings were not covered by the act.

By contrast, Idaho's law does not appear to distinguish between formal and informal convening of a public body. *Idaho Code*, § 67-2341(5).

Schultz v. Board of Education, 86 N.J.Super. 29, 205 A.2d 762, *aff'd* 45 N.J. 2, 210 A.2d 762 (1964) and *Beacon Journal Publishing Co. v. Akron*, 3 Ohio St.2d 191, 32 Ohio Ops.2d 183, 209 N.E.2d 399 (1965), held that only final actions

needed to be taken in open meetings. However, unlike Idaho's statute, neither of the statutes construed in these cases required deliberation to be conducted in open meetings.

Consequently, from a consideration of the judicial decisions relating to your question, it is our opinion that open meetings are required when information is exchanged which relates to any matter on which foreseeable action will be taken.

There are, however, certain meetings which need not be open to the public. Most notable are the specific exceptions contained in § 67-2345, *Idaho Code*, in which executive sessions are permitted.

Also, a limited exception involving the exchange of information which is unlikely to result in any decision or change in public policy would not appear to be covered by the definition of "meeting," or to be contrary to the policy of the act that "the formation of public policy is public business and shall not be conducted in secret." However, if such information were exchanged informally, and it became evident that some board action might be necessary with regard to the matter, the board should refrain from discussion and should ask that the information be presented again at a formal meeting.

Another exception may arise as to matters of strictly internal procedure which do not affect the public generally. For example, where there is no question as to a change of policy affecting the public, but rather only a question, for example, as to which personnel could best implement a known policy, such a discussion could occur at an informal session.

There is a danger that such informal sessions, though legal, may give rise to an appearance of impropriety. The goals of openness in government and resultant public confidence in government may thereby be diminished. Therefore, we would discourage the use of informal sessions whenever an open public meeting would be practical.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 67-2340.
2. *Idaho Code*, § 67-2341(5).
3. *Idaho Code*, § 67-2342.
4. *Idaho Code*, § 67-2345.
5. *Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors*, 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968).
6. *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla.App. 1969).
7. *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974).

8. *Wolfson v. State*, 344 So.2d 611, 614 (Fla.App. 1977).

9. *Accardi v. Mayor and Council of City of North Wildwood*, 145 N.J. Super. 532, 368 A.2d 416 (1976).

10. *Kessel v. Board of Supervisors for County of Nassau*, 394 N.Y.S.2d 763 (1977).

11. *Schultz v. Board of Education*, 86 N.J.Super. 29, 205 A.2d 762, *aff'd* 45 N.J. 2, 210 A.2d 762 (1964).

12. *Beacon Journal PUblishing Co. v. Akron*, 3 Ohio St.2d 191, 32 Ohio Ops.2d 183, 209 N.E.2d 399 (1965).

DATED this 7th day of December, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-67

TO: Marjorie Ruth Moon
Idaho State Treasurer
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. In the event of an overdraft in the "General Account", which is a part of the "State Operating Fund" under fund consolidation, is the service fee and interest charged to the "General Account" or to the "State Operating Fund"? If charged to the "General Account", is the charge figured on the entire amount of the "General Account" overdraft, or only on the portion of that overdraft which caused the "State Operating Fund" to go in the red? If charged to the "State Operating Fund", is the charge assessed against the entire fund or only to the account (in this case the "General Account") which has the red balance which caused the entire fund to go into the red?

2. When "deficiency warrants" are issued for excess costs for fire suppression,

as authorized by the State Land Board, is the service fee and interest charged to that account in the State Operating Fund, even though the State Operating Fund itself does not go into the red? Or is the service fee and interest charged to the State Operating Fund?

3. Since the State Treasurer does not keep records on the account level on the accounts in the State Operating Fund (or other funds except those specifically set out by the fund consolidation law), how is the State Treasurer to know when an "account" goes in the red if that account is to be charged the service fee and interest? Or, if the service fee and interest is to be charged against accounts only when the superfund goes in the red, how is the Treasurer to determine what the amount is on which the service fee and interest is to be based?

4. If the service charge and interest comes from the General Account and goes to the General Account, should actual bookkeeping entries be made since the effect is a wash? (In the past, no interest was actually debited or credited when Tax Anticipation Notes were issued to cover overdrafts in the General Fund, and this procedure was approved by the Board of Examiners.)

CONCLUSIONS:

1. In the event of an overdraft in the State Operating Fund caused by a deficiency in the General Account, the service fee and interest are charged to the General Account, based upon the amount of the General Account deficiency. Since the service fee and interest would also be credited to the General Account, the accounting for the transaction may be handled as outlined in "4." below.

2. When deficiency warrants are issued, pursuant to *Idaho Code*, § 38-131, for excess costs of fire suppression, a service fee and interest charge would be proper against the Forest Protection Account or other fund provided for the fire suppression purpose. The amount of the charge would be based upon the amount of the deficiency warrants issued.

3. A reporting system should be established by which the State Auditor's Office would notify the State Treasurer of any account deficiencies. By this means, determination of service fees and interest charges will be possible.

4. As you have pointed out, in those cases where the service fee and interest charge are both a credit and debit to the General Account, the effect is a wash. The existing practice of not making actual bookkeeping entries in such cases is sound.

ANALYSIS:

I.

Idaho Code, § 67-1212, provides in pertinent part:

> Unpaid warrants — Interest — Record. — (1) All warrants upon funds the balance in which is insufficient to pay them

must be turned over the the state treasurer by the state auditor. All of such warrants shall be registered by the state treasurer as follows: . . .

(2) In lieu of registering warrants as provided in subsection (1) above, the state treasurer shall have authority to: (a) Pay such warrants out of any money available if it appears that money sufficient to pay such warrants will, within thirty (30) days be available in the fund, or account in the case of accounts in the agency asset fund, rotary fund, or any other fund maintained on the account level, upon which such warrants are drawn; *the state treasurer shall charge the fund or account for which such moneys are advanced a service fee and an amount of interest substantially equal to what could have been earned had the advanced moneys been invested*, and the amount of the service fee and interest shall constitute an appropriation from the fund or account for which the advancement was made; or (b) After such thirty (30) day period, issue tax anticipation notes as provided by chapter 32, title 63, or section 57-1112, *Idaho Code*. [Emphasis added]

This section allows for the assessment of fees and interest to be made against the affected account. If the State Operating Fund is in the red as a result of a general account deficiency, the assessment should be made against the General Account rather than against the State Operating Fund. Otherwise, numerous separate accounts such as the Legislative Account, the Election Campaign Fund Account, the Bee Inspection Account, the Sheep Commission Account, etc., would be assessed interest charges occurring as a result of the General Account deficiency.

The General Account is maintained on the account level in the State Auditor's Office, but not in the State Treasurer's Office since the implementation of the Funds Consolidation Act, Chapter 8, Title 57, *Idaho Code*. Therefore, the service fee and interest charge should be assessed against the General Account, based upon the amount of the General Account deficiency, as reflected by the State Auditor's records.

The service fee and interest charge therefore reflect the amount of the warrants outstanding rather than warrants paid. This approach results in administrative efficiency, and is consistent with the thrust of the Funds Consolidation Act.

Since the service and interest charges would also be credited to the General Account, the accounting for the transaction may be handled as outlined in number "IV." below.

II.

Idaho Code, § 38-131, provides:

Deficiency warrants for excess costs of fire suppression. — In

> event the actual cost for the control or suppression of forest fires in any forest protective district exceeds in any one (1) year the maximum moneys available for forest protection in that district from the forest protection fund or any other special or general fund provided for that purpose, the state board of land commissioners may authorize the issuance of deficiency warrants for the purpose of defraying such excess costs and when so authorized the state auditor shall, after notice to the state treasurer, draw deficiency warrants against the general fund.

This section provides that the amount of the "deficiency warrants" are drawn against the General Fund. Pursuant to *Idaho Code*, § 57-804, the General Fund is now an account within the State Operating Fund. Thus, the amount of the "deficiency warrants" would now be a charge against the General Account balance. A service fee and interest charge against the Forest Protection Account would be proper based upon the amount of "deficiency warrants" issued.

III.

The Funds Consolidation Act, Chapter 8, Title 57, *Idaho Code*, consolidated funds within the State Treasurer's Office to promote administrative efficiency. As you have pointed out, very few funds are now maintained on the account level in the State Treasurer's Office. The records of accounts within funds are maintained at the State Auditor's Office. Consequently, a reporting system should be established by which the State Auditor would notify the State Treasurer of any accounts which go in the red, and the amount of the account deficiency. By this means, the State Treasurer will be able to assess service fees and interest charges.

Such a reporting system is authorized by *Idaho Code*, § 57-803, which provides in pertinent part:

> Funds recognized or established. — (1) For all budget, accounting, appropriation, allotment, audit, and other financial report purposes, the following funds, and none other, are recognized and confirmed in existence, or are established. For all such purposes, the use of accounts within funds is authorized.

The section thus provides for the use of accounts for financial reporting and other purposes. Also, *Idaho Code*, § 67-1001(15), provides: It is the duty of the auditor to furnish the state treasurer with a daily total dollar amount, by fund, and/or account when requested by the state treasurer, of warrants drawn upon the treasury. Consequently, we recommend that you work with the State Auditor's Office to develop a mutually satisfactory procedure for reporting the amount of account deficiencies.

IV.

Idaho Code, § 67-1210, provides in pertinent part:

> Investment of idle moneys. — It shall be the duty of the state treasurer to invest idle moneys in the state treasury, other than moneys in public endowment funds... The interest received on all such investments, unless otherwise specifically required by law, shall be paid into the general fund of the state of Idaho.

Therefore, unless otherwise specifically provided, when the General Account shows a deficit, the resulting service fee and interest charge would both come from the General Account and go to the General Account — the effect being a wash. You have said that in such circumstances, the past practice has been to make no actual bookkeeping entries.

Under such circumstances, it would appear that this accounting practice is sound.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 38-131.
2. *Idaho Code*, § 57-801, et seq.
3. *Idaho Code*, § 67-1210.
4. *Idaho Code*, § 67-1212.

DATED this 8th day of December, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-68

TO: Mary Kautz
Clerk of District Court
Washington County Courthouse
Weiser, Idaho 83672

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

May counties which receive federal "in lieu moneys" pursuant to 31 U.S.C. 1601, et seq., transfer those funds to special purpose districts such as fire protection districts and cemetery maintenance districts.

CONCLUSION:

"In lieu" federal funds received by a county pursuant to 31 U.S.C. 1601, may be transferred to other governmental districts within the county.

ANALYSIS:

31 U.S.C. 1601 provides:

> Effective for fiscal years beginning on and after October 1, 1976, the Secretary is authorized and directed to make payments on a fiscal year basis to each unit of local government in which entitlement lands (as defined in section 1606 of this title) are located. Such payments may be used by such unit for any governmental purpose. The amount of such payments shall be computed as provided in section 1602 of this title.

Thus, the section allows for the "in lieu" funds to be used by the county "for any governmental purpose." Fire protection districts and cemetery maintenance districts are governmental entities in Idaho and their purposes are governmental purposes. Therefore, the funds may be used by the county to promote the governmental purposes of those districts.

The implementing regulations of the Department of Interior are to the same effect, 43 C.F.R. 1880, et seq. Those regulations provide that the payments are made to units of general government (i.e. counties). A county, in turn, may use the moneys for any governmental purpose. As provided in 43 C.F.R. 1881.2:

> The monies paid to entitled units of local government may be used for any governmental purpose.

Mr. Edward P. Greenberg is designated by the regulations as the Department of Interior's contact to provide information regarding these regulations. We called Mr. Greenberg and were told that the Department of Interior is interpreting 31 U.S.C. 1601 and the implementing regulations as is outlined

above. We also learned that the Department of Interior interprets 31 U.S.C. 1601 as prohibiting any state imposed limitations upon the use of funds received so long as the funds are, in fact, being used for some governmental purpose.

It is therefore our opinion that the "in lieu" funds may be transferred to other governmental units within the county to be used for a governmental purpose.

AUTHORITIES CONSIDERED:

1. 31 U.S.C. 1601, et seq.

2. 43 C.F.R. 1880, et seq.

DATED this 9th day of December, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 77-69

TO: Mr. Dan R. Pilkington
Administrator
Division of Purchasing
Department of Administration
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Can so-called "local funds" of state educational institutions be handled in a manner different than General Fund moneys as it relates to the Idaho Purchasing Act.

CONCLUSION:

No. Sections 67-3608 and 67-3611, *Idaho Code*, require State institutions to deposit such funds with the State Treasurer at which time such funds are deposited in the General Fund of the State of Idaho and added to the deposits in the appropriation of the institution making such a deposit. But, regardless of its

General Fund identity, the Idaho Purchasing Act does not exempt such educational institutions or funds from the requisites of the Act.

ANALYSIS:

Section 67-3608, *Idaho Code*, reads in pertinent part as follows:

> Except as otherwise expressly provided by law, all sums of money received by any state educational institution, which belong to the state of Idaho, or received by any agent, employee or representative thereof for services, fees or net deposits, or for any other purposes whatever, . . . shall be immediately paid by the person receiving the same to the bursar of such educational institution, who shall deposit the same with the state treasurer at the time and in the manner required by law. . . . It is hereby made the duty of the state auditor and state treasurer to enter the deposits so received in the general fund of the state of Idaho, and the state auditor shall add the deposits so received to the appropriation currently available to the said institution . . .

Section 67-3611, *Idaho Code*, requires that:

> All state institutions, educational, charitable, penal and otherwise, shall be allowed to expend the funds arising from the sale of services, rentals of personal property, stock, farm or garden produce, or other goods, or articles produced within or by the institution, for the maintenance, use and support of said institution, without reducing the amount of the appropriations made to such institutions; all such sums received shall be deposited with the state treasurer and it is hereby made the duty of the state auditor and the state treasurer to enter deposits so received in the general fund of the state, and the state auditor shall add the deposits so received to the appropriations made to such institutions severally; and the sums of money so received are hereby appropriated from the general fund of the state of Idaho for the maintenance, use and support of the institution by which the same are so received;

Although you have not defined "Local funds" in your request for this opinion, it is my understanding that you refer to concessions and fees generated by state educational institutions over and above their set appropriation. With this in mind, §§ 67-3608 and 67-3611 specifically require such fees, services, or sale of goods to be deposited by the institution with the State Treasurer which funds become a part of the General Fund and return to the institution as a part of its appropriation. Therefore, such funds are to be handled no differently than General Fund moneys since they do in face become a part of the General Fund.

However, regardless of the above-cited sections, the Idaho Purchasing Act requires institutions of the State to comply with its requisites. As used throughout the Idaho Purchasing Act, an agency is defined as:

> All officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, the leiutenant governor, the secretary of state, the state auditor, the state treasurer, the attorney general, and the superintendent of public instruction. *Idaho Code,* § 67-5716(15).

Section 67-5717 goes on to say "that the administrator of the division of purchasing shall acquire, according to the provisions of this chapter, all property for state agencies." Since State institutions are not exempt from this Act, they are required to comply with its provisions. As a result, it makes no difference as to whether or not local funds, as cited in this opinion, or general funds are identified for purchasing purposes. The Idaho Purchasing Act applies to both such identified funds.

We therefore conclude that local funds, as identified in this opinion, are required by §§ 67-3608 and 67-3611 to be forwarded to the State Treasurer, becoming a part of the General Fund, and that regardless of their General Fund or local fund identity they are not exempted from the Idaho Purchasing Act.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* § 67-3608.
2. *Idaho Code,* § 67-3611.
3. *Idaho Code,* § 67-5716(15).
4. *Idaho Code,* § 67-5717.

DATED this 9th day of December, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 77-70

TO: Dale R. Christiansen
Director
Idaho Department of Parks and Recreation
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Can the State Land Board legally issue geothermal and oil and gas leases on land which is a part of Harriman State Park of Idaho?

2. Do these leases violate the terms of the conveyance agreement from the Harrimans to the State?

CONCLUSIONS:

1. The State of Idaho has reserved the mineral rights in all state lands sold after July 1, 1923. The State Land Board is authorized by law to lease rights to mineral exploration on state lands, including lands formerly owned by the state and sold after July 1, 1923.

2. Restrictive clauses in the conveyance agreement from the Harrimans apply only to the rights which the Harrimans owned. Since the state reserved mineral rights to the lands in question, leases for mineral exploration thereon are not in violation of the conveyance agreement.

ANALYSIS:

Records of the Idaho Department of Lands indicate that there are four leases for mineral exploration within the boundaries of Harriman State Park, including a geothermal lease and an oil and gas lease in both sections 16 and 36 of T.12N, R.42E. These Sections were sold according to law in 1946 and were subsequently conveyed to the Harrimans.

Idaho Code, § 47-701, states:

> . . . Such deposits [mineral] in lands belonging to the state are *hereby reserved to the state and are reserved from sale except upon a rental and royalty basis* as herein provided, and the purchaser of any land belonging to the state *shall acquire no right, title, or interest in or to such deposits*, and the right of such purchaser shall be subject to the *reservation of all mineral deposits and to the conditions and limitations prescribed by law* . . .

This Section was originally adopted in 1923 and makes clear the intent of the legislature that the state reserve the mineral rights in all state land sold. Moreover, State land sale certificates, numbers 22001, 22002, and 21932, expressly reserved mineral rights in Sections 16 and 36, the lands in question.

A 1936 decision of the Idaho State Supreme Court *In Re Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 664 quoted *Idaho Code*, § 47-701, with approval. That decision dealt with the taxability of the reserved rights in state lands; it was plain that there was no question that § 47-701 was considered valid by that court. The states of Utah and Montana have enacted language similar to *Idaho Code*, § 47-701, and no constitutional challenge has been sustained by the highest courts of those States. (Montana Revised Codes, 1947, § 81-902; Utah Code Annotated 1953, § 65-1-15). It is evident that the Idaho Legislature has the authority to reserve mineral rights in State Land. Moreover, no law has been found which would prevent the Land Board from leasing mineral rights to former state lands presently controlled by another state agency.

Given the State's expressed reservation of mineral rights in *Idaho Code*, § 47-701, and in the state land sale certificates for the lands in question, the answer to the second question is clear. In a conveyance agreement a property owner can restrict only that property which he owns and controls. Smith & Boyer, *Survey of the Law of Property*, pp. 301, 306, 307; 58 C.J.S. *Mines & Minerals*, § 15, p. 70. Sections 16 and 36 were sold to private citizens who in turn conveyed the lands to the Harrimans. The original conveyances from the state reserved mineral rights, and consequently the Harrimans did not receive title to the mineral rights in Sections 16 and 36. Thus, the restrictions in the conveyance agreement from the Harrimans to the State do not apply to mineral rights in these sections.

The lands contained in the gift from the Harrimans to the State, now known as Harriman State Park of Idaho, are an extremely valuable asset to the citizens of Idaho. The State of Idaho, by and through the legislature of 1963, agreed to abide by the terms of the conveyance agreement signed in 1961, and the state reaffirmed its intentions in documents signed in 1973 and 1977. The state Land Board has not violated the conveyance agreement or the laws of the State of Idaho in leasing mineral rights to Sections 16 and 36 within the boundaries of Harriman State Park.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Chapter 7, Title 47.
2. State Land Sale Certificates, Nos. 22001, 22002, and 21932.
3. *In Re Winton Lumber Co.* 57 Idaho 131, 63 P.2d 664.
4. Smith & Boyer, *Survey of the Law of Property*, pp. 301, 306, 307.
5. 54 AmJur 2d, *Mines & Minerals*, §§ 23-24.

6. 58 C.J.S., *Mines & Minerals*, § 15.

7. Chapter 315, 1963 Sessions Laws.

DATED this 9th day of December, 1977.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

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