IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

AND

SELECTED INFORMAL GUIDELINES

FOR THE YEAR

1985

Jim Jones
Attorney General

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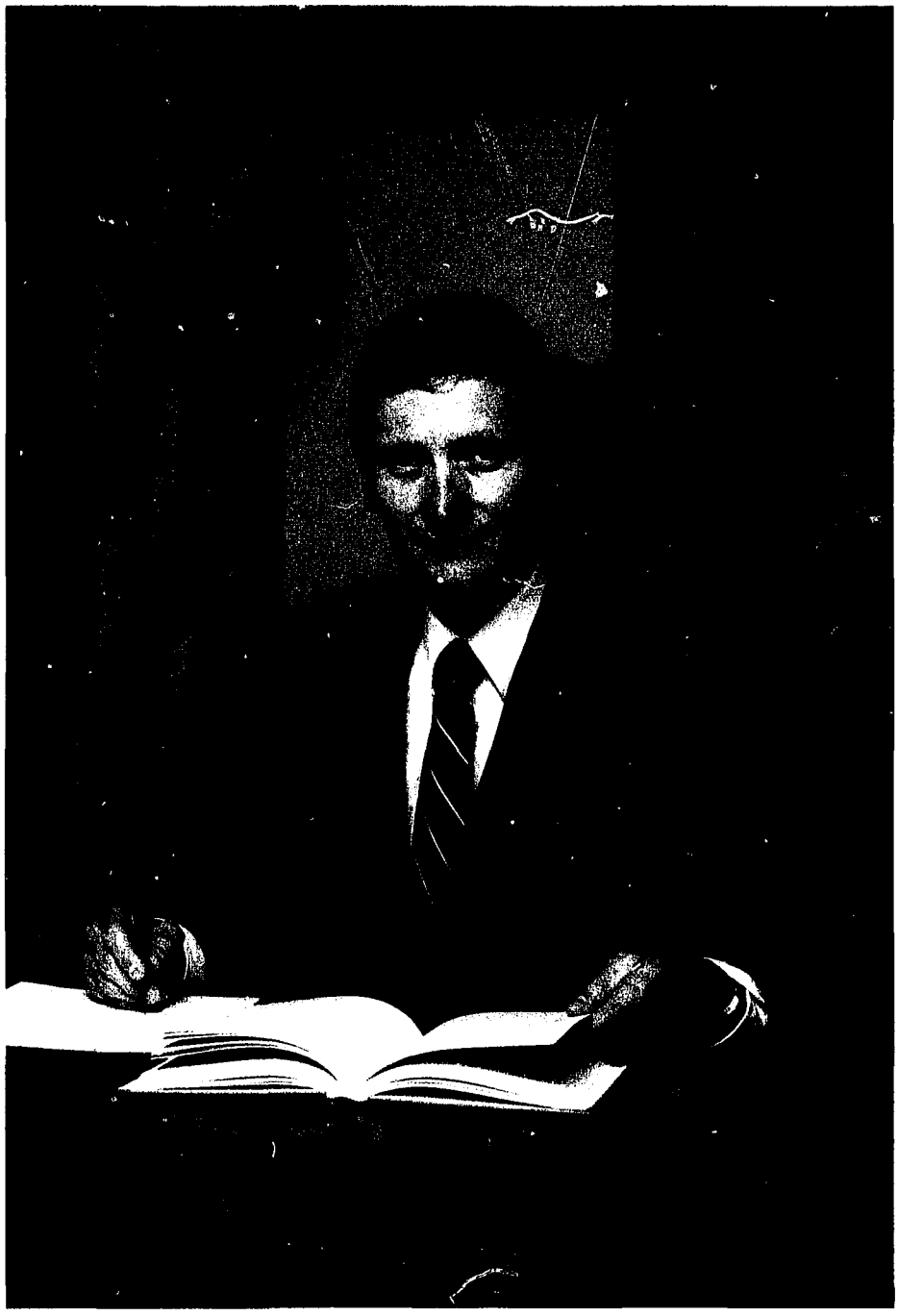

Jim Jones
Attorney General

INTRODUCTION

This volume contains the official opinions issued by the Office of the Attorney General during calendar year 1985. Yearly publication of official opinions is required pursuant to I.C.§ 67-1401(6). Although not required to do so by statute, we have also included the more significant informal guidelines issued by the Office during 1985.

The opinions and guidelines compiled in this volume are designed to provide legal guidance to all governmental entities and the general public, as well as to the specific addressees. They represent many long hours of research and writings by a dedicated staff and I believe them to be of high quality. Each year, however, we strive to upgrade the quality of our work product and to make this publication more useful to its readers.

In addition to exercising tighter quality control, this year we have added a cumulative index for opinions issued during the last ten years. It is our hope that this will be a helpful research tool for our readers. We also secured passage of legislation to remove the requirement that we publish a docket of our cases in the opinion book. The docket was essentially meaningless. In the 1984 opinion book the docket took up 14 pages.

The opinions of the Office are now available on the Lexis automated research system, making them more widely available for use by the public and private bar. However, we are still exploring the possibility of having our opinions referenced in future publications of the Idaho Code. Since the opinions do have some precedential value and since they do play a large part in shaping administrative policy and legislative action, it would seem that lawyers and jurists should have better access to them through the Code.

If you, our readers, have suggestions to improve the quality of this publication or make it a more useful document, please let us know. Your comments are encouraged and will be considered.

JIM JONES
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

As of December 31, 1985

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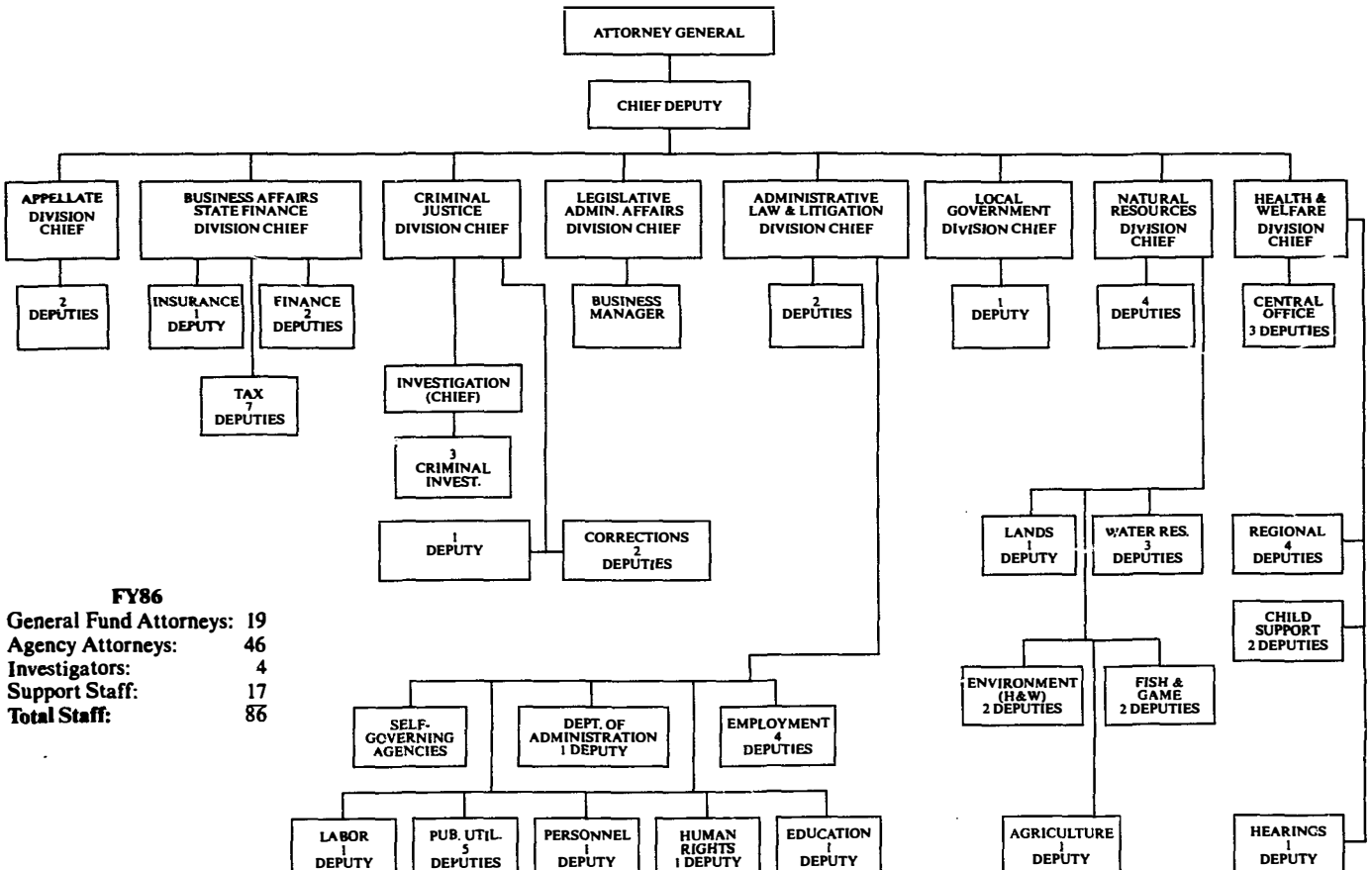

FY86

General Fund Attorneys:	19
Agency Attorneys:	46
Investigators:	4
Support Staff:	17
Total Staff:	86

ATTORNEY GENERAL OPINION NO. 85-1

TO: Commissioner Morgan Munger
Idaho State Tax Commission
Statehouse Mail

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Are personal property tax liens superior to prior perfected purchase money security interests in the same property?

CONCLUSION:

Yes.

ANALYSIS:

Nothing in Article 9 of the Uniform Commercial Code governs the priority between tax liens, which are statutory, and Article 9 security interests. Idaho Code § 28-9-102(2) states: "This chapter does not apply to statutory liens except as provided in Section 28-9-310." Idaho Code § 28-9-310 deals only with the priority of possessory liens in goods subject to security interests where the possessory lien arose from furnishing materials or services with respect to such goods.

The Colorado Supreme Court has considered the priority of personal property tax liens compared to Article 9 security interests. In *Moorehead v. John Deere Industrial Equipment Co.*, 194 Colo. 398, 572 P.2d 1207, 23 UCC Rep. Serv. 505 (1977, Reh. den. 1978), the court held that a tax sale of personal property for delinquent personal property taxes vested clear title in the tax sale purchaser and extinguished all prior liens and encumbrances. The tax sale purchaser was competing with and prevailed over a prior perfected security interest. The court stated:

> It is an established principle of real property law in Colorado that a treasurer's deed issued pursuant to a valid tax sale extinguished all prior liens, encumbrances, and other charges against the real property and conveys a new and paramount title to the grantee.
>
> * * *
>
> In enacting the present personal property tax sale statute in 1964, the General Assembly apparently decided to track the language from its real property counterpart. Colo Sess Laws 1964, ch 94, § 137-10-11(7) at 720. This use of almost identical language indicates a legislative intent that the purchaser at the personal property tax sale should receive the same unencumbered, new, and paramount title as that received by a grantee of a treasurer's deed. We so hold.
>
> * * *

> Important policy considerations support our decision. We note the fundamental necessity for the unimpared collection of general tax revenues for the support of our government. An interpretation of the statute which would render the tax collection provisions less effective should not be adopted unless clearly indicated by the statutory language employed.
>
> * * *
>
> Thus, we are irresistibly led to the conclusion that public policy and prior case law dictate that a treasurer's certificate of purchase, issued pursuant to a sale of personal property, extinguishes all prior liens and encumbrances.

194 Colo. at 401, 402.

Although the issue addressed by the court dealt with whether the prior security interests were extinguished by the tax sale, these results were derivative from the lien priorities. At all types of foreclosure sales, higher priority liens are preserved, lower priority liens are discharged. The court was, in essence, holding that the tax liens were first priority. The court looked to the tax statutes to determine the priority.

Pre-Code law looked to the statute imposing the tax lien to determine the tax lien's comparative priority. Generally, the tax laws gave first priority to the tax lien. These issues are discussed in 3 T. Cooley, *The Law of Taxation,* § 1240, pp. 2467-2472 (4th ed., 1924). Professor Cooley states:

> Not only is it competent for the state to charge property with a lien for the taxes imposed thereupon, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of tax. . . .
>
> This statutory priority generally extends to prior mortgage liens so as to subordinate such liens to tax liens. So the priority may be given to liens for a personal property tax. When a preference is given, the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the res without regard to individual ownership, and if enforced by sale of the land the purchaser will take a valid and unimpeachable title. (Cites omitted).

In order to determine the relative priority of personal property tax liens, it is necessary to review the Idaho statutes imposing the lien and the case law interpreting those statutes.

The basic authority to levy ad valorem taxes is given in Article VII, § 2, of the Idaho Constitution which provides in relevant part as follows:

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

The importance of these taxes in the scheme of state government is declared in Article VII, § 7, of the Idaho Constitution, which provides:

> § 7. State taxes to be paid in full. — All taxes levied for state purposes shall be paid into the state treasury, and no county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes.

This section has been held to be self-implementing. *Cunningham v. Moody,* 3 Idaho 125, 28 P. 395 (1891). In *Kieldsen v. Barrett,* 50 Idaho 466, 297 P. 405 (1931) (hereafter, *Kieldsen*) the Idaho Supreme Court held, in part, that this section mandated first priority for tax liens. The court stated:

> Tax liens on real property cannot be made subordinate to other liens without disregarding sec. 7, Art. VII, of Idaho Const.

50 Idaho at 472.

The court went on to hold that the maximum priority the legislature could grant to other state liens was co-equal priority with tax liens.

The constitutional authorizations have been implemented and augmented by statute. Idaho Code § 63-102 is the statutory foundation for the ad valorem tax system. The relevant part of that statute reads:

> 63-102. Lien of taxes — All property subject to assessment shall be assessed annually for taxation . . . under the provisions of this act, . . . on the first day of January . . . All taxes levied upon real estate under the provisions of this act, shall be a lien upon the real property assessed, and all taxes levied upon personal property shall be a lien upon the personal property assessed and upon any other personal or real property of the owner thereof within the county where assessed, . . . which several liens attach as of the first day of January in that year, *and shall only be discharged by the payment, cancellation or rebate of the taxes as provided in this act:* . . . (Emphasis added).

Idaho Code § 63-102 gives priority to all ad valorem taxes for all state, county or local purposes. The authority to extend priority to county and local taxes was upheld in *Bosworth v. Anderson,* 47 Idaho 697, 280 P. 227 (1929).

> The state taxes, by the constitution, and the county and city taxes, by legislative declaration, are prior to the special assessment, and this court has, in effect, so held. (cites omitted).

47 Idaho at 707.

The *Kieldsen* case dealt with ad valorem taxes on real property. However, the constitutional provision regarding priority and the statutory language limiting discharge to payment, cancellation or rebate apply equally to personal property ad valorem

taxes. As the underlying policies are identical, there should be no difference between the treatment of real and personal property ad valorem taxes. In *Scottish American Mortgage Co., Ltd., v. Minidoka County,* 47 Idaho 33, at 41, 272 P. 498 (1928), the Idaho Supreme Court indicated that if faced with the issue it would declare the personal property tax lien to be first priority over antecedent encumbrances.

Scottish American Mortgage goes on to hold that where uncollected personal property taxes are extended on the real property rolls, the lien that arises is governed by first-in-time, first-in-right priorities. The court discussed, but did not decide, the relative priority of the tax lien that arises when one item of personal property is encumbered for the taxes accruing on other items of personal property.

Determining that personal property tax liens are entitled to first priority is consistent with the structure of ad valorem taxes. The taxes are a direct charge on the property rather than security for a personal liability. As no personal liability is involved, no determination of the taxpayer's interest in the property is necessary. The tax is attached to the res. This rule prevents private parties from defeating the tax by allocating the entire equity in the property to a prior lienholder.

CONCLUSION:

In Idaho, personal property tax liens are entitled to first priority, even over antecedent encumbrances, including prior perfected purchase money security interests. Idaho tax statutes provide this priority and are not contradicted by Article 9 of the UCC or any Pre-Code law.

AUTHORITIES CONSIDERED:

1. Id. Const. art. VII, §§ 2, 7.
2. Idaho Code § 63-102.
3. *Kieldsen v. Barrett,* 50 Idaho 466, 297 P. 405 (1931).
4. *Bosworth v. Anderson,* 47 Idaho 697, 280 P. 227 (1929).
5. *Scottish American Mortgage Co., Ltd., v. Minidoka County,* 47 Idaho 33, 272 P. 498 (1928).
6. *Cunningham v. Moody,* 3 Idaho 125, 28 P. 395 (1891).
7. *Moorehead v. John Deere Industrial Equipment Co.,* 194 Colo. 398, 572 P.2d 1207, 23 U.C.C. Rep. Serv. 505 (1977, Reh. den. 1978).
8. 3 T. Cooley, *The Law of Taxation,* § 1240, pp. 2467-2472 (4th ed., 1924).

DATED this 27th day of February, 1985.

ATTORNEY GENERAL
STATE OF IDAHO
JIM JONES

ANALYSIS BY:

C. A. DAW
Deputy Attorney General

CAD: 6531J

CC: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 85-2

TO: A. Kenneth Dunn, Director
Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Does the Idaho Water Resource Board have the authority to issue revenue bonds for the purpose of loaning the proceeds to a local water project sponsor to construct a hydroelectric power project which serves no other water development, usage or conservation purposes?

CONCLUSION:

Yes. The Idaho Water Resource Board has the authority to issue revenue bonds for the purpose stated in the question presented. Idaho Code § 42-1734(x) authorizes the board to issue the proceeds of the sale of revenue bonds to local water project sponsors. Since there is no statutory language evidencing a contrary intent, the term "water project" must be construed to encompass purely hydroelectric power projects.

ANALYSIS:

The Idaho Resource Board was established pursuant to the provisions of article 15, section 7, of the Constitution of the State of Idaho. Idaho Code section 42-1732 establishes the board as the constitutional agency within the department of water resources. Thus, the board, while operating within the department of water resources, has its own constitutional and legislative existence and duties. Idaho Code § 42-1734(x) authorizes the board to issue revenue bonds:

> To loan without prior legislative approval, the proceeds of the sale of revenue bonds to the local water project sponsor or sponsors; to enter into lease, sale or loan agreement; and to purchase all or a portion of, or participate in, loans, originated by private lending institutions.

The determinative question is whether the term "water projects" encompasses a hydroelectric project that has no irrigation benefits. The legislature did not include a definition of "water project" in the act now in question and legislative history concerning the act is scant and inconclusive. Furthermore, research reveals no case law that would be helpful in the matter. Therefore, it is necessary to glean the meaning of the words, applying well-recognized rules of statutory construction.

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

> In the absence of some manifestation to the contrary we must assume the legislature intended the ordinary import of the words it used. *Nicolaus v. Bodine,* 92 Idaho 639, 641, 448 P.2d 645, 647 (1968).

> When the language used in a statute has a definite, clear meaning and applies to a certain case, the courts must give effect to that meaning whether or not the individuals comprising the legislature anticipated the result. *Unity Light & Power Company v. City of Burley,* 83 Idaho 285, 289, 361 P.2d 788, 790 (1961).

> In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, "such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like." *Messenger v. Burns,* 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963).

> The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is patently absurd, the courts must assume that the legislature meant what it said. Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect. *State, Department of Law v. One 1955 Willys,* 100 Idaho 150, 153, 595 P.2d 299, 302 (1979).

> A statute is to be construed in consideration of the reason for the statute, its object and purpose and thereby ascertain and render effective the legislative intent. *State v. Hoch,* 102 Idaho 351, 352, 630 P.2d 143, 144 (1981).

Examining the act in question with the above quoted principles in mind mandates a conclusion that the board has the authority to issue revenue bonds for the purpose of loaning the proceeds to a local water project sponsor of a hydroelectric project.

Article 15, section 7, of the Constitution of the State of Idaho vests the Water Resource Agency with certain enumerated powers. It reads as follows:

> 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.

The above quoted amendment to the state constitution, passed in 1964, charges the agency with the responsibility to "implement a state water plan for *optimum development of water resources in the public interest*. . . ." (Emphasis added.) Such a plan must include both the most efficient utilization of hydroelectric power, and also the most efficient method of generating hydroelectric power.

Article 15, section 7, also authorizes the Water Resource Agency "to generate and wholesale hydroelectric power at the site of production. . . ." This authority is not limited to hydroelectric power projects with associated irrigation benefits. It would appear incongruous, absent a specific prohibitionary provision, if the board's parallel authority to participate in the indirect financing of local hydroelectric power through revenue bonds was limited to projects with irrigation benefits.

Idaho Code § 42-1731 reads as follows:

> The welfare of the people of this state is dependent upon conservation, development and optimum use of our water resources. To achieve this objective and protect the waters of Idaho from diversion out of state, 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 issuance of revenue bonds for local hydroelectric projects conforms to this declaration of intent. The issuance of said bonds will enable the state to develop the optimum use of its water resources and protect the waters of Idaho from diversion out of state.

Idaho Code § 42-1734(s) also gives some guidance to this question. It states in pertinent part that the agency is empowered to "issue revenue bonds for the rehabilitation and repair of existing irrigation projects and irrigation facilities, *and* for water projects, . . ." (Emphasis added.) If the term "water project" was intended to mean only irrigation projects, the above quoted language would be superfluous.

Although no definition of "water project" exists within the act in question, the term is defined for purposes of the code sections concerning the revolving development fund. Idaho Code § 42-1751(d) states:

> "Project" means any project by means of which water should be utilized or benefits accrue within this state for purposes within the limitations of this act.

Obviously, any hydroelectric project would have to utilize water within this state and, if found worthy of revenue bond support by the board, would be for purposes within the limitations of this act.

On April 15, 1983, the Water Resource Agency adopted rules and regulations in order to administer the revenue bond program. Rule 2, 3 defines an eligible program as follows:

> "Eligible project" means a project in Idaho in conformance with the State Water Plan developed pursuant to Article 15, Section 7, Idaho Constitution, which has been approved for financing by an eligible financial institution. Projects may include but are not limited to the drainage or irrigation of agricultural property, the provision of domestic and municipal water supplies, energy production, flood control, fish and wildlife, recreation, agriculture, or water quality. Projects with multiple water uses are encouraged, however, secondary water uses that could be included in a multi-purpose project shall be consistent with the primary purpose.

Thus, while priority is given to "projects with multiple water uses," the agency believes it has the authority to issue revenue bonds for projects with the single purpose of "energy production." Although the agency's interpretation is by no means controlling, it should be given deference:

> A construction given a statute by executive or administrative officers of the state is entitled to great weight and will be followed by the court unless there are cogent reasons for holding otherwise. *Idaho Public Utilities Commission v. V-1 Oil Company,* 90 Idaho 415, 420 412 P.2d 581, 583 (1966).

In the instant case there are no cogent reasons for holding otherwise. The authority to issue revenue bonds is consistent with the broad powers and duties given to the Water Resource Agency by the state constitution and legislative enactment.

Besides deciding whether the board has the authority to issue said bonds, it must also be determined whether the issuance of revenue bonds is constitutionally permissible. However, examination of the issue in detail in this opinion is not necessary. The Idaho Supreme Court has already decided that the issuance of revenue bonds is constitutionally permissible. *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976). The issuance of revenue bonds for hydroelectric projects is authorized by statute and constitutionally permissible.

SUMMARY:

Idaho Code § 42-1734(x) authorizes the board to issue revenue bonds to a local water project sponsor. The term "water project" is not defined. However, the act in question manifests no legislative intent to exclude purely hydroelectric projects from

within the definition. It is statutorily authorized and constitutionally permissible for the Idaho Water Resource Board to issue revenue bonds to a local water project sponsor to construct a hydroelectric power project which serves no other water development, usage or conservation purpose.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

   Art. 15, § 7.

2. *Idaho Code*

   Sections 42-1731, 42-1732, 42-1734(s), 42-1734(x), 42-1751(d).

3. *Idaho Cases*

   a. *Unity Light & Power Company v. City of Burley,* 83 Idaho 285, 289, 361 P.2d 788, 790 (1961).

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

   c. *Idaho Public Utilities Commission v. V-1 Oil Company,* 90 Idaho 415, 420, 412 P.2d 581, 583 (1966).

   d. *Nicolaus v. Bodine,* 92 Idaho 639, 641, 448 P.2d 645, 647 (1968).

   e. *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976).

   f. *State, Department of Law v. One 1955 Willys,* 100 Idaho 150, 153, 595 P.2d 299, 302 (1979).

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

4. *Other Authorities*

   Idaho Water Resource Agency Rules and Regulations, Rule 2, 3, (April 15, 1983).

DATED this 31st day of May, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

STEVEN L. ADDINGTON
Deputy Attorney General
Natural Resources Division

ATTORNEY GENERAL OPINION NO. 85-3

TO: Mr. Stanley F. Hamilton
Director
Department of Lands
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

Regarding: Idaho Code § 58-140

QUESTION PRESENTED:

Idaho Code § 58-140 provides that up to 10% of the income from state timber sales, grazing leases, and recreation site leases upon state lands shall be paid to a special fund to be used for maintenance, management, and protection of such state owned lands. Most of such lands are endowment lands. Should proceeds from endowment lands be accounted for and invested separately from other state funds so that any interest income earned thereon benefits the endowment lands or endowment funds rather than the general fund?

CONCLUSION:

Until July 1, 1985, the special fund provided by Idaho Code § 58-140 is consolidated in the state operating fund, pursuant to Idaho Code § 57-804. Interest upon idle funds in the state operating fund is paid to the general fund. Idaho Code § 57-804 was repealed by Ch. 195, 1985 S.L., effective July 1, 1985. Thereafter, the state auditor is authorized to classify accounts within the funds established by Idaho Code § 57-803.

To avoid violation of constitutional and land grant provisions, the special fund should be consolidated in the agency asset fund so that interest will be accounted for separately for the benefit of the account.

Accordingly, we recommend that effective July 1, 1985, the state auditor transfer the special fund from the state operating fund to the agency asset fund.

ANALYSIS:

Management and control of state lands is vested in the state board of land commissioners pursuant to Idaho Const. art. 9, §§ 7 and 8. Article 9, § 7 provides:

> The governor, superintendent of public instruction, secretary of state, attorney general and state auditor shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.

Idaho Const. art. 9, § 8, provides, in pertinent part:

> It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; . . . The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; . . .

Thus, the constitution imposes a duty upon the board of land commissioners to provide for the location, protection, sale and rental of land grants in such a manner as to secure maximum long-term financial return therefrom. The constitution imposes a duty upon the legislature to provide laws such that land grants shall be judiciously located, carefully preserved, and held in trust to further the purposes of the land grants. Also, the legislature is required to provide for the sale of lands and timber and to provide for the faithful application of the proceeds thereof in accordance with the terms of the land grants.

Idaho Code § 58-140 provides a statutory funding mechanism to carry out this constitutional mandate. The section provides, in pertinent part:

> A reasonable amount not to exceed ten per centum (10%) of the moneys received from the sale of standing timber, from grazing leases and from recreation site leases shall constitute a special account, which is hereby created to be used for maintenance, management and protection of state owned timber lands, grazing lands and recreation site lands: provided, that any moneys constituting part of such account received from a sale of standing timber or from leases of lands which are a part of any endowment land grant shall be used only for the maintenance, management and protection of lands of the same endowment grant. Provided further, that all such funds collected from timber sales shall be expended solely for the purpose of management, protection and reforestation of state lands. All such funds collected from recreation site leases shall be expended for the maintenance, protection and improvement of both new lease sites, and existing recreation areas situate on state lands. All such funds collected from grazing leases shall be expended for the maintenance, management and protection of state owned grazing lands. Control and eradication of noxious weeds is a part of the maintenance, protection and improvement programs.
>
> The state board of land commissioners is hereby authorized to establish rules and regulations fixing a percentage of the amount received from each sale of standing timber and from each grazing and recreation site lease, not to exceed ten per centum (10%) of the total, which shall constitute the special account herein created. The account shall be deposited with the state trea-

> surer, who shall keep a record thereof which shall show separately moneys received from each category of endowment lands. All moneys deposited in the account are hereby appropriated continually to the state board of land commissioners for the purposes hereinabove enumerated.

The statute provides a reasonable funding mechanism to carry out the state's obligation to carefully preserve and protect lands granted to the state.

However, as noted previously, the constitution also provides that the lands are held in trust and the proceeds therefrom must be faithfully applied in accordance with the terms of the grant.

In *Roach v. Gooding,* 11 Idaho 244, 81 P. 642 (1905), the Idaho Supreme Court considered the state's trust responsibility to apply proceeds from the sale of university grant lands only for support and maintenance of the University of Idaho. Specifically, the court considered the constitutionality of a statute which provided for repayment of university building bonds from the income from university land grants. The court held:

> I must therefore conclude that the legislature had no power or authority to appropriate or set apart for the payment of the interest or principal of the bonds referred to any part of the proceeds of the permanent fund created by the sale of the whole or any part of said seventy-two sections of land or the timber thereon.

11 Idaho at 255.

Thus, the court required endowment fund proceeds to be strictly applied to the purposes enumerated in the constitution. In a number of cases since *Roach,* supra, the Idaho Supreme Court has carefully guarded the endowment lands and endowment funds. For example, in *Pike v. State Board of Land Commissioners,* 19 Idaho 268, 113 P. 447 (1911), the court upheld the board's practice of requiring an agreement to bid a given price as a condition precedent to advertising lands for sale.

In *Barber Lumber Co. v. Gifford,* 25 Idaho 654, 139 P. 557 (1914), the court pointed out that the grant of lands by the federal government to the state constitutes a trust fund. Therefore, the state board of land commissioners is bound by trust principles to administer the lands to secure the greatest measure of advantage to the beneficiary.

It was held in *Hellerud v. Hauck,* 52 Idaho 226, 13 P.2d 1099 (1932), that title to school grant lands could not be acquired by adverse possession against the state no matter how long adversely occupied. Thus, the cases reflect a consistent judicial policy of protecting the interest of the beneficiaries of endowment land grants and requiring a strict application of trust principles for the benefit of beneficiaries of endowment land grants.

The Idaho Supreme Court has further ruled that proceeds of endowment lands may only be applied by the legislature in furtherance of the purposes of the endowment. In *Evans v. VanDeusen,* 31 Idaho 614, 174 P. 122 (1918), the court considered

appropriations to institutions under the control of the state board of education. The appropriations provided essentially that the amount of general fund appropriations would be reduced in an amount equal to the amount of endowment fund income earned and available to the institutions. Endowment fund earnings were separately appropriated to the institutions by means of a continuing appropriation.

The court denied the application for a writ challenging the method of appropriation and the accounting practices used to implement it. The court determined that the method utilized did not divert endowment funds from endowment purposes. In discussing the nature of endowment funds and the legislature's duty not to divert them for other purposes the court said:

> The funds referred to being declared by the constitution to be trust funds, are not, strictly speaking, subject to appropriation. They were appropriated or set apart for certain purposes designated by the terms of the grants which had been accepted by the state. The legislature, however, is required to provide the method by which they may be made available for such special purposes, and to that extent only are the funds subject to what may be called an appropriation. The courts are not concerned with the methods which the legislature may provide, further than that, upon proper proceedings therefor, they will prevent the diversion of the funds from the objects or purposes for which they have been granted.

31 Idaho at 620.

While the legislature is accorded some flexibility in providing the methods of making endowment funds available, both the *Evans* case and the *Roach* case discussed previously hold that the legislature may not divert those funds for purposes other than those authorized by the constitution and federal grants.

As noted previously, Idaho Code § 58-140 creates a special fund from a portion of the proceeds of timber sales and lease payments. The statute provides a reasonable funding mechanism to carry out the land board's constitutional duty to carefully preserve and protect endowment lands. However, as the cases point out, the funds cannot be diverted for purposes not authorized by the constitution and provisions of the land grants. We must, therefore, examine the statutory provisions to determine whether they result in a diversion of endowment interest earnings for unauthorized purposes.

Idaho Code § 57-804(2) provides, in pertinent part:

> The following funds and money existing on June 30, 1977, are consolidated into the state operating fund:

Auditor's Fund Number	Name of Fund	Created by Idaho Code Section
	* * * * * *	
266	Ten Percent Timber and Grazing Land Lease Fund	58-140

Idaho Code § 57-803(a) provides:

> The state operating fund is hereby created and established in the state treasury. The state operating fund is to be used to account for moneys which are not necessarily restricted in use or purpose, and which are generally utilized to finance the ordinary functions of state government.

The statutes above-quoted improperly classify the 10% timber and grazing land lease fund within the state operating fund. As the cases discussed previously point out, proceeds from endowment lands are trust funds constitutionally restricted in use and purpose and are not utilized to finance the ordinary functions of state government.

Also, there are no provisions in Idaho Code §§ 57-803(a), 57-804, or 58-140 providing for interest earnings to accrue to the benefit of the 10% timber and grazing land lease fund. Interest earnings upon idle funds in the state treasury are paid to the general fund pursuant to Idaho Code § 67-1210.

In our opinion, the 10% timber and grazing land lease fund should properly be placed within the agency asset fund.

The agency asset fund is created and defined by Idaho Code § 57-803(n) as follows:

> The agency asset fund is hereby created and established in the state treasury. The agency asset fund is to be used to account for moneys which are restricted in use or purpose, and which must or may be, invested and accounted for as separate entities, and are not accounted for in any other fund.

Placing the 10% timber and grazing land lease fund in the agency asset fund would satisfy constitutional requirements since the fund is designed to handle accounts which are restricted in use and purpose. Accounts within the fund are accounted for as separate entities by the state treasurer. Unlike the state operating fund, the agency asset fund provides the necessary accounting mechanisms to attribute interest earnings to particular accounts.

A fundamental rule of trust law is that a trustee must separately account for trust property and funds and must not use trust property or funds in his trade, business, or private affairs or the business affairs of any other person unless authorized by the terms of the trust. Any profit or gain resulting from his own use of trust funds inures to the trust estate. See e.g., *McComb v. Frink,* 149 U.S. 629, 13 S.Ct. 993, 37 L.Ed. 867 (1893); *Bruun v. Hanson,* 103/F.2d 685 (C.A. Idaho, 1940), cert.den. *Hanson v. Bruun,* 308 U.S. 571 (1939), 60 S.Ct. 86, 84 L.Ed. 479; *Nampa Investment Corp. v. Demming Explor. Co.,* 50 Idaho 46, 293 P. 326 (1930); *Restatement, Trusts,* 2d § 179.

Since the existing statutes permit the use of trust funds to generate income for the general account, they appear to violate trust principles. However, the current statutorily required classification of the account within the state operating fund is repealed by Ch. 195, 1985 S.L., effective July 1, 1985. Thereafter, the state auditor is

authorized to classify accounts in the various funds enumerated in Idaho Code § 57-803. On the effective date of the Act, the state auditor should reclassify the 10% timber and grazing land lease fund in the agency asset fund to conform the state's accounting practices to those contemplated by the Idaho Constitution.

AUTHORITIES CONSIDERED:

Idaho Const. art. 9, §§ 7 and 8

Idaho Code § 58-140

Idaho Code § 57-803,(a),(n)

Idaho Code § 57-804(2)

Idaho Code § 67-1210

Idaho Code § 57-811(4)

Ch. 195, 1985 Session Laws

Restatement, Trusts, 2d § 179

Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905)

Pike v. State Board of Land Commissioners, 19 Idaho 268, 113 P. 447 (1911)

Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557 (1914)

Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932)

Evans v. VanDeusen, 31 Idaho 614, 174 P. 122 (1918)

McComb v. Frink, 149 U.S. 629, 13 S.Ct. 993, 37 L.Ed. 867, (1893)

Bruun v. Hanson, 103 F.2d 685 (C.A. Idaho, 1940) cert.den. *Hanson v. Bruun,* 308 U.S. 571, 60 S.Ct. 86, 84 L.Ed. 479 (1939)

Nampa Investment Corp. v. Demming Explor. Co., 50 Idaho 46, 293 P. 326 (1930)

DATED this 17th day of June, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

Mr. Stanley F. Hamilton
Director
Department of Lands

ANALYSIS BY:

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

ATTORNEY GENERAL OPINION NO. 85-4

TO: Mr. William G. Hepp
Investment Manager
Endowment Fund Investment Board
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

Regarding: Idaho Code § 57-722(3)(b)

QUESTIONS PRESENTED:

1. Whether Idaho Code § 57-722(3)(b) is constitutional?

2. What authority does the State Treasurer have as custodian of the public school fund to: (a) question the investments made by the Board through its Investment Manager who has been granted discretionary authority regarding investments; and (b) to refuse to open accounts as instructed by the Investment Manager for securities which clearly qualify for investment pursuant to Idaho Code § 57-722, specifically subsections (3)(b) and (8)?

CONCLUSIONS:

1. Idaho Code § 57-722(3)(b) authorizes investment in money market mutual funds whose assets are limited to obligations of the United States or any agency or instrumentality thereof. Such investments are constitutionally permitted, provided that the money market mutual fund meets two requirements. First, it must unconditionally guarantee full repayment of principal and interest as required by Idaho Const. art. IX, § 11. Second, the state must not directly or indirectly become a stockholder in any association or corporation. These determinations must be made on a case-by-case basis following review of the particular investment agreement and prospectus.

2. Responsibility for choice of legally permissible investments is vested in the board. The state treasurer has a custodial responsibility to safeguard fund assets entrusted to her care. This responsibility is broad enough, at a minimum, to refuse to

open accounts or transfer funds for clearly illegal investments. As to investments which the treasurer believes are possibly illegal, we recommend that the transaction be completed and that legal resistance, if any, to a board request for investment be limited to judicial review of the question.

ANALYSIS:

Question 1

The question presented is whether Idaho Code § 57-722(3)(b) violates the Idaho Constitution. Idaho Code § 57-722(3)(b) provides:

> The board or its investment manager(s) may, and they are hereby authorized to, invest the permanent endowment funds of the state of Idaho in the following manner and in the following investments or securities and none other:
>
> * * *
>
> (b) Money market mutual funds whose assets are limited to obligations of the United States or any agency or instrumentality thereof.

Idaho Constitution art. IX, § 11, sets forth the primary constitutional limitation upon permissible investments of the permanent endowment funds. That section provides:

> The permanent endowment funds other than funds arising from the disposition of university lands belonging to the state, *shall be loaned* on United States, state, county, city, village, or school district bonds or state warrants or on such other investments as may be permitted by law under such regulations as the legislature may provide. (Emphasis added)

The leading case construing this section's limitations upon investments is *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969). In that case, the Idaho Supreme Court held that §§ 9(6) and 9(8) of S. B. 1277 (S. L., 1969), which permitted purchase of stock and conversion of convertible bonds, violated Idaho Const. art. VIII, § 2, and art. IX, § 11.

In construing Idaho Const. art. IX, § 11, the court found that the legislature was limited to authorizing *loans* of endowment funds in view of the operative verb "shall be loaned" which is used in that section. In defining loan, the court held:

> In this situation we believe the important word "loan" must not be loosely construed to include all types of "investment." Instead, the word "loan," as used in Idaho Const., art. IX, § 11 and as extended in scope by the 1968 amendment, must carry the meaning that *there must be a guarantee of full repayment of principal as well as interest. There must be an unconditional promise to repay the principal sum originally lent.* (Emphasis added)

93 Idaho at 223.

The court in *Engelking* also held that the statute authorizing purchases of stock and conversion of convertible bonds violated the express provision of art. VIII, § 2, that the state shall not "directly or indirectly become a stockholder in any association or corporation."

Thus, the court has established two requirements which must be met by any investment of the Idaho Endowment Fund Investment board. First, the investment must be a "loan," i.e., there must be an unconditional guarantee of full repayment of principal as well as interest. Second, the board must not directly or indirectly become a stockholder in any association or corporation.

In *Engelking,* supra, the court permitted investment in convertible bonds provided that they were not converted into common stock by the board. Thus, the fact that a security includes a potential for appreciation measured by the increase in value of equity interests is not fatal, provided that the security also unconditionally guarantees the full repayment of principal and interest.

In view of the numerous and varying provisions included in financial instruments offered to investors, it is necessary to determine compliance with Idaho's constitutional limitations upon endowment investments on a case-by-case basis. This necessarily requires a review of the particular security being considered as defined by the terms of the security agreement and prospectus.

Applying the *Engelking* decision to money market mutual fund investments, we begin with a definition of money market mutual fund drawn from the *Dictionary of Banking and Finance,* John Wiley & Sons, New York, 1982. Therein, "money market fund" is defined in the finance context as:

> . . . [a]n investment vehicle whose primary objective is to make higher-interest securities available to the average investor who wants immediate income and high investment safety. This is accomplished through the purchase of high-yield money market instruments, such as U.S. Government securities, bank certificates of deposit, and commercial paper.

pp. 335-335.

"Mutual fund" is defined as:

> . . . [a]n investment company which ordinarily stands ready to buy back (redeem) its shares at their current net asset value; the value of the shares depends on the market value of the fund's portfolio securities at the time. Also, mutual funds generally continuously offer new shares to investors.

p. 342.

"Investment company" is defined as including "a company or trust that uses its capital to invest in other companies . . ." p. 288. In the context of Idaho Code § 57-722(3)(b), such a company or trust would be limited to investment in federal obligations.

Thus, a money market mutual fund is an investment company, utilizing a corporation or trust form of organization, which invests in high-yield money market instruments such as U.S. government securities and will redeem its shares at their current net asset value.

The definition of money market mutual fund neither includes nor excludes from the definition funds which do or do not guarantee repayment of principal and interest. It would not be contrary to the definition to provide a guarantee of repayment of principal and some amount of interest over a given period.

As an example, assume that a money market mutual fund invests in federal obligations with an average maturity of 30 days and an average annual interest rate of 8%. Also assume that the fund guarantees full repayment of principal plus interest at a minimum rate of 4% per annum if the security is held for 30 days. The fund further agrees that the investment can be redeemed at the net asset value per share at stated times.

Such an investment would meet the definition of money market mutual fund. It would also meet the definition of "loan" as interpreted by the Idaho Supreme Court in *Engelking,* supra. Such an investment would be comparable to convertible bonds which the court found permissible in *Engelking.* Like convertible bonds, there is an unconditional promise to repay principal and interest if held to a particular date in the future. Like convertible bonds, such an investment would include a right to convert the investment in the event of appreciation above the guaranteed return. In the case of convertible bonds, the court held that conversion to common stock would not be permitted since the state would upon conversion own stock in a corporation in violation of Idaho Const. art. VIII, § 2. This problem is not presented in the above example since upon redemption the state would receive cash rather than stock. Such a money market mutual fund investment would be constitutional.

In view of the ingenuity of the securities industry in developing various investment instruments, the above example is not intended to indicate that only money market mutual funds so structured meet constitutional requirements. Rather, it is intended to point out that money market mutual fund investments are constitutionally permitted vehicles for endowment fund investments if structured so that the state receives an unconditional promise to repay principal and interest.

When a statute is susceptible to a constitutional construction, that construction must be adopted. *Matter of 1979 Valuation of Parcel No. R23487550330,* 104 Idaho 681, 662 P.2d 1125 (1983); *State ex rel. Kidwell v. U.S. Marketing, Inc.,* 102 Idaho 451, 631 P.2d 662 (1981); *Nelson v. Marshall,* 94 Idaho 726, 497 P.2d 47 (1972); *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969). Accordingly, it is our opinion that a court faced with a challenge to Idaho Code § 57-722(3)(b) would read that section to preserve its constitutionality.

The court would construe Idaho Code § 57-722(3)(b) as authorizing investment in money market mutual funds which unconditionally guarantee repayment of principal and interest and which invest in federal obligations.

We have also considered the question whether the form of business organization chosen by an investment company affects the above analysis. As noted earlier, investment companies include both companies and trusts which use their capital to invest in other companies or federal obligations. In practice, money market mutual funds utilize either the corporate or business trust form of organization. Business trusts are also referred to as Massachusetts trusts and common law trusts. It is our opinion that the requirement of an unconditional promise to repay principal and interest must be provided whether the money market mutual fund is organized as a corporation or a Massachusetts or business trust.

There is a great deal of case law describing the nature and attributes of Massachusetts or business trusts (See, e.g., *Modern Status of the Massachusetts or Business Trust,* 88 ALR3d 704.) The ALR annotation discusses the Massachusetts or business trust in substantially more detail than can be covered herein. However, the following points are pertinent to the questions involved in this opinion. Summarizing the cases defining such trusts the annotation states:

> From the following illustrative cases which have undertaken to define a Massachusetts or business trust (also known as common-law trust), it may be said that a business trust is an unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate.

In addition to general agreement as to the basic definition of Massachusetts or business trusts, there is also general agreement that such trusts are very different from traditional trusts. For example, in *Morrissey v. Commissioner,* 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935), the U.S. Supreme Court pointed out that in business trusts the object is not to hold and conserve particular property with incidental powers as in the traditional trust. Rather, the business trust is created to provide a medium for the conduct of business and the sharing of gains.

Similarly, in *Jim Walter Investors v. Empire Madison, Inc.,* 401 F.Supp. 425 (D.C. Ga. 1975), the court noted the following associational characteristics of a real estate investment trust organized under the business trust provisions of Florida law. The associational characteristics found included centralized control, beneficial shares, a distinct legal existence provided by its declaration of trust, limited liability, profit motivation, and the ability of shareholders to remove trustees and to merge, terminate, or amend the trust. The court concluded that the organization displayed no indicia of a traditional trust.

We are aware of no states which treat Massachusetts or business trusts in the same manner as traditional trusts. This apparently results from the associational nature of such organizations and the basic difference in purposes. The associational nature of such organizations has led courts to classify Massachusetts or business trusts as corporations, partnerships, or unincorporated associations. 88 ALR 722-729. States which do not view Massachusetts or business trusts as corporations frequently regulate them as corporations. For example, in *Swartz v. Sher,* 344 Mass. 636, 184 NE2d

51 (1962), it was held that, although a Massachusetts trust with transferable shares was not a corporation or an entity apart from the trustees, the trust was subject to regulation as a corporation and, as a practical matter, business trusts closely resemble corporations.

The cases also hold that the indenture or declaration of trust is determinative of the nature of the organization and of the details of its operation. 88 ALR3d 730. This underscores the importance of reviewing the declarations of trust on a case-by-case basis in determining the nature of a trust in a particular case. For example, in *Koenig v. Johnson,* 71 Cal.App.2d 739, 163 P.2d 746 (1945), it was held that the declaration of trust is to be looked to in determining whether the organization thereby created is an ordinary trust or a business trust.

Similarly, once it is determined that a money market mutual fund is a business trust rather than an ordinary trust, the question whether the securities it offers carry an unconditional promise to repay principal and interest should be determined with reference to the specific terms of the actual offering which are included in the offering's prospectus.

In Idaho, there have been three Supreme Court cases which have considered business trusts. *Spotswood v. Morris,* 12 Idaho 360, 85 P. 1094 (1906); *State v. Cosgrove,* 36 Idaho 278, 210 P. 393 (1922); *Edwards v. Belknap,* 66 Idaho 639, 166 P. 2d 451 (1946).

Spotswood, supra, was an action to recover commissions for procuring a purchase for an alleged sale of real estate. The property involved had been conveyed in trust for a business association or syndicate called the Denver Townsite Company. One of the issues raised was whether two of the members of the business association or syndicate could bind the syndicate other than as set forth in the articles of agreement.

After reviewing the agreement, the court concluded that the association was a form of partnership unlike a normal partnership. In its opinion, the court reproduced virtually the entire agreement which reflects the importance of reviewing the actual agreements involved in determining the nature of such organizations and the legal effects resulting therefrom.

In *Cosgrove,* supra, the court considered the question whether a business trust of the state of Montana which sold one unit of its capital stock in Idaho was subject to Idaho's Blue Sky Law. The court determined that the business trust was an "association" and was, therefore, subject to the Blue Sky Law.

In *Edwards,* supra, the court considered whether grantors of a quitclaim deed to a business trust were entitled to cancellation of the deed as a result of the failure of the business trust to file articles of incorporation or to comply with reporting requirements upon corporations. The case was decided on grounds of estoppel rather than the nature of the organization. As to the nature of business trusts, the decision is somewhat confusing. Only Justice Budge stated that the trust is not technically an association or legal entity. Justices Givens and Keolsch found that the business trust was an unincorporated association which is a legal entity. Justices Holden and Miller

(Dissenting) argued that since the trust exercised powers and privileges of corporations, it was required to file articles of incorporation and conduct its affairs in Idaho as a corporation.

The Idaho cases make it clear that the nature and legal effect of such trusts must be determined with reference to the particular agreements involved. It is also clear from the Idaho cases that a business trust will be treated in Idaho as a form of business organization and not as a traditional trust. This is consistent with the normal view of business trusts as discussed in the ALR annotation cited previously.

The distinction bears emphasizing. Traditional trusts are not viewed as legal entities. Consequently, investment in a federal security by a traditional trustee of endowment funds would be viewed as a direct investment of the endowment fund in federal securities. However, a business trust is viewed by Idaho and virtually all other states as a business entity. As such, Idaho would follow the general rule that certificate holders in a conventional business trust stand in relation to the trust much as do stockholders to a corporation in that they are not creditors of the trust but are rather equitable owners of proportional interests in trust assets and liabilities. 88 ALR3d 737-739; *Selected Investment Corp. v. Duncan,* 260 F.2d 918 (Ca. 10 Okl. 1958), cert.den. 359 U.S. 914, 79 S.Ct. 584, 3 L.Ed. 2d 576.

The same rule has even been found in Massachusetts, one of the jurisdictions following the minority view that business trusts are not legal entities. In *Kennedy v. Hodges,* 215 Mass. 112, 102 N.E. 432 (1913), it was held:

> . . . [t]he shares in the Western Real Estate Trust, come within the same rule. The trustees are resident in this commonwealth and their home business office is here, where only can the certificates be transferred upon surrender and new certificates issued. The certificate holder is at least the owner of an undivided equitable interest in the property held by the trustees. There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation. This is virtually decided by *Kinney v. Treasurer and Receiver Gen.,* 207 Mass. 368, 371, 93 N.E. 586, 35 L.R.A. (N.S.) 784, Ann.Cas. 1912A, 902; *Peabody v. Stevens,* 102 N.E. 435.

In summary, the form of business organization chosen by a money market mutual fund will not affect the application of Idaho's constitutional provisions regarding investment of endowment funds. Idaho, as most other states, will look to the substance rather than form of business organization to determine the essential nature thereof. If organized as a business trust, an organization will be treated as a business organization and not as a normal trust. This determination will be made by reviewing the declaration of trust to determine the essence of the arrangement. Rights and obligations of shareholders and the trust will be determined from the agreements and documents defining those rights and obligations, including the declaration of trust and prospectus. To satisfy Idaho's constitutional requirements for endowment investments, such documents must unconditionally guarantee repayment of principal and interest upon the endowment investments.

Question 2

The second question posed concerns the authority of the state treasurer to question investments made by the board or to refuse to open accounts or transfer funds for investments chosen by the board.

The Idaho Supreme Court considered the responsibilities of the treasurer and the legislature as to the public school fund in *Moon v. Investment Board,* 96 Idaho 140, 525 P.2d 335 II (1974), and its conclusions therein were reaffirmed in *Moon v. Investment Board,* 97 Idaho 595, 548 P.2d 861 (1976). In interpreting Idaho Const. art. IX, § 3, in the initial case, the court reviewed the reported debate at the Idaho Constitutional Convention and held:

> Such language indicates that the Constitutional Convention intended that the legislative branch of the government should have control over the investment of the school endowment fund. . . . This does not conflict with the provision that the state treasurer should be the custodian of the fund, but bifurcates the responsibilities between the executive and legislative branches of government. The treasurer is the custodian of the fund[2] and the legislature directs by law how the fund shall be invested, which, in this case, was accomplished by the creation of an investment board.
>
> * * *
>
> Article IX, § 11, as amended, further indicates the constitutional mandate that the legislature is responsible for the investment of permanent endowment funds.

96 Idaho at 144.

The court did not define in detail the bifurcation of responsibilities between the treasurer and the board. However, the court's citation of 72 Am.Jur.2d, States, § 64 in footnote 2 of its discussion lends further insight into its thinking as to the intended division of responsibilities.

The Am.Jur. section cited states in pertinent part:

> Generally speaking, the duty of a state treasurer is to keep the moneys of the state and to pay them out only on regular warrants or requisitions for legal claims. He is not a trustee of moneys in the state treasury, but holds them only as the agent of the state. If there is any trust, the state is the trustee, and unless it can be sued the trustee cannot be enjoined. Ordinarily, it is not intended that payments out of the public funds should be made on the judgment of the public treasurer alone or the auditor alone. The auditor examines as to the amounts and the performance of the work, and it would seem that as to the facts his finding is sufficient protection, in the absence of any collusion or notice of fraud to the treasurer. However, the auditor's conclusion as to whether a claim is authorized or provided for by law is not binding on, nor is it a protection to, the treasurer. The state treasurer may refuse to

> obey a statute commanding him to indorse [sic] warrants when the constitutional debt limit is reached, although the statute is in other respects in its general provisions constitutional.

With regard to the public school fund, it is a trust fund of the state and the endowment fund investment board is trustee. The treasurer is the custodian of the fund. Generally speaking, principles of trust law would apply to the duties of the custodian and the trustee of the trust. The trustee is responsible for the management of the trust fund. The treasurer is responsible as custodian for the safekeeping of the assets of the trust fund.

The citation points out, in the analogous situation of warrant payments, that it is ordinarily not intended that payments out of public funds should be made on the judgment of the treasurer alone or the auditor alone. As to factual questions such as the amount of a claim or the performance of work, the treasurer is entitled to rely on the auditor absent notice of collusion or fraud involving the claim.

However, as to the question of whether a claim is authorized or provided for by law, the auditor's determination is not binding on the treasurer. The treasurer is to pay out state funds "only on regular warrants or requisitions for legal claims" and is not required to make statutorily authorized payments that would violate constitutional provisions. By analogy, the treasurer's custodial responsibilities should not be so narrowly construed as to eliminate all safeguards for the fund. Neither should the treasurer's custodial responsibilities be so broadly construed as to frustrate the board's control over the investment of the fund. Likewise, the board's authority should be interpreted broadly enough to provide for effective investment of funds but not so broadly as to eliminate the safekeeping responsibilities of the custodian.

The Am.Jur. citation indicates that the treasurer, as custodian of the fund, has some authority to refuse to open accounts or to transfer funds for illegal investments. At a minimum, the treasurer may refuse to permit investments that are clearly unconstitutional. On the other hand, refusal to permit clearly legal investments would frustrate the board's constitutional control over investments. Between these extremes, existing case law does not definitively answer the question of the treasurer's responsibility when faced with a request to open an account the treasurer believes is unauthorized by the constitution.

A procedure along the following lines would appear to provide a reasonable approach to the problem. The treasurer should notify the board of legal questions she has regarding any particular investment. The board should review the questions and notify the treasurer whether the board wishes to proceed with the investment. Such a procedure should resolve most problems, assuming substantial discussion with the legal advisors to the treasurer and the board. In those cases in which there remains a substantial doubt as to the legality of an investment, the parties could submit the question to the attorney general for a formal opinion. Alternatively, the treasurer might wish to seek judicial clarification of the question when she has substantial doubts as to the legality of an investment which the board decides to make.

We would recommend that the treasurer refuse to open an account or transfer funds for an investment only in extreme cases in which it appears clear to her on the basis of legal advice that the investment is unauthorized. This recommendation is made for several reasons. It is clear that the responsibility for the choice of investments is vested in the legislature and the board. Liability for losses upon statutorily unauthorized investments would be the responsibility of the board rather than the treasurer (Attorney General Opinion 79-8). Liability for losses upon authorized investments and presumably upon statutorily authorized but unconstitutional investments would impose a constitutional liability which the legislature would be required to satisfy pursuant to Idaho Const. art. IX, § 3, and Idaho Code § 57-724.

If a procedure such as that recommended above is implemented by the treasurer and the board, we would recommend that the board give the treasurer some advance notice of proposed money market fund investments or other new investments differing significantly from those previously utilized. For example, when the board requests legal advice from its counsel as to the legality of a proposed investment, it could notify the treasurer that the board will be considering the investment. Such notice would facilitate the review process.

The above procedural recommendations are intended only as one possible outline of procedures to advance common interests in safeguarding the fund and in providing for the maintenance of the public schools. The board and the treasurer are in the best position to determine whether other procedures will be more responsive to the needs of the parties or more conducive to improved long-term working relationships.

SUMMARY:

Public school endowment funds may constitutionally be invested in money market mutual funds which invest exclusively in federal obligations, provided the money market mutual fund unconditionally guarantees full repayment of principal and interest and provided the state does not directly or indirectly become a stockholder in any association or corporation. The determination must be made on a case-by-case basis following review of the particular investment agreement and prospectus.

Responsibility for choice of investments is vested in the board and the board is responsible for making investments which are legally permitted. The state treasurer has a custodial responsibility to safeguard fund assets entrusted to her care. This responsibility is broad enough, at a minimum, to refuse to open accounts or transfer funds for clearly illegal investments. As to investments which the treasurer believes are possibly illegal, we would recommend that the transaction be completed and that legal resistance, if any, to a board request for investment be limited to judicial review of the question.

Finally, we recommend that the board and the treasurer jointly develop procedures designed to promote the ability of both the board and the treasurer to effectively carry out their responsibilities.

AUTHORITIES CONSIDERED:

Idaho Constitution art. VIII, § 2

Idaho Constitution art. IX, § 3

Idaho Constitution art. IX, §11

Idaho Code § 57-724

§§ 9(6) and 9(8) of S. B. 1277 (S. L., 1969)

72 Am.Jur.2d, States, § 64

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Attorney General Opinion No. 79-8

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State v. Cosgrove, 36 Idaho 278, 210 P. 393 (1922)

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DATED this 20th day of June, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

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

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 85-5

TO: Rose Bowman, Director
Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Is the Governor of Idaho permitted to appoint a member of the judiciary to the Children's Trust Account Board?

CONCLUSION:

No. An appointment of a member of the judiciary to the Children's Trust Account Board would violate the separation of powers clause, article 2, section 1 of the Idaho Constitution.

ANALYSIS:

Your letter asks if it is permissible for the governor to appoint a sitting judge to serve on the Children's Trust Account Board created by the 1985 legislature, codified at Idaho Code § 39-6001 et seq. The question is primarily one of separation of powers.

Little guidance is provided in that regard by article 5, § 7 of the Idaho Constitution, which states:

> No justice of the Supreme Court shall be eligible to any other office of trust or profit under the laws of this state during the term for which he was elected.

This provision of the constitution was adopted without debate at the constitutional convention. Vol. II, p. 1522. The meaning of the provision is, however, clear from the debate of a similar provision which was proposed regarding the governor and other constitutional officers. The sponsors of that proposal — which failed to pass — had argued that such a restriction would serve three purposes: first, it would prevent the governor from using "the patronage of his office and the influence of his position, for the purpose of lifting himself into some other office, generally that of senator of the United States"; second, it would prevent constitutional officers, especially attorneys, from seeking less prestigious but more highly paying offices; finally, it would insure stability and continuity in government because, in the opinion of the sponsors, "when the people elect a man to any office he should undertake to fill that office during the term for which he was elected, and not when he gets into office merely use it for something else." Proceedings of Constitutional Convention, Vol. I, pp. 426-29.

Article 5, § 7 sheds no light on the question presented in your letter. For one thing, as the Idaho Supreme Court has stated, "this provision is applicable only to justices of the Supreme Court," not to trial judges. *Jordan v. Pearce,* 91 Idaho 687, 429 P.2d 419 (1967). More importantly, the purpose of the provision, even as to supreme court justices, is to prevent a sitting justice from aspiring to another office during his term of office — not to map the terrain dividing strict separation of powers from permissible overlap of powers.

Instead, the answer to the question posed in your letter must be found in article 2, section 1, of the Idaho Constitution, which states in full:

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

The framers of the Idaho Constitution gave very little consideration to the separation of powers provision embodied in article 2, section 1. In fact, during the proceedings of the constitutional convention, there was no article regarding separation of powers in the papers before the convention delegates or in any committee thereof. Judge Beatty offered the section under a suspension of the rules because the committee on revision had discovered that there was:

> no article in here such as is provided in nearly all constitutions for the distribution of the powers of the legislative, executive and judiciary; and I have prepared, or rather I have quoted from another constitution, what is the usual provision, . . .

Under suspension of the rules, the article was adopted unanimously.

The source of the separation of powers doctrine at the federal level predates the U.S. Constitution. As narrated by the Iowa Supreme Court in *State v. Barker,* 89 N.W. 204 (1902), the founding fathers:

> had in mind "Montesquieu's Dissertation on the Spirit of the Laws," in which he said: "There is no liberty if the power of judgment be not separated from the legislative and executive powers when the legislative and executive powers are united in one body or person." . . . He further said: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive, the judge might behave with all the violence of an oppressor."

89 N.W. at 208. The same principles were enunciated during the debate over adoption of the U.S. Constitution in the Federalist Papers. Of particular importance, as noted by the Supreme Court of Michigan, are the following passages from those documents:

> "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47.
>
> "For this reason, that convention which passed the ordinance of government, laid its foundation on the basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." (quoted from Jefferson on Notes on the State of Virginia). The Federalist No. 78.

Local 170, Transport Workers Union of America v. Gadola, 34 N.W.2d 71, 78 (1948).

The Constitution of the United States does not itself contain any express separation of powers doctrine, "but the federal courts have uniformly held that only judicial functions may be imposed upon the judiciary." *State v. Brill,* 111 N.W. 638, 642 (Minn. 1907). A complete summary of the history of the separation of powers doctrine at the federal level may be found in the *Brill* case.

Against the federal background, several states have adopted an absolutely unyielding approach to questions involving separation of powers. In Oregon, for example, it has been held that a circuit court judge may not accept employment as a part-time teacher for pay at a state-funded college. *In the Matter of The Honorable Loren L. Sawyer, Judge,* 594 P.2d 805 (Or. 1979). The same provision of the Oregon Constitution has been held to prohibit a member of the Oregon Legislature from serving as a teacher in a public school. *Monaghan v. School District No. 1,* 315 P.2d 797 (Or. 1957).

Similarly, in West Virginia, that state's supreme court held that "no question can be raised as to the plain meaning of the separation of powers clause . . . and that its plain language calls not for construction but only for obedience." *State v. Bailey,* 150 S.E.2d 449, 452 (1966).

In Idaho, by contrast, the supreme court has never taken so inflexible an approach:

> It is not always possible to draw a sharp line of distinction between legislative, judicial and executive powers or functions, nor does it appear necessary to the purpose of the constitutional separation of powers to do so.

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 607, 308 P.2d 225, 228 (1967). In stressing the flexibility of the doctrine of separation of powers, the Idaho Supreme Court was echoing the words of, among others, Chief Justice Cardozo while on the New York Court of Appeals:

> The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers.

In re Richardson, 160 N.E. 655, 657 (1928). Similarly, the Supreme Court of Georgia has held that:

> "This separation [of powers] is not and from the nature of things can not be total." (citations omitted.) "While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than another." (citation omitted.)
>
> The separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government, . . .

Greer v. State, 212 S.E.2d 836, 838 (1975).

The flexibility of Idaho's approach in dealing with separation of powers issues is provided for by the constitution itself, which provides an exception: "except as in this constitution expressly directed or permitted." This exception to the separation of powers doctrine has led the Idaho Supreme Court even to allow district court judges to exercise such obviously non-judicial powers as the appointment of drainage district commissioners to drainage districts situated within their judicial districts, when called upon to do so by statute. The court ruled that judges may perform such duties because the appointment clause of the Idaho Constitution (article 6, section 4) is equal with and falls within the exception to the separation of powers clause. *Elliot v. McCrea,* 23 Idaho 524, 130 p. 785 (1913). See also, *Ingard v. Barker,* 27 Idaho 124, 147 p. 292 (1915).

In like manner, the Idaho Supreme Court has been flexible in reading the separation of powers clause itself, which expressly forbids only "the exercise of powers *prop-*

erly belonging" to another branch of government. Thus, the court has upheld the constitutionality of a statute calling upon district judges to hear petitions by agricultural landholders to detach their lands from a municipality and, upon a finding that certain statutory conditions were met, to enter judgment granting such petitions. The supreme court held that the function of the court in such hearings is purely judicial in nature, not discretionary or policy-making. *Lyon v. City of Payette,* 38 Idaho 705, 224 p. 793 (1924). As such, a court performing such functions was not exercising any power "properly belonging" to the legislative or executive branches of government.

The Idaho Supreme Court's most recent and most extensive treatment of the separation of powers doctrine is to be found in *Jewett v. Williams,* 84 Idaho 93, 369 P.2d 590 (1962). That case involved a statute which created a Children's Commission, staffed initially by four members of the legislature. In addressing a challenge to that statute on the ground that it violated the separation of powers clause of the Idaho Constitution, the supreme court adhered to the same flexible approach that has been traditional throughout the state's history.

> It is the basic powers of sovereignty which must remain separate; not subsidiary activities which include the ascertainment of facts, investigation and consultation, the duty of reporting facts and making recommendations, for the purpose of carrying out those basic powers.

84 Idaho at 100, 369 P.2d 594. The court then conducted a detailed examination of the powers conferred upon the Children's Commission by statute and determined that these powers were "subsidiary," not "basic":

> to conduct a study and appraisal, make findings and recommendations relative to certain subject matters involving children, and to report to the Governor in order that he may make appropriate budgetary decisions for submission to the next session of the legislature.

84 Idaho at 101, 369 P.2d at 594.

The principles that guided the court in *Jewett v. Williams* are dispositive of the question posed in your letter. The Children's Trust Account Board, unlike the Children's Commission in the *Jewett* case, is not merely "a fact-finding and fact evaluating body, to provide information to the legislature." 84 Idaho at 101. As constituted by the 1985 Idaho Legislature, Idaho Sess. Laws, ch. 31, p. 59, codified at Idaho Code § 39-6001 et seq., the Children's Trust Account Board is created within the department of health and welfare "to administer the children's trust account." 39-6001. In doing so, the board is empowered to "contract with public or private nonprofit organizations, agencies, schools or with qualified individuals for the establishment of community-based educational and service programs designed to reduce the occurrence of child abuse and neglect." 39-6002(a). Further, the board is given the power to "develop policies to determine whether programs will receive renewed funding." 39-6003. In addition, the board is given the power to "adopt rules and regulations pursuant to [the Idaho Administrative Procedure Act] to carry out the provisions of this chapter." 39-6002(d). The board, finally, is not subservient to the department of health and welfare within which it is situated. Rather, the department is responsible for the man-

agement and acounting of trust account moneys "under the direction of the children's trust account board." 39-6008.

In short, it is clear that the Children's Trust Account Board is not a mere fact-finding arm of the legislature; nor is it a mere advisory board subservient to the department of health and welfare. Rather, it is given powers and duties of an executive nature to "administer and enforce the laws as enacted by the legislature and as interpreted by the courts." This is the classic definition of executive power. *Quinn v. United States,* 349 U.S. 155, 161 (1954).

It is my conclusion that a member of the judiciary can not serve on the Children's Trust Account Board without violating the Idaho Constitution's prohibition against exercising powers that "properly belong" to another branch of government, as that prohibition has been interpreted by the Idaho Supreme Court. It must also be stressed that a judge does not have the privilege, in his individual or private capacity, to assume executive responsibility that cannot be imposed on him by law. "To argue that we may separate a judge as the individual servant of the State from a judge sitting as judicial officer is too suspicious to stand the constitutional test imposed in this State for more than a hundred years." *Local 170 v. Gadola,* 34 N.W.2d at 78.

The policies underlying the prohibition against sitting judges exercising executive powers were stated by Chief Justice Cardozo. "The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other conflicting duties." *In re Richardson,* 160 N.E. at 661.

My conclusion that a member of the judiciary (or of the legislature) may not accept appointment to an executive board, commission or agency, is in keeping with the opinions of other attorneys general. See the following opinions, available on LEXIS: Office of the Attorney General, State of Utah, 85-12, May 9, 1985 (state judge may not simultaneously serve as a member of the State Board of Regents); Office of the Attorney General, State of California, No. 84-506, August 16, 1984 (member of California judiciary may hold office of county law library trustee, but not that of trustee of the State Library); Office of the Attorney General, State of South Carolina, October 6, 1980 (statute allowing automobile license holder to have implied consent hearing before a magistrate in the county where the licensee was arrested, found unconstitutional as imposing on the judiciary responsibilities which are not judicial in nature and which infringe on the powers of the executive branch of government): Office of the Attorney General, State of Iowa, 78-4-1, April 3, 1978 (proposal to have a district court judge serve as member of the Board of Directors of the Department of Correctional Services within his judicial district, was "a classic violation of the doctrine of separation of powers").

To the same effect are cases from numerous other jurisdictions. See, for example, *State ex rel. McLeod v. Yonce,* 261 S.E.2d 303 (S.C. 1979) (statute appointing circuit court judge to preside over public utility rate cases held unconstitutional): *Greer v. State,* 212 S.E.2d 836 (Ga. 1975) (members of the Georgia Assembly ineligible to serve on the governing body of the World Congress Center Authority); *Application of Nelson,* 163 N.W.2d 533 (S.D. 1968) (statute requiring circuit judge to be chairman

of South Dakota Electric Mediation Board held unconstitutional as infringing on executive branch despite fact powers of board were quasi-judicial in nature); *State v. Bailey,* 150 S.E.2d 449 (W.Va. 1966) (statute naming leadership of legislature to membership on State Building Commission held unconstitutional); *Local 170 v. Gadola,* 34 N.W.2d 71 (Mich. 1948) (statute requiring circuit judge to sit on compulsory arbitration board handling labor/management disputes for public utilities and hospitals held unconstitutional as an exercise of powers not properly belonging to the judiciary). Finally, despite a tradition dating back many decades and despite allegations that the tradition was "efficient, convenient and useful in facilitating functions of government," the Mississippi Supreme Court recently responded to a suit brought by that state's attorney general and overturned nine different statutes appointing members of the legislature to various boards, commissions and agencies. *Alexander v. State By and Through Allain,* 441 So.2d 1329 (Miss. 1983).

It is a tribute to the wisdom, diligence and integrity of a judge that the governor wishes him to assume responsibilities as a trustee of the Children's Trust Account Board. Nothing in this opinion should be interpreted as casting a cloud on the talents or person of anyone involved in this endeavor. Nonetheless, it is my opinion that a member of the judiciary (or of the legislature) may not serve on any board, commission or agency that exercises powers of the executive branch of government. To do so would violate the separation of powers clause, article 2, section 1, of the Idaho Constitution.

DATED this 21st day of October, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

AUTHORITIES CONSIDERED:

1. Constitutions:
   Idaho Constitution art. 2, section 1.
   Idaho Constitution art. 5, section 7.

2. Statutes:
   Idaho Code § 39-6001 et seq.

3. Idaho Cases:
   Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P.2d 225 (1967).

   Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967).

Elliot v. McCrea, 23 Idaho 524, 130 P. 785 (1913).

Ingard v. Barker, 27 Idaho 124, 147 P. 292 (1915).

Lyon v. City of Payette, 38 Idaho 705, 224 P. 793 (1924).

Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962).

4. Cases Cited from Other Jurisdictions:

Quinn v. United States, 349 U.S. 155 (1954).

State v. Barker, 89 N.W. 204 (Iowa 1902).

Local 170, Transport Workers Union of America v. Gadola, 34 N.W.2d 71 (Mich. 1948).

State v. Brill, 111 N.W. 638 (Minn. 1907).

In the Matter of The Honorable Loren L. Sawyer, Judge, 594 P.2d 804 (Or. 1979).

Monaghan v. School District No. 1, 315 P.2d 797 (Or. 1957).

State v. Bailey, 150 S.E.2d 449 (W.Va. 1966).

In re Richardson, 160 N.E. 655 (N.Y. 1928).

Greer v. State, 212 S.E.2d 836 (Ga. 1975).

State ex rel. McLeod v. Yonce, 261 S.E.2d 303 (S.C. 1979).

Application of Nelson, 163 N.W.2d 533 (S.D. 1968).

Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983).

ATTORNEY GENERAL OPINION NO. 85-6

TO: Mr. Tom D. McEldowney, Director
State Department of Finance
STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

1. We have records for two banks which were liquidated by the FDIC in 1955 and whose records were returned to us by FDIC. We also have records for a bank closed in

1923 as well as files containing charters, articles of incorporation, and other documents for institutions that were closed, bought-out or converted to federal charters. We would like to get rid of these records. Are these records subject only to Idaho Code § 67-5751, and the regulations of Central Records Management or are we required to retain these records indefinitely?

2. In connection with the closure of a savings and loan association, the Director was ordered by the Fifth District Court in 1970 to destroy ledgers and other records of the association in 1975. The Department failed to destroy the records at that time. Should the records be destroyed now pursuant to the court order or must destruction be pursuant to rules of the Department of Administration?

3. In connection with this same closure in 1970, the court ordered unclaimed funds to be transferred to the State Treasurer pursuant to Idaho Code § 26-919, now superseded. This transfer was made. The Auditor said that this money must now be sent to the Tax Commission under the Unclaimed Property Law (ch. 5, title 14). Must that money be transferred to the Tax Commission? If so, is it the responsibility of this Department or the Treasurer to make that transfer? If so, is the transfer to be made under the current or prior Unclaimed Property Law?

4. What is the relationship between the Unclaimed Property Law and liquidation procedures in the Bank Act (ch. 10, title 26)? Is the Bank Act procedure superseded by the Unclaimed Property Law? To what extent does the new Unclaimed Property Law supersede the time limits of the prior Unclaimed Property Law?

CONCLUSION:

1. With the exception of records ordered destroyed by court order, bank records which the Department of Finance no longer needs may be destroyed or transferred to the State Historical Society pursuant to the procedures provided by Idaho Code §§ 67-5751 through 67-5753.

2. Records previously ordered destroyed by court order should be destroyed pursuant to that order.

3. The Unclaimed Property Act applies to unclaimed funds transferred to the State Treasurer. The responsibility for compliance is on the holder of the funds, which is the State Treasurer in this instance. The current Unclaimed Property Act governs the procedure to be followed.

4. The Bank Act is in effect and governs treatment of unclaimed funds during liquidation. Upon completion of liquidation and transfer of unclaimed property to the State Treasurer pursuant to the Bank Act, the State Treasurer should file an unclaimed property report and transfer funds to the unclaimed property account as provided in the Unclaimed Property Act.

ANALYSIS:

Question No. 1

The bank records described in question 1 may be destroyed pursuant to the provisions of Idaho Code §§67-5751 through 67-5753. These statutes empower the Director of the Department of Administration to provide rules and procedures for the retention of state records and the destruction of state records. Idaho Code § 67-5751 defines state records as:

> Any document, book, paper . . . or other material regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official state business.

It appears from the question presented that the records were received pursuant to law and in connection with the transaction of official state business. Therefore, the general provisions of Idaho Code § 67-5751 apply unless statutes specifically relating to bank records provide a different result.

Our research discloses no such specific banking statutes which govern destruction or retention of bank records by the Department of Finance. Therefore, the general statutes, Idaho Code §§ 67-5751 through 67-5753 apply.

Question No. 2

The records previously ordered destroyed by the district court should be destroyed pursuant to the court's order. Idaho Code §§ 67-5751 through 67-5753 discussed above, which govern destruction of records, were adopted in 1974 and 1975. Prior to this time there were no laws governing retention or destruction of general records held by state agencies. Accordingly, prior to adopting the records destruction statutes, control, retention and destruction of bank records would have been left to the discretion of the Department of Finance after consideration of administrative, regulatory and public needs.

However, in this instance, the matter was submitted to the district court and the resulting orders of the court must be obeyed. The State Constitution vests judicial power in the courts. Idaho Constitution, art. 5. The judicial power includes the power to finally determine controversies and provide an adequate remedy. See, e.g., *Electors of Big Butte Area v. St. Bd. of Educ.*, 78 Idaho 602, 308 P.2d 225 (1957).

When the Director of the Department submitted the closure of the savings and loan to a court, he became subject to the orders of the court in that matter. *Id.* As the court ordered destruction of the records, they should be destroyed — regardless of the fact that destruction is now some 10 years later than ordered.

Question No. 3

The third question addresses the status of unclaimed funds transferred to the State Treasurer after liquidation of a savings and loan association. The transferred funds are unquestionably unclaimed property. Idaho's Unclaimed Property Act is found at Idaho Code §§ 14-501 et seq. Idaho Code § 14-502 is the basic statute in Idaho's Unclaimed Property Act. That section provides in pertinent part:

> Property presumed abandoned — General rule. — (1) Except as otherwise provided by this chapter, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than seven years after it became payable or distributable is presumed abandoned.

Idaho Code § 14-511 makes the Unclaimed Property Act applicable to properties distributable in liquidation of business associations. That statute provides:

> Property of business associations held in course of dissolution. — Intangible property distributable in the course of a dissolution of a business association which remains unclaimed by the owner for more than one year after the date specified for final distribution is presumed abandoned.

Idaho Code § 14-513 makes the Unclaimed Property Act applicable to government agencies, including the State Treasurer, providing:

> Intangible property held for the owner by a court, state or other government, governmental subdivision or agency, public corporation, or public authority which remains unclaimed by the owner for more than one year after becoming payable or distributable is presumed abandoned.

The burden of compliance with Idaho's Unclaimed Property Law falls on the holder of the property in question pursuant to Idaho Code § 14-517. "Holder" is defined in Idaho Code § 14-501 as the person in possession of the unclaimed property. The burden of compliance with the Unclaimed Property Law in this case then is on the State Treasurer. Pursuant to Idaho Code § 14-538, the current Unclaimed Property Law is the proper law of application to this problem. However, the prior law's enforcement and penalty provisions are specifically preserved.

Question No. 4

The fourth question requests clarification of the relation between the Bank Act, Idaho Code § 26-1001 et seq., and the Unclaimed Property Act, Idaho Code 14-501 et seq. The two Acts do not appear to conflict as to property which is reportable by the bank to the Unclaimed Property Administrator. The Idaho Unclaimed Property Administrator ["Administrator"] becomes a creditor of the bank and succeeds to the priority and status of the true owners of the unclaimed funds. In Epstein, McThenia & Forslund, *Unclaimed Prop. L. and Rept. Forms,* § 3.02, pp. 3-5 (Matthew Bender 1984), there is a discussion of this issue as follows:

> The right of the states to escheat or take custody of unclaimed property is generally considered to be derivative. In other words, the state takes the interest of the unknown or absentee owner.

Thus, the Administrator should be notified of bank insolvency pursuant to Idaho Code § 26-1016. The Administrator's claims for such unclaimed property should be treated as all other claims under Idaho Code §§ 26-1017 et seq.

We read Idaho Code § 26-1023 (which deals with distribution of unclaimed property after the liquidation is completed) as being consistent with Idaho's Unclaimed Property Act. There is no express conflict between the statutes. A transfer of the unclaimed property should be made to the State Treasurer pursuant to Idaho Code § 26-1023. The Treasurer then has a duty to comply with the Unclaimed Property Act. The State Treasurer should report the unclaimed property to the Administrator. This report should be made pursuant to Idaho Code § 14-517 in the report due next after the one-year holding period specified in Idaho Code § 14-513 has run. The Treasurer has six months after filing the report to transfer physical possession of the unclaimed property to the Administrator pursuant to Idaho Code § 14-519.

AUTHORITIES CONSIDERED:

Idaho Constitution art. 4, §2

Idaho Code §§ 14-501, 14-502, 14-511, 14-513, 14-517, 14-519, 14-538 (Unclaimed Property Act, ch. 5, title 14)

Idaho Code § 26-919

Idaho Code §§ 26-1001, 26-1016, 26-1017, 26-1023 (Bank Act, ch. 10, title 26)

Idaho Code §§ 67-5751 through 67-5753

Epstein, McThenia & Forslund, *Unclaimed Prop, L. and Rept. Forms*, § 3.02, pp. 3-5 (Matthew Bender 1984)

DATED this 19th day of November, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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STEVE PARRY
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WAYNE KLEIN
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cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 85-7

TO: Mr. Gary H. Gould
Director, Department of
Labor and Industrial Services

STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Are dedicated fund divisions of the Department of Labor and Industrial Services required to go through the budgeting and appropriation procedures set out in title 67, ch. 35, Idaho Code, before expending the fund in the respective division's dedicated fund accounts? This question is posed because the provisions in the Idaho Code relative to those accounts (§§ 39-4124, 54-1015, and 54-2630) do contain language which suggests that the funds in these accounts may be perpetually appropriated to the Department.

CONCLUSION:

The dedicated fund divisions of the Department of Labor and Industrial Services are required to go through the budgeting and appropriation procedures of ch. 35, title 67, Idaho Code, before expending the dedicated funds.

ANALYSIS:

The Department of Labor and Industrial Services is funded from the general account, interaccount billings, the mine safety training grant account, and three dedicated accounts. Chapter 90, 1985 Sess. L. The three dedicated accounts include the electrical board account, the plumbing board account and the Idaho building code account. Each of these dedicated accounts receives funds from various fees that the Department charges.

The statutes creating the three dedicated accounts provide for continuing appropriations to the Department from those accounts. For example, Idaho Code § 54-2630, which creates the Idaho plumbing board account, provides in pertinent part:

> All such moneys, hereafter placed in said account, are hereby set aside and perpetually appropriated to the department of labor and industrial services to carry into effect the provisions of this act.

Idaho Code §§ 39-4124 and 54-1015 create the Idaho building code fund and the electrical board account. Those code sections also contain continuing appropriation language nearly identical to the continuing appropriation language of Idaho Code § 54-2630 quoted above.

If the three continuing appropriation statutes were not modified by other statutory

provisions, they would provide sufficient authority for the Department to spend funds of those accounts without the need for an annual appropriation bill. For example, in *McConnel v. Gallet,* 51 Idaho 386, 6 P.2d 143 (1931), the Idaho Supreme Court considered a similar continuing appropriation from the Adjutant General's contingent fund. The Court held that there is no constitutional inhibition against such continuing appropriation, provided the continuing appropriation is limited to amounts in a special fund of the state.

Thus, if there were no other statutes providing for annual budgeting and appropriation of funds that have been continually appropriated, there would be no necessity to go through the annual budgeting and appropriation procedures. However, as discussed below, ch. 35, title 67, Idaho Code, requires annual budgeting and appropriation of continually appropriated funds.

Several sections of ch. 35, title 67, Idaho Code, require agencies receiving continuing appropriations to comply with the annual budgeting and appropriation process. Idaho Code § 67-3503 provides in pertinent part:

> *Each department, office and institution . . . shall,* not later than the 15th day of August . . . prepare and *file* in the office of the administrator of the division [of financial management] . . . *its report of receipts from all sources,* including appropriations made by the legislature, its expenditures of all sums received from all sources, segregated as provided for in the blanks, and its estimates of receipts and expenditures for the current and succeeding fiscal years. [Emphasis added]

Following receipt of the foregoing information, the administrator of the division of financial management submits to the governor and the Joint Finance/Appropriation Committee information for the budget, pursuant to Idaho Code § 67-3505.

The governor is then required to submit the executive budget to the legislature. Pursuant to Idaho Code § 67-3507 the executive budget must include detailed information as to the needs of the various departments for the next fiscal year, and provides:

> *All funds,* including federal and local funds and interaccount receipts received for any purpose, *shall be accounted for in the budget.* [Emphasis added]

The foregoing sections reflect a legislative intention to deal with *all* sources of funding as part of the annual appropriation process.

Idaho Code § 67-3514 deals with the responsibility of the Joint Finance/Appropriation Committee in preparation of appropriation bills and deals specifically with continuing appropriations. That section provides in pertinent part:

> [p]roviding further, that for any department, office, or institution operating in part or in whole under a continuing appropriation or fund authorized by the legislature, the joint committees of the legislature having jurisdiction of

> appropriations shall, after examining the budget, prepare and introduce appropriation bills covering all the requirements of the respective departments, offices, and institutions of the state operating under each such continuing appropriation.

Thus, the Joint Finance/Appropriation Committee is required to prepare an appropriation bill covering all the requirements of departments, such as the Department of Labor and Industrial Services, which operate in part under a continuing appropriation or fund authorized by the legislature.

Finally, Idaho Code § 67-3516 provides in pertinent part:

> Appropriation acts when passed by the legislature of the state of Idaho, and allotments made thereunder, *whether the appropriation is fixed or continuing,* are fixed budgets beyond which state officers, departments, bureaus and institutions may not expend. [Emphasis added]

The foregoing statutes clearly require departments such as the Department of Labor and Industrial Services to follow the annual budgeting and appropriation process of ch. 35, title 67, Idaho Code, and to limit fiscal year expenditures to the amount appropriated by the annual appropriation bill. The effect of the legislature's creation of the three dedicated acounts for the department is to set aside and dedicate certain revenues for the exclusive use of the department. However, the amount of such revenue that can be expended in any fiscal year is controlled by the legislature through the annual appropriation process.

We note that certain continuing appropriations, such as those regarding endowment funds or endowment income funds are exempted from the provisions of ch. 35, title 67 (Idaho Code § 67-3530). However, there is no comparable exception applicable to the dedicated funds of the Department of Labor and Industrial Services.

AUTHORITIES CONSIDERED:

Idaho Code § 39-4124

Idaho Code § 54-1015

Idaho Code § 54-2630

Idaho Code § 67-3503

Idaho Code § 67-3505

Idaho Code § 67-3507

Idaho Code § 67-3514

Idaho Code § 67-3516

Idaho Code § 67-3530

McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931)

DATED this 31st day of December, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

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

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 85-8

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

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Your letter of December 30, 1985 requests our opinion as to whether "motor vehicles owned by Idaho cities, counties, and other political subdivisions of the State [are] subject to the mandatory automobile liability insurance laws" found in Idaho Code §§ 49-232 to -235.

CONCLUSION:

Our opinion is that cities, counties and other political subdivisions of the State of Idaho are not subject to the automobile insurance liability laws.

ANALYSIS:

Your letter notes that there is some confusion in the area of automobile liability insurance coverage because of the conflicting signals provided by Idaho Code section 49-233, on the one hand, and section 49-1533 on the other. Idaho Code § 49-233

Idaho Code § 67-3530

McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931)

DATED this 31st day of December, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

DAVID G. HIGH
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cc: Idaho Supreme Court
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CONCLUSION:

Our opinion is that cities, counties and other political subdivisions of the State of Idaho are not subject to the automobile insurance liability laws.

ANALYSIS:

Your letter notes that there is some confusion in the area of automobile liability insurance coverage because of the conflicting signals provided by Idaho Code section 49-233, on the one hand, and section 49-1533 on the other. Idaho Code § 49-233

seems to provide that a motor vehicle owner must either (a) carry liability insurance, or (b) post an indemnity bond. This section of the Code is entitled "Required motor vehicle insurance" and it appears to apply to every motor vehicle owner without exception.

On the other hand, as your letter notes, the liability insurance coverage of § 49-233 must be "in an amount not less than that required by section 49-1521, Idaho Code . . ." But section 49-1533 expressly exempts motor vehicles owned by state and local governments from the liability insurance requirements of section 49-1521: "This act shall not apply with respect to any motor vehicle owned by the United States, this state or any political subdivision of this state or any municipality therein." Thus, we are forced to address the question of whether state and local governments are subject to the "Required motor vehicle insurance" provisions of section 49-233 or the broad "Exceptions" set forth in section 49-1533.

It is our opinion that the Idaho Legislature intended that state and local governmental entities be exempt from Idaho's motor vehicle insurance laws. First, it is important to read statutes so as not to reach absurd results. As your letter notes, it would make no sense to require units of government to carry automobile liability insurance under section 49-233 if "the amount of the insurance coverage they are required to maintain can only be determined by reference to a section of the Code from which they are exempt." In short, the statute requiring insurance is rendered a nullity if the amount of insurance required is zero.

Second, there are sound policy reasons why compulsory automobile liability insurance provisions should not apply to governmental units. The purpose of compulsory automobile insurance has been succinctly stated by the Idaho Court of Appeals:

> A legislative requirement that motorists carry liability insurance falls within the social and economic domain reserved for the deferential standard of review. It is not only reasonably conceivable but manifest that this requirement serves the objective of reducing the economic hardship suffered by persons injured, or whose property is damaged, by financially irresponsible operators of motor vehicles.

State v. Reed, 107 Idaho 162, 167, 686 P.2d 842, 847 (1984). The state and its political subdivisions are not "financially irresponsible operators of motor vehicles" because, as we shall show later in this opinion, the legislature has provided a series of backup measures so that governmental entities will always be held financially responsible when their tortious conduct, or that of their employees, causes personal injury or property damage. That being the case, it is easy to see why the exemption granted to governmental entities from the requirements of the Motor Safety Responsibility Act is intended to apply to all other automobile insurance requirements as well.

Third, as noted by the Idaho Supreme Court in *Porter v. Farmers Insurance Company of Idaho,* 102 Idaho 132, 134, 627 P.2d 311, 313 (1981), the Motor Vehicle Safety Responsibility Act found at Idaho Code §§ 49-1501 to -1540 represents this state's adoption of a uniform act. It is routinely held that:

> Under the terms of the financial responsibility or compulsory automobile liability insurance statutes enacted in several jurisdictions the provisions of the law are expressly made inapplicable to any motor vehicle owned (or owned and operated) by the United States, the state government, or any political subdivision of the state, or any municipality therein.

7 Am.Jur.2d "Automobile Insurance" § 33 at 487. It should not be presumed that the Idaho Legislature intended to diverge from this accepted construction of the uniform law.

Finally, we must not read the state's automobile insurance liability laws in a vacuum. The liability of state and local governmental units for the tortious conduct of their employees is comprehensively treated in the Idaho Tort Claims Act. That Act provides the principles whereby "every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment duties . . ." Idaho Code § 6-903. The Tort Claims Act sets forth the conditions under which governmental units are liable, the corresponding liability of governmental employees, the procedure for filing claims, and the guidelines for such matters as venue, service, attorneys' fees and damages.

Several provisions of the Tort Claims Act make it clear that local governmental units are not required to carry liability insurance. For one thing, the overall structure of the Act itself is revealing. Throughout the Act, the duties placed upon the state parallel those placed upon political subdivisions of the state. Thus, under Idaho Code § 6-919, "the risk manager in the division of purchasing shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits." The obligation of this comprehensive liability plan may be met *either* by purchasing liability insurance *or* by "use of the retained risk fund provided in section 67-5757." *Id.*

The provisions for political subdivisions of the state are similar, though of course less grandiose. Under Idaho Code § 6-927, it is anticipated that all political subdivisions of the state shall likewise have a "comprehensive liability plan" in place to cover their liability exposure. Similarly, Idaho Code § 6-923 authorizes, but does not require, political subdivisions to purchase whatever liability insurance is necessary to meet the needs of themselves and their employees. In each instance, the legislature has required that governmental entities have a plan in place to handle exposure to tort liability, but has provided alternative means for meeting that requirement.

Further evidence can be found in Idaho Code § 6-912 for the proposition that liability insurance is but one option in providing coverage for a governmental unit's liability exposure. That section sets forth the procedure for compromising claims against a governmental political subdivision: "The governing body of each political subdivision, after conferring with its legal officer or counsel, may compromise and settle any claim allowed by this act, subject to the terms of the insurance, *if any.*" (Emphasis added.)

The final two sections of the Tort Claims Act give additional guidance. Idaho Code

§ 6-927 provides a mechanism whereby local governmental units may raise funds to provide themselves with a comprehensive liability plan:

> Notwithstanding any provisions of law to the contrary, all political subdivisions shall have authority to levy an annual property tax in the amount necessary to provide for a comprehensive liability plan *whether by the purchase of insurance or otherwise as herein authorized,* even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded thereby; . . . (Emphasis added.)

Similarly, Idaho Code § 6-928 provides a mechanism whereby local governmental units may raise funds to pay claims, in the absence of a liability insurance policy:

> Notwithstanding any provision of law to the contrary and in the event that there are no funds available, the political subdivision shall levy and collect a property tax, at the earliest time possible, in an amount necessary to pay a claim or judgment arising under the provisions of this act *where the political subdivision has failed to purchase insurance or otherwise provide a comprehensive liability plan* to cover a risk created under the provisions of this act. (Emphasis added.)

In both of these latter situations, the legislature has provided a fail-safe procedure so that tort victims will not go without reimbursement for their personal injuries or property damage. In doing so, the legislature has expressly provided that any tax levy needed to meet these requirements will be exempt from the one percent law or other similar restrictions.

In conclusion, it is fair to say the legislature anticipated, as a general rule, that governmental entities — both state and local — would carry liability insurance. At every turn, however, the legislature stopped short of requiring such insurance and made express provision for governmental units to adopt alternative comprehensive liability plans that allow for liability coverage apart from insurance coverage.

DATED this 31st day of December, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

AUTHORITIES CONSIDERED:

Statutes:

Idaho Code § 6-903

Idaho Code § 6-912

Idaho Code § 6-919

Idaho Code § 6-923

Idaho Code § 6-927

Idaho Code § 6-928

Idaho Code § 49-232-235

Idaho Code § 49-233

Idaho Code § 49-234

Idaho Code § 49-235

Idaho Code § 49-1501-1540

Idaho Code § 49-1521

Idaho Code § 49-1533

Idaho Code § 67-5757

Idaho Cases:

Porter v. Farmers Insurance Company of Idaho, 102 Idaho 132, 124, 627 P.2d 311, 313, (1981).

State v. Reed, 107 Idaho 162, 167, 686 P.2d 842, 847 (1984).

Other Authorities:

7 Am. Jur. 2d § 33.

ATTORNEY GENERAL OPINION NO. 85-9

TO: Mr. A. I. Murphy
Director
Idaho State Board of Corrections

STATEHOUSE MAIL

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

1. Are the meetings of the Commission of Pardons and Parole subject to the Open Meeting Law, Idaho Code § 67-2341, et seq.?

2. What records are exempt by law from public inspection and may be considered in executive session pursuant to Idaho Code § 67-2345(d)?

3. May a vote of the Commission of Pardons and Parole be taken in private?

CONCLUSION:

1. As a statutory entity with authority to make decisions concerning paroles, pardons and commutations, the Commission of Pardons and Parole is subject to the Open Meeting Law and is required to open all meetings to the public except those conducted in executive session.

2. Only documents which are excluded from public inspection by statute are to be considered in executive session. Idaho Code §§ 67-2342(1) and 67-2345(3).

3. The Commission of Pardons and Parole may not vote in private.

ANALYSIS:

Question No. 1

The Idaho Commission of Pardons and Parole is appointed by the Board of Corrections under authority of Idaho Code § 20-210. The Commission has the power to establish rules, regulations, policies and procedures under which parole may be granted. Idaho Code § 20-233. A quorum of three commissioners holds regular parole hearings. Idaho Code § 20-210.

The Commission also has the authority to grant commutations and pardons. Idaho Code § 20-210, Idaho Const., art. 4, § 7. The Commission meets at least four times a year to consider applications for pardon and commutation of sentence. Idaho Code § 20-213.

Under the Idaho Open Meeting Law, governing bodies of public agencies created by statute, as well as those created by the Idaho Constitution, are required to open their meetings to the public. Idaho Code § 67-2341(3)(a); Idaho Att'y Gen. Op. No. 77-30 (1977). "Governing body" is defined as "the members of any public agency which consists of two or more members with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 67-2341(4). "Public agency" includes any state board or commission. Idaho Code § 67-2341(3)(a). Thus, the Commission of Pardons and Parole, a statutorily created public agency, having both statutory and constitutional powers to make decisions concerning paroles, pardons and commutations, is subject to the provisions of the Open Meeting Law. All of the Commission's meetings, except those conducted in an executive session, must be open to the public. Similar conclusions have been reached in other states. *See,* Missouri Att'y Gen. Op. No. 32-83 (1983) (Board of Pardons and Parole subject to Missouri's Open Meeting Law); and *Sanders v. Benton,* 579 P.2d

815 (Okla. 1978) (Board of Corrections, by reason of its statutory origin, comes within the purview of the Oklahoma Open Meeting Law).

Furthermore, "meeting" is defined in Idaho Code § 67-2341(5) as "the convening of a governing body of a public agency to make a decision *or to deliberate towards a decision* on any matter" (emphasis added). Therefore, deliberations by the Commission must be conducted publicly. *See,* Idaho Att'y Gen. Op. No. 77-13 (1977).

It could be argued that as to the deliberative processes by which the Commission arrives at its decisions, its function is judicial or quasi-judicial, and as to that phase of its activities, the Open Meeting Law should not apply under Idaho Code § 67-2341(1)(a) which excludes "court and their agencies and divisions, and the judicial council, and the district magistrates commission." Such an argument fails, for the reasons that follow.

In Idaho, quasi-judicial functions have been defined as those acts which entail the application of "general rules or policies to specific individuals, interests, or situations," *Cooper v. Board of County Commissioners of Ada Co.,* 101 Idaho 407, 410, 614 P.2d 947, 950 (1980), and those acts involving "investigation, judgment and discretion," *Raaf v. State Board of Medical Examiners,* 11 Idaho 707, 717 (1906), (quoting, *People v. Dental Examiners,* 110 Ill. 180). When these definitions are applied to the Commission of Pardons and Parole, many of the Commission's functions are quasi-judicial: The Commission conducts hearings, considers evidence, makes a determination affecting only a specific individual, and comes to a decision in much the same manner as a court of law. (*See,* Missouri Att'y Gen. Op. No. 32-83 (1983), which states that the Missouri Board of Probation and Parole has rulemaking and quasi-judicial powers.)

Unlike Idaho, the statutes of several states address the issue of whether their Open Meeting Laws apply to quasi-judicial functions, and/or boards of pardons and parole. Such statutes may be grouped into the following three categories:

(1) *By specifically excluding quasi-judicial bodies from the scope of the Open Meeting Law.* (*See,* Ky.Rev.Stat.Ann. §§ 61.805(2) (Supp. 1984); Wash.Rev.C.Ann. § 42.30.140(2) (Supp. 1986); N.Y.Pub.Off.L. § 108 (Supp. 1985), *or by permitting such bodies to deliberate in private,* (*See,* Alaska St. § 44.62.310(d)(1) (Supp. 1984); Wis.Stat.Ann. § 19.85(1)(a) (Supp. 1985); Kans.Stat.Ann. § 75-4318(a) (1985);

(2) *By specifically including quasi-judicial bodies within the scope of the Open Meeting Law,* (*See,* Tex.Rev.Civ.Stat.Ann., art. 6252-17(c) (Supp. 1985); Ariz.Rev.Stat.Ann. § 38-431(6) (1985); Mo.Ann.Sta. § 610.010(2) (Supp. 1984); or

(3) *By specifically excluding parole and/or pardon boards from the scope of the Open Meeting Law,* (*See,* N.J.Stat.Ann. § 10:4-8(a) (Supp. 1985); Ohio Rev.C.Ann. § 121.22(D) (1984); Alaska Stat. § 44.62.310(d)(3) (Supp. 1984).

However, Idaho's Open Meeting Law, like the open meeting laws of many other states, does not specifically address quasi-judicial functions or quasi-judicial bodies.

In a few of these states like Idaho, courts have been asked to determine whether quasi-judicial functions come within the Open Meeting Law.

The leading case on this issue is *Canney v. Board of Public Instruction of Alachua Co.*, 278 So.2d 260 (Fla. 1973). In *Canney,* the Florida Supreme Court held that the quasi-judicial proceedings of a school board were not excluded from Florida's open meeting law:

> Once the legislature transforms a portion of a board's responsibilities and duties into that of a judicial character so that the board may exercise quasi-judicial functions, the prerogatives of the legislature in the matter do not cease. . . . If the legislature may delegate these quasi-judicial powers to the School Board and regulate the procedure to be followed in hearings before the board, it follows as a matter of common logic that the legislature may further require all meetings of the board at which official acts are to be taken to be public meetings open to the public. *Id.* at 263.

The reasoning of *Canney v. Board of Public Instruction* has been followed in court opinions from other states (*See, City of Harrisburg v. Pickles,* 492 A.2d 90, 96 (Pa. 1985); *Citizen Action Coalition of Indiana, Inc., v. Public Service Commission of Indiana,* 425 N.E.2d 178 (Ind. 1981); Ill.Att'y Gen.Op. 83-004 (1983)), and is harmonious with the statutory and constitutional provisions of Idaho. Of special significance is Idaho's constitutional provision that, "the legislature shall by law prescribe the sessions of said board [i.e., Board of Pardons] and the manner in which application shall be made, and regulate proceedings thereon." Article 4, § 7, Idaho Constitution. Until the Idaho legislature provides to the contrary, this public agency is bound by the Open Meeting Law like all other public agencies. To hold otherwise would be to ignore the express words of the statute, "[a]ll 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." Idaho Code § 67-2342(1). Where a statute is neither ambiguous nor uncertain, the clearly expressed intent of the legislature must be given effect and there is no occasion for interpretive construction. *Swensen v. Buildings, Inc.*, 93 Idaho 466, 468, 463P.2d 932, 934 (1970).

Furthermore, failure to conduct its business pursuant to the Open Meeting Law may be a source of great and untoward mischief: "Any action taken at any meeting which fails to comply with the provisions of [this law] shall be null and void." Idaho Code § 67-2347.

Therefore, it is our opinion that, except for those meetings properly conducted in executive session, Idaho's statutes require that the Commission of Pardons and Parole deliberate in public.

Question No. 2

Idaho Code § 67-2345(1)(d) of the Open Meeting Act states that executive sessions may be held for the purpose of considering records that are exempt by law from public inspection. This section must be read in conjunction with Idaho Code § 9-301, which states that "[e]very citizen has a right to inspect and take a copy of any public writing

of this state, except as otherwise expressly provided by statutes." The wording of these two statutory provisions clearly indicates that only certain documents which have been excluded from public inspection by clear statutory provision may be considered in executive session. Furthermore, the Idaho Supreme Court has stated that it would not create an exception to the rule of disclosure where exception has not been explicitly provided by statute: "[s]uch language clearly evidences an intent by the legislature to create a very broad scope of government records and information accessible to the public." *Dalton v. Idaho Dairy Products Commission,* 107 Idaho 6, 11, 684 P.2d 983 (1984).

Records that are exempt by law from public inspection and would, therefore, be appropriately considered in executive session include: Criminal preliminary hearing transcripts, Idaho Code § 19-813; records of grand jury proceedings, Idaho Code § 19-1112; special inquiry judge proceedings, Idaho Code § 19-1123; and presentence investigations, Idaho Code § 19-2515(d), Idaho Criminal Rules 32(g).

Question No. 3

The Open Meeting Law requires that all voting on a public agency's decisions must be conducted in public. "No decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 67-2342(1). "Decision" is defined as "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present." Idaho Code § 67-2341(1).

The requirement that voting must be conducted in public cannot be circumvented by retiring into executive sessions. "[N]o executive session may be held for the purpose of taking any final action or making any final decision." Idaho Code § 67-2345(3). *See,* Att'y Gen.Op. 77-13. Thus, matters discussed in executive session must still be voted upon in public.

AUTHORITIES CONSIDERED:

Idaho Constitution art. 4, § 7

Idaho Code § 9-301

Idaho Code § 19-813

Idaho Code § 20-210

Idaho Code § 20-213

Idaho Code § 20-233

Idaho Code § 67-2341(1),(1)(a),(3)(a),(4),(5)

Idaho Code § 67-2342(1)

Idaho Code § 67-2345(3)(d)

Idaho Criminal Rules 6(c)

Idaho Criminal Rules 32(g)(h)

Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973)

Citizen Action Coalition of Indiana, Inc. v. Public Service Commission of Indiana, 425 N.W.2d 178 (Ind. 1981)

City of Harrisburg v. Pickles, 492 A.2d 90 (Pa. 1985)

Common Cause v. Utah Public Service Commission, 598 P.2d 1312 (Utah 1979)

Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947

Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 684 P.2d 983 (1984)

Della Serra v. Borough of Mountainside, 481 A.2d 547 (N.J. 1984)

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

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

Raaf v. State Board of Medical Examiners, 11 Idaho 707, 717 (1906)

Swensen v. Buildings, Inc., 93 Idaho 466, 463 P.2d 932 (1970)

Sanders v. Benton, 579 P.2d 815 (Okla. 1978)

Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d (1979)

Idaho Att'y Gen. Op. 77-13 (1977)

Idaho Att'y Gen. Op. 77-30 (1977)

Ill. Att'y Gen. Op. 83-004 (1983)

Mo. Att'y Gen. Op. 32-83 (1983)

DATED this 31st day of December, 1985.

ATTORNEY GENERAL
State of Idaho
JIM JONES

ANALYSIS BY:

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice Division

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 85-10

TO: Rose Bowman, Director
Idaho Department of Health and Welfare

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

For ease of analysis, the questions raised in your letter have been restructured into the following major areas.

I. Idaho's "Relative Responsibility" law, codified at Idaho Code § 32-1008A, is but one of several laws dealing with liability of parents or spouses for repayment of public assistance, including medical assistance. Which of these laws should be addressed in formulating an application for a waiver under the demonstration program provisions of section 1115 of the Social Security Act?

II. Under Idaho's relative responsibility law, payments collected from parents and spouses are treated by the state as payments from a legally liable third party if they are made after the state has paid Medicaid bills. Should this practice be addressed in applying for a waiver under the demonstration program provisions of section 1115 of the Social Security Act?

III. If the waiver of "general applicability" were received, would Idaho's relative responsibility law still violate the Social Security Act by selecting out only the parents, spouses and adult children of Medicaid nursing home clients?

IV. Assuming that Idaho's relative responsibility program would qualify for a demonstration program waiver under section 1115 of the Social Security Act, the following additional questions must be addressed regarding repayment collections:

A) Do Idaho's relative responsibility law and other pertinent statutes give the Department of Health and Welfare jurisdiction and authority to collect from non-residents?

B) Does the Department have to obtain a district court support order prior to obtaining repayment?

C) Can the Department collect from parents and spouses the amounts paid by Medicaid before the effective date of these rules?

CONCLUSIONS:

I. The intent of the waiver application is to create a demonstration project along the lines of Idaho's relative responsibility law as that law is contained in Idaho Code § 32-1008A. If the application were carefully drafted to incorporate that precise intent, the other statutes in your letter would be irrelevant.

II. A waiver request should state that collections shall be treated as payments from legally liable third parties.

III. It is the responsibility of the federal government to determine whether those provisions of Idaho's relative responsibility law which violate the Social Security Act can be waived pursuant to section 1115 of the same act.

IV. The collection program problems associated with implementing a relative responsibility program are significant:

A) The relative responsibility law does not give the Department of Health and Welfare jurisdiction or authority to collect from nonresidents.

B) The Department would have to obtain a district court support order prior to obtaining repayment.

C) The Department could not collect from responsible relatives any amounts paid by Medicaid before the effective date of promulgation of the Idaho rules.

BACKGROUND:

Idaho's relative responsibility law, Idaho Code § 32-1008A, became effective on October 1, 1983. The law governs Medicaid patients in licensed skilled nursing facilities and licensed intermediate care facilities. It provides that responsible relatives must pay specific portions of the medical assistance provided to such patients and defines "responsible relatives" to include spouses, *natural and adoptive children* and others.

The Idaho Department of Health and Welfare began to implement this program and adopted appropriate regulations in 1983. However, when the Department began the collection phase of the program, Senator Terry Reilly of the Idaho Legislature

requested an Attorney General's opinion as to whether the new relative responsibility law conformed with federal laws and regulations regarding the use of Medicaid funds.

Pursuant to this request, the Attorney General issued Opinion No. 84-7 on March 23, 1984. That Opinion concluded that Idaho's relative responsibility law was "inconsistent with federal law regulating the use of Medicaid funds" and that a "continuation of the statutory scheme may subject Idaho to federal sanctions and/or private court actions. . . ." 1984 Attorney General Opinion No. 84-7 at 67.

In particular, the Opinion found that Idaho's relative responsibility law was not a law of "general applicability" and that its demand for repayment from responsible relatives violates the intent of Congress, which was that "States may not include in their plans provisions for requiring contributions from relatives other than a spouse or a parent of a minor child. . . ." S.Rep. No. 404, 89th Cong. 1st Sess. 78 (1965).

Subsequent to receipt of Attorney General Opinion No. 84-7, the legislative germane committees requested the Idaho Department of Health and Welfare to seek a waiver of the above-quoted prohibitions in the federal Social Security Act, pursuant to section 1115 of that law. The Department inquired into the possibility of such a waiver and, on November 2, 1984, received a response to its inquiry from Norman V. Meyer, Associate Regional Administrator for Policy of the Department of Health and Human Services. The response states that the federal agency "views the relative responsibility program as an important Medicaid issue; one which is of interest philosophically to this administration." This Opinion addresses the questions surrounding any application Idaho might make for such a waiver.

ANALYSIS:

I. *Idaho Statutes Pertinent to a Demonstration Program Waiver.*

The following Idaho statutes are mentioned in your opinion request as having possible relevance to the waiver request:

> Idaho Code § 56-203A — Authority of Department of Health and Welfare to enforce child support.
>
> Idaho Code § 56-203B — Payment of public assistance for child constitutes debt to the Department by natural or adoptive parents.
>
> Idaho Code § 56-209b(3) — Medical assistance.
>
> Idaho Code § 32-1002 — Reciprocal duties of support.
>
> Idaho Code § 32-1003 — Liability of parent for child's necessaries.
>
> Idaho Code § 66-414 — Developmentally disabled persons with assets sufficient to pay expenses, liability of relatives.

Idaho Code § 32-901 — Mutual obligations of husband and wife.

Idaho Code §§ 56-203A, 56-203B, 32-1002, and 32-1003, are specific laws that do not relate to the Medicaid program. Therefore, any responsibility of the Department pursuant to these laws should not be addressed in terms of a waiver/demonstration project pursuant to section 1115 of the Social Security Act.

Idaho Code § 56-209b(3) subrogates the Department to the rights of the patient to recover Medicaid monies from any third party who might be responsible for payment of this expense. However, this section clearly relates only to claims of a Medicaid recipient founded in tort against an outside third party. Therefore, this section does not relate to a third party liability such as addressed by the relative responsibility program and is not relevant to a waiver application.

Idaho Code §§ 56-203A and 56-203B do provide a specific enforcement mechanism requiring the Department to seek recovery against a natural or adoptive parent or parents for any public assistance benefits paid to any child. These specific sections have been enforced for some time in this state and have been implemented and enforced by the child support unit in the Department of Health and Welfare. Therefore, these statutes are not relevant to the proposed waiver application for a demonstration project under 42 U.S.C. 1315.

Idaho Code § 32-1002 imposes reciprocal duties of support upon the father, the mother and the children, who are unable to maintain themselves. This statute specifically refers to the *county* indigency program and does not give the Department responsibility or authority to require repayment for public assistance, including medical assistance and thus is not relevant to a waiver-demonstration project.

Idaho Code § 32-1003 imposes liability upon a parent for furnishing necessaries to a child and allows an action by a third party who may provide such support. *Isaacson v. Obendorf,* 99 Idaho 304, 581 P.2d 350 (1978). Although section 32-1003 does not impose a responsibility upon the Department, it does provide a third party authorization for the Department to maintain a cause of action in the case where it has provided public assistance, including medical assistance, payments to a child if such payments are supplied in good faith and are necessary for the support of that child. Therefore, these statutes are not appropriate for the proposed waiver-demonstration project under 42 U.S.C. 1315.

Idaho Code § 32-901 imposes mutual obligations upon the husband and wife to provide support. This section is contained in title 32, chapter 9 of the Idaho Code relating to a husband and wife's separate and community property. It is concerned only with the respective rights of spouses in their community and separate property, and is not a general support statute. *Williams v. Paxton,* 98 Idaho 155, 559 P.2d 1123 (1973); cf. *Linton v. Linton,* 78 Idaho 355, 303 P.2d 905 (1956). Sections 56-203B and 56-203C are the civil statutes authorizing and requiring the Department to require spouses to repay for public assistance, including medical assistance, as defined in Idaho Code § 56-201(e). Idaho Code § 32-709 supports the Department's authority to sue for support where the spouse does not receive public assistance. Therefore, Idaho Code § 32-901 does not authorize or require the Department to require spouses to repay for

aid for dependent children, including medical assistance. Furthermore, Idaho Code §§ 56-203B and 56-203C are not appropriate for the waiver-demonstration project under 42 U.S.C. 1315.

II. *Treatment of Collection Procedures Under a Waiver Program.*

The policy guidelines issued by the U.S. Department of Health and Human Services, as outlined in Medicaid Manual Transmittal, HFCA pub. 45-3 no. 3812 (February, 1983), specifically note that third party liability regulations at 42 CFR 433, subpart D, do not apply to collections pursuant to a statute of general applicability. Subpart D refers to requirements and options that the state may take pursuant to its state plan under the medicaid program. As these third party liability provisions are state plan requirements, this avenue cannot be used for collections regarding the relative responsibility program. The state agency that administers the Medicaid program may not enforce the statute of general applicability because the medicaid program receives federal financial participation only for expenditures made under an approved state plan. As the Department of Health and Welfare is the designated state agency to administer the medicaid program in Idaho, a statute of general applicability which would authorize the same Department to make collections on the relative responsibility program could come into serious conflict with 42 CFR 435.602(a)(2) and § 436.602(a)(2). This concern should be addressed in the waiver application.

Medicaid Action Transmittal SRS-AT-77-4, dated January 13, 1977, regarding retroactive recoupment specifically relates to considering the financial responsibility of relatives in order to determine eligibility and the amount of benefits. It implies that the regulations do not prohibit a retroactive recoupment pursuant to a statute of general applicability. The Secretary may waive this provision but the policy guideline in publication 45-3 would still have to be followed. As the relative responsibility program set up in section 32-1008A would not deem relative responsibility contributions as income available to the Medicaid applicant or recipient, because it is not actually received by the recipient but by the Department, such a collection program would be permissible.

Under the waiver/demonstration project as guided by the existing provisions of Idaho Code § 32-1008A, subsection (5), the amounts collected under such a relative responsibility program would be received by the Department of Health and Welfare and not by the applicant or recipient. Such a process following the guidelines of Medicaid Manual Transmittal HFCA pub. 43-3 no. 3812 (February, 1983) which would count as third party liability payment and not count such payments as income in determining medical eligibility, would not place the state out of conformance with federal laws and rules regulating the use of Medicaid funds if a specific waiver of 42 CFR 435.602 and 42 CFR 436.602 is included in the application.

III. *Validity of the Waiver.*

The most important question in your letter requesting an Attorney General Opinion states:

> If the waiver of "general applicability" were received, does "Relative Responsibility" (Idaho Code, Section 32-1008A) still violate Section 1902(1)(17)(D) of the Social Security Act (42 USC, Section 1396a(17)(D))?

The simple answer is that when the federal government grants a waiver of certain statutory requirements, a state agency must consider those requirements waived, or at least must be held harmless for actions taken in violation of those requirements.

As mentioned earlier, the federal official contacted regarding a waiver in this instance has replied that Health and Human Services regards "the relative responsibility program as an important Medicaid issue" and that it is "one which is of interest philosophically to this administration." The response went on to say that "[t]he waiver authority contained in section 1115 [of the Social Security Act] would be the appropriate authority for conducting a demonstration of this type." Finally, the response stated: "It would appear, at a minimum, that waivers would be needed of Section 1902(a)(17)(D) of the act and accompanying regulations and regulatory citations concerning the prohibition against treating relative contributions as third party liability."

In short, the federal government has initially assured the Idaho Department of Health and Welfare that the present administration is interested in sponsoring a demonstration project along the lines of Idaho's relative responsibility program; that a waiver under section 1115 of the Social Security Act is the appropriate mechanism for such a waiver; and that, at a minimum, the waiver application must seek exemption from all federal provisions (both statutory and regulatory) that would otherwise forbid a state from requiring adult children to pay their parents' Medicaid bills.

The communication from the federal agency outlines the considerations that will determine whether such a demonstration project might be accepted:

> I would emphasize, however, that this [waiver] authority is limited to demonstrations that test hypotheses and provide data and information that enable us to make national policy decisions.

This communication comports with the generally recognized principle that the Secretary of the Department of Health and Human Services is vested with broad powers to authorize projects which do not fit within permissible statutory guidelines of the standard public assistance programs pursuant to section 1115 of the Social Security Act, 42 USC § 1315. *Aguayo v. Richardson,* 352 F.Supp. 462 (S.D.N.Y.), aff'd, 473 F.2d 1090 (2d Cir. 1973), cert. den., 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1973).

> The only limitation upon the Secretary's authority under section 1115 is that he must judge the project to be one which is likely to assist in promoting the objectives of the applicable title of the Act. Id. Congress has entrusted this judgment to the Secretary and not to the courts.

Thus, once a project has been approved by the Secretary, it is the function of the courts only to determine whether his decision was arbitary and capricious and lacking in rational basis.

Crane v. Matthews, (D.C. Ga. 1976) 417 F.Supp. 532, 539. The Secretary may waive a state's compliance and conformance with section 1902(a) (17) of the Social Security Act (42 U.S.C. 1396(a) (17)) which requires a law of general applicability for a relative responsibility program, provided that such authority of the Secretary is not exercised arbitrarily, capriciously, or on an irrational basis, and such waiver is likely to assist in promoting the objectives of the Medicaid law. *California Welfare Rights Organization v. Richardson,* 348 F.Supp. 491 (D.C. Cal. 1972).

The communication from the regional representative of the Department of Health and Human Services also makes clear the obligations that Idaho's Department of Health and Welfare must assume in undertaking such a demonstration project:

> In order for this project to be considered for approval, the State of Idaho would have to complete the attached grant application and submit it for review by a technical panel of government and nongovernment individuals knowledgeable in the field of social science research.
>
> The application would have to include, among other things, a clear statement of goals and objectives, specific hypotheses to be tested, a well-formulated research design and evaluation plan, a thorough explanation of the data to be collected and a plan for using that data, an analysis of the potential utilization of the findings and an assessment of the applicant's potential for implementing the project.

In other words, the "waiver" would not simply be a waiver to go forward with Idaho's relative responsibility program. If Idaho's waiver application is to be approved, it will be because Idaho has committed significant resources to running a sophisticated, scientifically valid demonstration program. The purpose is not to exempt Idaho from a federal requirement, but to use Idaho as a test laboratory (at Idaho's expense) to run an experiment.

Such a demonstration project could be used to test such reasonable hypotheses as whether a relative responsibility program would cause Idaho residents not to enter nursing homes in Idaho or to enter nursing homes in other states. Such goals and objectives would provide data for the federal agency to evaluate the effects of the program and to determine if it is workable for all states and would not meet with a great deal of public resistance.

Further, it must be stressed that waiver programs approved under section 1115 of the Social Security Act cannot last longer than two years. Thus, it must be clearly understood at the outset that federal approval of a waiver application would not imply a long-term approval of Idaho's relative responsibility program.

IV. *Collection Problems.*

The final cluster of questions in your opinion request deals with residual collection programs that may arise even if the state succeeds in having its waiver application approved.

A. First, you ask whether Idaho Code §§ 32-1008A and 5-514 give the Idaho Department of Health and Welfare jurisdiction and authority to collect relative responsibility payments from responsible relatives who do not reside in Idaho. Idaho Code § 32-1008A(1) directs the Department to collect from all responsible relatives of a Medicaid recipient. Subsection (4) authorizes the Department to enter into reciprocal enforcement agreements if similar provisions are enacted by another state. It does not address long-term jurisdiction at all. Neither does it avail if other states lack reciprocal enforcement agreement statutes, as is generally the case.

Idaho Code § 5-514 is the general long-arm statute but contains no provision which may be relied upon for out of state jurisdiction under the relative responsibility program. Even though this section is intended to confer all the jurisdiction available under the due process clause of the U.S. Constitution, traditional notions of fair play and substantial justice would require, at the very least, that there be some specific area of contact with the state. *Southern Idaho Pipe and Steel Co. v. Cal-Cut Pipe and Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977), cert. den., 98 S.Ct. 1225, 55 L.Ed. 2d 757 (1978); *Duignan v. A.H. Robbins Co.*, 98 Idaho 134, 559 P.2d 750 (1977).

The mere relationship of a parent and child is not sufficient to meet the due process test requiring minimum contacts or a sufficient connection of the non-resident with the state so as not to offend the traditional notions of fair play and substantial justice. There must be some act by which a non-resident avails himself of the privileges of conducting activities within this state and clear notice that the defendant is subject to suit here. *Columbia Briargate Co. v. First National Bank*, 713 F.2d 1052 (4th Cir. 1983); *Idaho Potato Com'n v. Washington Potato Com'n* 410 F.Supp. 171 (D.C. Idaho 1976).

Idaho Code § 5-514 is modeled after an Illinois statute which has been liberally construed to extend jurisdiction to a non-resident who fathered an illegitimate child in the state by treating paternity as a tortious act committed in the state. *Poindexter v. Willis*, 87 Ill. App.2d 213, 231 N.E.2d 1 (1967). Idaho Code § 32-1008A places a duty upon responsible relatives. But there would be no tortious act committed in the state, only a lack of contribution to help pay voluntary nursing home costs. Nor would there be any medicaid application, agreement or assurance made in the state or to anyone in the state by the non-resident. This is not sufficient to meet the due process and fundamental fairness test. *Madison Consulting Group v. South Carolina*, 53 U.S.L.W. 2358 (C.A. 7 1985); *Wright v. Yackley*, (9th Cir. 1972) 459 F.2d 287; *Tillay v. Idaho Power Company*, 425 F. Supp. 376 (D.C. Wash. 1976); Jurisdiction Over Non-resident Parent, 76 A.L.R.3d 708 (1977). There is no language whatsoever in this subsection which could be construed to authorize out of state jurisdiction due to the fact that an individual may meet the definition of responsible relative within Idaho Code § 32-1008A.

The difficulties that will be encountered can readily be seen by referring to the history of the child support enforcement program. Several years ago states had substantial difficulties in attempting to enforce their child support obligations in other states when the father was not a resident of the same state as the mother and child. There was spotty and ineffective enforcement because the various states did not cooperate with one another without any requirement to enter into reciprocal enforcement

agreements. The federal government stepped into this area by adopting the Uniform Reciprocal Enforcement of Support Act (URESA) requiring that federal financial assistance would be unavailable unless each state cooperated with other states to enforce their respective child support laws and judgments. Idaho adopted URESA in 1969, Idaho Code § 7-1948 et seq. A viable medicaid relative responsibility program should be conducted under the auspices of a federal statute or regulation which requires all states to cooperate with one another in their collection and enforcement efforts. Without this, an effective system that avoids the aforementioned constitutional problems would be difficult to obtain.

B. The relative responsibility program, of course, may obtain voluntary repayments in accordance with applicable rules and regulations adopted pursuant to the authority of Idaho Code § 32-1008A. However, in the event that a responsible relative does not voluntarily comply with the provisions of the program, the Department would be required to obtain a judgment or support order in a district court prior to being able to enforce judgment and execute thereon pursuant to Idaho Code §§ 8-505, 506, 528 and 529. By analogy a reference to Idaho Code § 56-203D(1)(a) indicates that repayment must be established by judgment.

C. The Idaho Administrative Procedure Act, Idaho Code §§ 67-5201, et seq., would require the Department to adopt and promulgate rules and regulations pursuant to the various statutes relied upon for authority to collect from parents and spouses the amounts paid by Medicaid. Even though the authorizing statutes have been in existence for some time, they are not self executing and would require appropriate rules and regulations. Thus, the Department could not collect from parents and spouses amounts paid by Medicaid before the effective date of rules properly promulgated under the Idaho Administrative Procedure Act.

It must be noted that the simplest and clearest approach for the State of Idaho would be for the legislature to amend Idaho Code § 32-1008A to make it a law of general applicability and address the other concerns expressed herein. The restrictions and limited life of a section 1115 waiver-demonstration experiment would not effectively carry out the legislative purpose in adopting Idaho Code § 32-1008A. Even if the federal agency approved a comprehensive waiver application that would hold the state harmless from losing federal funding, it would not bar third parties from initiating litigation that could adversely impact federal funding and expose the state to liability for the costs and attorney fees of such a lawsuit. *Aguayo v. Richardson, supra.* This opinion cannot assure that the exercise of the secretary's discretion in approving a waiver request would survive judicial review.

AUTHORITIES CONSIDERED:

1. Statutes:

Idaho Code § 5-514

Idaho Code §§7-1048 et seq.

Idaho Code § 18-401-405

Idaho Code § 32-709

Idaho Code § 32-901

Idaho Code § 32-1002

Idaho Code § 32-1003

Idaho Code § 32-1008A

Idaho Code § 39-1301

Idaho Code § 56-201(e)

Idaho Code § 56-203A

Idaho Code § 56-203B

Idaho Code § 56-203D

Idaho Code § 56-209b(3)

Idaho Code § 66-414

Idaho Code §§ 67-5201 et seq.

Social Security Act § 1115; 42 USC § 1315

Social Security Act § 1902(a) (17) (D); 42 USC § 1396a(a) (17) (D)

2. Idaho cases:

Isaacson v. Obendorf, 99 Idaho 304, 581 P.2d 350 (1978)

Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1973)

Linton v. Linton, 78 Idaho 355, 303 P.2d 905 (1956)

Southern Idaho Pipe and Steel Company v. Cal-Cut Pipe and Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. den., 434 U.S. 1056, 98 S.Ct. 1225, 55 L.Ed. 2d 757 (1978)

Duignan v. A. H. Robbins Co., 98 Idaho 134, 559 P.2d 750 (1977)

Idaho Potato Com'n v. Washington Potato Com'n, 410 F. Supp. 171 (D.C. Idaho 1976)

3. Cases Cited From Other Jurisdictions:

Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973)

Potter v. James, 499 F. Supp. 607 (D.C. Ala. 1980)

Crane v. Matthews, 417 F. Supp. 532 (D.C. Ga. 1976)

California Welfare Rights Organization v. Richardson, 348 F. Supp. 491 (D.C. Cal. 1972)

Columbia Briargate Company v. First National Bank, 713 F.2d 1052 (4th Cir. 1983)

Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972)

Tillay v. Idaho Power Company, 425 F. Supp. 376 (D.C. Wash. 1976)

4. Other Authorities:

S. Rep. No. 404, 89th Cong. 1st Sess. 78 (1965)

H.R. Rep. No. 213, 89th Cong. 1st Sess. 68 (1965)

42 C.F.R. 433, subpart D

42 C.F.R. 435.602

42 C.F.R. 436.602

Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3, No. 3812 (February, 1983)

Medicaid Action Transmittal SRS-AT-77-4 (January 13, 1977)

Attorney General Opinion No. 84-7 (March 23, 1984)

Jurisdiction Over Nonresident Parent, 76 A.L.R. 3d 708

DATED this 31st day of December, 1985.

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

ANALYSIS BY:

MICHAEL DE ANGELO
Deputy Attorney General
Chief, Health and Welfare Division

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January 10, 1985

The Honorable Terry Sverdsten
Idaho State Senator
District #3
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Sverdsten:

During the last legislative session you raised some questions concerning timber sales on state endowment lands and requested that this office provide you with some legal guidance on the issue prior to the 1985 legislative session. Your request has been forwarded to me for response.

ISSUE:

Can the State of Idaho deduct from the gross proceeds of an endowment timber sale the administrative costs of conducting the sale without violating the endowment provisions of the Idaho Admission Bill or the Idaho Constitution?

CONCLUSION:

The Idaho Admission Bill does not appear to preclude recovery of timber sale administrative expenses from endowment trust proceeds. However, although several credible arguments can be made for the proposition that the Idaho Constitution does not prohibit the deduction of timber sale expenses from the gross proceeds of a sale, it appears that a 1977 Idaho Supreme Court decision may prevent such practice.

ANALYSIS:

Before addressing your specific question, the present method of accounting for revenues and expenses on endowment timber lands should be reviewed. Currently, the cost of preparing timber sales together with general timber management expenses are paid for from the general funding of the department of lands, but the money earned is placed in the endowment fund. Capital expenditures which enhance the market value, productivity, and income capacity of specific endowment lands are paid for by the "ten percent fund." This is a special fund consisting of a percentage of the income from specific endowment lands, which can only be used as a reinvestment upon the lands from which the monies accrued. Idaho Code § 58-1140. Finally, appraisal and scaling costs are defrayed by the use of a surcharge on timber sales. Idaho Code § 58-301 and Idaho Code § 58-416.

The State of Idaho holds endowment lands under an express trust for the benefit of the designated beneficiaries. Idaho Const. art. IX, § 8; *Ervien v. United States,* 251 U.S. 41, 64 L.Ed. 128 (1919). If there are no conflicting terms of purposes expressed in

the enabling act or the state constitution, it is generally accepted that the state is bound by the rules applicable to private trusts. *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 139 P. 557 (1914); *United States v. Swope*, 16 F.2d 215 (8th Cir. 1926); *Oklahoma Education Ass'n, Inc. v. Nigh*, 642 P.2d 230 (Okla. 1982). Thus, resolution of the issue posed requires an examination of the language of both the Idaho Admission Bill and the Idaho State Constitution.

Sections 4, 5, 6, 8, 10, 11, and 12 of the Idaho Admission Bill enumerate the state land grants and their purposes. An examination of the Admission Bill discloses no express provision requiring the state to bear the costs of administration from its general revenues. The language in sections 5, 8, and 12, however, might arguably be interpreted as requiring the state to assume the costs of administration.

The three critical phrases in the Admission Bill that might be construed as requiring the state to assume administrative expenses associated with state endowment lands are as follows: First, section 12 states that, "Lands granted by this section shall be held, appropriated, and disposed of *exclusively* for the purposes herein mentioned. . . ." Second, section 8 requires that income generated by university lands be used "*exclusively* for university purposes." Finally, both sections 5 and 8 require that "*proceeds* [from sale of school endowment lands are] to constitute a permanent school fund."

Though it can be argued that *exclusively* means no other use and *proceeds* means gross proceeds, *c.f., Opinion of the Justices*, 47 So.2d 729 (1950), most courts and state legislatures that have considered the issue interpreted the words so as not to preclude the state from recovering administrative expenses. *See, e.g., United States v. Swope*, 16 F.2d 215 (8th Cir. 1926); *State ex rel. Greenbaum v. Rhoades*, 4 Nev. 312 (1868); *Bourne v. Cole*, 53 Wyo. 31, 77 P.2d 617 (1938); Wash. Att'y Gen. Op. 59-60, No. 150 (1960); 32 Mont. Att'y Gen. Op. No. 8 (1967).

New Mexico is the only state that has litigated the administrative expense issue extensively. Its experience is particularly relevant to our state for two reasons. First, it is the only state where both federal and state courts have interpreted an enabling act. Since the grant involves both federal and state interests, the litigation gives a fairly accurate view of the intent behind the state land grants. Second, the section of the New Mexico Enabling Act being construed by the courts is substantially similar to Idaho's Admission Bill. For example, neither act makes reference to administrative costs; they merely require that the *"proceeds"* be placed in a permanent fund and prohibit the comingling or use of the fund for any other object than the one specified in the grant.

The first interpretation of the New Mexico Enabling Act occurred in 1919. At issue was a state statute directing the state land commission to expend three percent of the annual proceeds from the trust lands to publicize the advantages of living in New Mexico. In *Ervien v. United States*, 251 U.S. 41, 64 L.Ed. 128 (1919), the Supreme Court held Congress could not have intended for the proceeds of such trust lands to be used for general governmental purposes.

Approximately seven years later, the United States Eighth Circuit Court of Ap-

peals considered the constitutionality of a New Mexico statute that appropriated twenty percent of the income derived from any trust lands for the purpose of paying expenses incurred in the administration of the lands. In *United States v. Swope,* 16 F.2d 215 (1926), the court upheld the statute. Relying on the trust analogy in *Ervien,* the court stated:

> It is conceded that the grant of lands was upon an express trust. The rule of construction of such trusts is that the absence of a provision for the payment of the reasonable and proper costs and expenses of administering the trust does not throw such expense upon the shoulders of the trustees, but the trustees have an inherent equitable right to be reimbursed for such expenses incurred.

Id. at 217. The persuasiveness of the *Swope* opinion becomes more apparent after considering that the federal government had specifically required New Mexico to bear the costs of administration of lands granted for an agriculture or a mining college but made no express reference to such costs in the other grants. (*See also, State ex rel. Greenbaum v. Rhoades,* 4 Nev. 312 (1868). Nevada's enabling act also resembles Idaho's Admission Bill.)

The last two cases involving the New Mexico Enabling Act make explicit the implicit rule developed in *Ervien* and *Swope.* In *State v. Mecham,* 250 P.2d 897 (1952), the New Mexico Supreme Court struck down a statute that appropriated five percent of the trust funds to defray general governmental expenses. After considering *Ervien* and *Swope,* the court held that Congress did not intend for the trust funds to be used for general administrative expenses. In *United States v. State of New Mexico,* 536 F.2d 1324 (10th Cir. 1976), however, the United States Court of Appeals reconfirmed the state's right to reimbursement for expenses arising exclusively from the administration of trust property.

Since the Idaho Admission Bill constitutes a federal grant, the grantor's intent should be controlling. Thus, the fact that two federal courts have interpreted an enabling act similar to Idaho's as allowing the deduction of administrative expenses resulting from the management of trust property provides a significant basis for arguing that the Idaho Admission Act does not preclude such action. Whether the Idaho Constitution precludes such deductions, however, is less certain.

The sections of the constitution critical to analysis of this issue are as follows: Article IX, § 8 of the Idaho Constitution provides for the disposition of state endowment lands. Section 8 states that the State Board of Land Commissioners shall provide for the sale of the land and "for the sale of timber . . . and for the faithful application of the *proceeds* thereof in accordance with the terms of said grants . . ." Further, the board is charged with securing the "maximum long-term financial return. . . ." Article IX, § 4, defines the public school fund as including "the *proceeds* of such land as has heretofore been granted, or may hereafter be granted, to the state by the general government as school lands. . . ." Finally, art. IX, § 3, requires that the fund is to remain "inviolate and intact forever." It states, further, "[n]o part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided."

As in the Idaho Admission Bill, the Idaho State Constitution contains no specific provision requiring the state to bear the expense of administration of trust lands. If a duty to bear expenses is to be found, it must be based upon an interpretation that *proceeds* means gross proceeds not net proceeds.

Although the Idaho Supreme Court did not define "proceeds" in the case of *Moon v. Investment Bd.*, 98 Idaho 200, 5760 P.2d 871 (1977), the court's decision in *Moon* poses a substantial impediment to the use of sale proceeds to pay the expenses of the sale. The following discussion will first consider the *Moon* decision and then will detail some arguments supporting a more liberal interpretation of the term "proceeds."

The Idaho Supreme Court has taken a very protective stance toward the endowment lands. In *State v. Peterson,* 61 Idaho 50, 97 P.2d 603, 604 (1939), the court said:

> [T]hese public school endowment funds are trust funds of the highest, most sacred order, made so by Act of Congress and the Constitution so considered by members of the constitutional convention and so recognized and declared by this court.

Thus, it is not too surprising that the supreme court strictly construed art. IX, § 3, of the Idaho Constitution in *Moon.*

At issue in *Moon* was an appropriation of trust income for the purpose of defraying the investment board's trust management expenses. In a per curiam opinion with Justice Shepard dissenting, the court held that the legislation authorizing the transfer violated art. IX, § 3, of the Constitution of the State of Idaho. *Id.* at 201. Justice Shepard, in a persuasive dissent, argued that there was a presumption of constitutionality of legislative action. *Id.* He found it difficult "to conceive that the drafters of the constitution, while specifically providing that the corpus of the public school funds should remain 'inviolate' in requiring the makeup of all losses to said fund, also meant that the gross earnings from the investment are similarly 'inviolate' from all costs reasonably incurred in the investment process. . . ." He added, "[i]n my judgment the general law is clear that a trustee is entitled to reimbursement or setoff of those expenses reasonably incurred in the investment and administration of the trust corpus." *Id.*

Though the *Moon* decision is distinguishable because it involved the money in the school fund rather than what is to be deposited into the fund (gross or net proceeds), the court's superficial treatment of § 3 suggests that it will be an uphill battle to convince the court that administrative expenses are a proper deduction. Yet, there are four credible arguments for such an interpretation.

First, nothing in the constitutional convention suggests such a restrictive reading. The entire debate centered on the issue of whether the endowment lands should ever be sold. There was no discussion of expenses of administration per se. In fact, the expense of administration was only mentioned twice, and both times it was assumed by the speaker that the administrative expenses would be deductible from the proceeds. 1 Idaho Const. Conv. 739, 744-45 (1889) (Mr. Claggett and Mr. Grey speaking). While these passing comments alone offer little assistance in ascertaining the draf-

ters' intent, when combined with the absence of debate on the issue and the drafters' specific reference in art. IX, § 8, to applying the grants to the purposes for which Congress made them, they suggest that the convention did not intend a more restrictive interpretation than did Congress. If the drafters had intended a more restrictive reading they could have clearly expressed their intent. Therefore, the term "proceeds" is subject to being interpreted in light of *Swope* and *Rhoades. See, State ex rel. Forks Shingle Co., Inc. v. Martin,* 83 P.2d 755 (Wash. 1938).

Second, since the drafters used the legal term "trust" in art. IX, § 8, it must be assumed that they were familiar with the existing body of trust law and the right of setoff. This assumption would not be inconsistent with the protective attitude of the drafters because trust rules place well defined limitations on diversion of trust assets. Impliedly, the Washington Supreme Court adopted this reasoning in upholding a statute that directed that trust properties bear the timber sale costs. *State ex rel. Forks Shingle Co., Inc. v. Martin,* supra.

Third, art. IX, § 8, requires the board to protect the lands for the purpose granted. Presumably, the federal government and the drafters of the state constitution would not have relied on the uncertain nature of future appropriations by the state to guarantee the preservation of the trust lands. Uppermost in their minds was a perpetual base of funding for the benefit of all the designated beneficiaries.

Fourth, all of the states operating under similar constitutional provisions have assumed that administrative expenses are deductible from the trust assets, and their interpretation should be given some deference. *See, e.g.,* Wash. Rev. code § 76.65.030 (1981); Wash. Att'y Gen. Op. 59-60, No. 150 (1960); 32 Mont. Att'y Gen. Op. No. 8 (1967).

A review of the Idaho Code suggests that the legislature has followed the uniform practice. For example, Idaho Code § 58-140 appropriates ten percent of the monies received from the sale of standing timber, from grazing leases and from recreation site leases for the maintenance, management, and protection of state-owned lands. Interestingly, the statute goes on to adopt the *Ervien-Swope* reasoning to require that the proceeds only be applied to the trust lands from which they were generated.

In conclusion, the Idaho Admission Bill does not appear to preclude recovery of timber sale administrative expenses from endowment trust proceeds. However, although several credible arguments can be made for the proposition that the Idaho Constitution does not prohibit the deduction of timber sale expenses from the gross proceeds of a sale, it appears that a 1977 Idaho Supreme Court decision may prevent such practice.

If this office can be of further assistance, do not hesitate to contact us.

Sincerely,

RINDA RAY JUST
Deputy Attorney General
Natural Resources Division

RRJ:tg

January 16, 1985

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Payette County
P.O. Box 157
Payette, ID 83661

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Birch:

You have requested an opinion regarding (1) the legal age for the consumption of alcohol, (2) statutory prohibitions against furnishing alcohol to or procuring alcohol for persons under age, and (3) the scope of exceptions, as set forth in Idaho Code § 23-1023, to these statutory proscriptions.

Specifically, you request guidance on how the exceptions in Idaho Code § 23-1023 apply to the holding of graduation parties "on private property each year, at which parties minors are allowed to consume alcohol under the supervision of chaperones."

As you note in your letter, the answers to your first two questions are clear-cut. The legal age for consumption of alcohol is nineteen years or older. Idaho Code § 23-949 (alcoholic liquor); 23-1023 (beer); 23-1334(a) (wine). A person who furnishes or procures alcohol to or for a minor is guilty of a misdemeanor. Idaho Code §§ 18-1502(a); 23-603; 23-1023; see Idaho Code §§ 23-929; 23-1013; 23-1334(b) and (d).

The answer to your final question — i.e., the scope of exceptions to these statutory prohibitions — is less clear. You raise several concerns and the statute itself raises still others.

The plain and literal wording of the statute must be our starting point. *Local 1494 of International Association of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 639, 586 P.2d 1346 (1978). Thus, we begin by quoting the statute, Idaho Code § 23-1023, in full:

> Any person who shall procure beer for any person under nineteen (19) years of age or any person under nineteen (19) years of age who shall purchase, attempt to purchase or otherwise procure, consume or possess beer, shall be guilty of a misdemeanor. This section does not apply to possession by a person under the age of nineteen (19) years making a delivery of beer in pursuance of the order of his parent or in pursuance of his employment, or when such person under the age of nineteen (19) years is in *a private residence accompanied by his parent or guardian* and with such parent's or guardian's consent. (emphasis added)

Your first concern is whether the "private residence" exception is limited exclusively to the residence of a parent or guardian. A plain reading of Idaho Code §

23-1023 is that it does not restrict possession of beer by a minor to the private residence of the minor's parent or guardian. Possession is allowed in "a" — or *any* — private residence so long as the minor is accompanied by his or her parent or guardian and has the parent's or guardian's consent.

Next, you ask whether "the supervision of (adult) chaperones" can substitute for that of the minor's own "parent or guardian," as required by statute. The answer is no. Under Idaho law, a person becomes the "guardian" of a minor only by "testamentary appointment or upon appointment by the court." There is no precedent, either in Idaho law or elsewhere, for a loose usage of the word "guardian" that would extend to chaperones. See 39 Am.Jur. 2d "Guardian and Ward."

Thus, in the graduation party context, the exception carved out by Idaho Code § 23-1023 does extend to the private residences of adults other than the minor's parents or guardian; but it does not extend to substitution of chaperones for that of the minor's own parents or guardian.

A final cluster of problems surrounding Idaho Code § 23-1023 poses a trap for the unwary and a dilemma for prosecutors. On these items, we offer only the fruits of our research. Enforcement obviously remains a delicate matter of prosecutorial discretion.

For one thing, it should be pointed out that the Idaho Code § 23-1023 exception to the state's alcoholic beverage laws appears only in chapter 10, i.e., "the beer law." There is no parallel exception in chapter 9 (the alcoholic liquor law) or in chapter 13 (the wine law). Thus, even if Idaho Code § 23-1023 can be construed to allow minors to consume beer in a private residence when accompanied by a consenting parent or guardian, no such exception exists for wine or other alcoholic beverages. Taken literally, this would mean that a parent could not serve a minor a cup of Christmas egg nog, or a sip of New Year's Eve champagne, or even a glass of wine at a religious Passover observance.

Furthermore, as you note in your letter, the exception spelled out in the beer law is unambiguous only with regard to "possession," not "consumption," of beer. The plain reading of Idaho Code § 23-1023 is that a minor may *possess* beer (1) if making a delivery for his or her parent or employer, or (2) if in a private residence, accompanied by and with the consent of his or her parent or guardian.

It would be plausible to read the second portion of Idaho Code § 23-1023 as allowing a minor to lawfully *consume* as well as "possess" beer, and as allowing an adult to lawfully procure the beer, so long as the "private residence" exception is otherwise satisfied. An argument supporting this contention would be that Idaho Code § 23-1023 should be construed to make sense. *Gavica v. Hanson,* 101 Idaho 58, 60, 608 P.2d 861 (1980). And the section does not make much sense if construed as allowing possession but not consumption.

Though plausible, such a reading might not prevail. Taken literally, the entire second sentence of Idaho Code § 23-1023 applies only to *possession,* not consumption, of beer. This restricted reading is supported by the title of the enacting bill, which read in

part: ". . . AND MAKING EXCEPTION TO CERTAIN KINDS OF 'POSSESSION.'" 1967 Sess.L., Ch. 351 at 995.

Moreover, the conspicuous omission of "consumption" from the second sentence — after "consume" is specifically enumerated in the first sentence along with "possess" — could be read as a deliberate exclusion of consumption from the ambit of the second sentence. See *Local 1494*, supra at 639; *Peck v. State*, 63 Idaho 375, 380, 120 P.2d 820 (1941).

Also troubling is the fact that the prohibitions against procuring and furnishing beer for minors, set forth in Idaho Code § 23-1023 and other sections cited above, are not expressly excepted by the express wording of Idaho Code § 23-1023. Taken literally, this could lead to the result that Idaho Code § 23-1023 gives a minor the right to possess beer, but denies any legal means (i.e., procurement by adults) to transform the right into a practical reality.

Dictum in the Idaho case of *State v. Bush*, 93 Idaho 538, 466 P.2d 578 (1970), acknowledges that ambiguities exist in the code provisions regarding alcohol. *Bush* reads Idaho Code § 23-1013 to prohibit the sale, serving, or dispensing of beer to a minor by a private person, whether pursuant to a commercial transaction or not. Justice McQuade, in a concurring opinion, expressed misgivings about the court's holding vis-a-vis section 23-1023:

> Prosecutions under Idaho Code § 23-1013 in situations not involving a commercial transaction may modify the safeguards afforded parents in Idaho Code § 23-1023. Parents and friends of parents may be prosecuted for serving minors beer in the privacy of their residences, despite the presence and permission of parents . . . We must look to the legislature to safeguard the citizens of Idaho from the jeopardy of a criminal conviction under Idaho Code § 23-1013 for "dispensing" beer to their children and their friends' children in the privacy of their own homes. I call attention to that body to make its intention clear and unambiguous.

93 Idaho at 541.

In the fifteen years since *Bush*, the legislature has not seen fit to "make its intention clear and unambiguous" regarding the scope of Idaho Code § 23-1023's private residence exception. Until the legislature takes such action, the citizens of Idaho must remain in "jeopardy of a criminal conviction . . . for 'dispensing' beer to their children and their friends' children in the privacy of their own homes," and the prosecutors of Idaho must remain in a quandary as to their duties in this delicate matter.

Sincerely,

JOHN J. McMAHON
Chief Deputy

JJM:lh

January 22, 1985

The Honorable Norma Dobler
State Senator, District 5
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Restrictive Covenants

Dear Senator Dobler:

You have asked whether a restrictive covenant among a group of landowners in a subdivision is enforceable in Idaho. According to your letter, the proposed restrictive covenant limits lot usage to:

> . . . residential purposes and by a family of one (1) or more persons related by blood, marriage or adoption or a group of not more than six (6) persons not related by blood or marriage, living together as a single housekeeping unit.

In addition, it would exclude any:

> . . . commercial establishment, hospital, sanitarium, place for institutional care or treatment of the sick or disabled, physically or mentally, or mobile home.

It is our opinion that a restrictive covenant of this nature may face insurmountable hurdles in the areas of property law, constitutional law and public policy and thus could prove unenforceable in Idaho.

ANALYSIS:

I. *Property Law Considerations*

As a general principle, restrictive covenants among property owners are enforceable in Idaho. *Ada County Highway Dist. v. Magwire,* 104 Idaho 656, 662 P.2d 237 (1983); *Twin Lakes Improvement Ass'n v. East Greenacres Irrigation Dist.,* 90 Idaho 281, 409 P.2d 390 (1965); *Payette Lakes Protection Ass'n v. Lake Reservoir Co.,* 68 Idaho 111, 189 P.2d 1009 (1948).

On the other hand, restrictive covenants are not favored because they act as a burden on the free use and alienability of property. Consequently, courts will construe such convenants narrowly. *Campbell v. Glacier Park Co.,* 381 F.Supp. 1243 (Id. 1974). Thus, if there are any defects in the creation of the covenant or any ambiguities in its wording it will not be enforced.

According to your letter, the proposed restrictive covenant will be an amendment to

the existing subdivision covenants. Such amendments are enforceable if the original covenants provide a mechanism for amendment. However, the amendment mechanism must be meticulously carried out: the required number of property owners must agree; the amendment must cover all of the lots covered by the original covenants; and the revised covenants must be properly recorded. Annot: "Validity, Construction and Effect of Contractual Provisions Regarding Future Revocation or Modification of Covenant Restricting Use of Real Property," 4 ALR3d 570 (1965). The *Idahonian* of December 8, 1984, indicates that not all property owners have agreed to the amendments. If that is so, the proposed covenant may not be enforceable. We do not have a copy of the original covenants to determine whether the conditions for amendment have been met.

The earliest court cases dealing with this subject have construed covenant language narrowly and have generally allowed group homes in residential neighborhoods. In *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (1981), the Minnesota Supreme Court summarized the reasons adopted by various courts for treating residents of a group home as a "family" when covenants permit only "single-family" dwellings:

> From the outside, the home looks like all the other single-family homes in the neighborhood. The residents live in a family-type setting and call the dwelling their home. Courts in other jurisdictions have found similar group homes in compliance with single-family restrictive covenants. *State ex rel. Region II Child & Family Services, Inc. v. District Court of the Eighth Judicial District,* 609 P.2d 245 (Mont. 1980) (five retarded children; one unit single-family dwelling); *Bellarmine Hills Ass'n v. Residential Systems Co.,* 84 Mich.App. 554, 269 N.W.2d 673 (1978) (six retarded children; one single private family dwelling); *Berger v. State,* 71 N.J. 206, 364 A.2d 993 (1976) (eight to twelve multihandicapped children under age nine; one dwelling house). Factors considered by the courts include the single housekeeping structure, the relatively permanent type of living situation, and public policy supporting such living arrangements — all factors applicable to Caromin House.

313 N.W.2d at 27.

The Minnesota Supreme Court likewise held that the group home for retarded adults did not violate a covenant banning "commercial" usage simply because the home was compensated for its services. The court found support for this holding in *J.T. Hobby and Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981) (receipt of money by group home for four retarded adults does not violate covenant restricting use to residential purposes and one single-family dwelling); and *Crowley v. Knapp,* 94 Wis.2d 421, 288 N.W.2d 815 (1980) (for-profit group home for retarded adults complies with covenant restricting use to single-family dwelling used for residential purposes only). Only one case has been found where a covenant restricting use to "single family dwellings" has been enforced to ban group homes for mentally retarded adults. See *Omega Corp. of Chesterfield v. Malloy,* 319 S.E.2d 728 (Va. 1984).

In reading covenants to allow group homes within the definition of a "single family

dwelling," courts frequently take their cues from state zoning statute language. As you note in your letter, the Idaho legislature has already decreed that a "single family dwelling" shall include "any home in which eight (8) or fewer unrelated mentally and/or physically handicapped persons reside," and that such a home shall constitute a "residential use" for local zoning purposes. Idaho Code §§ 67-6530 through 67-6532. Thus, it seems likely that the proposed covenant restricting usage to "a single housekeeping unit" could not be interpreted to ban a group home. Furthermore, a court might conclude that a covenant restricting any "place or *institution* for care or treatment of the sick or disabled, physically or mentally" would be unenforceable in Idaho because such homes have been expressly designated by the legislature as "alternatives to institutionalization." Idaho Code § 39-4604(h).

We assume, however, that you are not simply interested in whether loopholes can be found in a proposed covenant but whether *any* restrictive covenant attempting to ban group homes from residential neighborhoods could prove enforceable in Idaho. The remainder of this opinion addresses the broader question.

II. *Constitutional Considerations*

Two federal circuit courts have recently overturned local zoning ordinances that exclude from residential neighborhoods group homes for retarded adults or for former mental patients. In *Cleburne Living Center, Inc. v. City of Cleburne, Texas,* 726 F.2d 191 (1984), the Fifth Circuit held that mentally retarded persons are a "quasi-suspect" class because they have been "subjected to a history of unfair and often grotesque mistreatment; . . . subjected to ridicule . . . and derision; . . . relegated to a position of political powerlessness; . . . [whose] condition is immutable." 726 F.2d at 196-198. As such, zoning ordinances that discriminate against this class must be subjected to "heightened scrutiny" because they "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 2394-95 n. 14, 72 L.Ed.2d 786 (1982). The Fifth Circuit concluded that a zoning ordinance excluding group homes for mentally retarded adults in an "apartment house district" was unconstitutional on its face as violating the Equal Protection Clause of the fourteenth amendment to the United States Constitution.

The Ninth Circuit reached a similar conclusion, under similarly heightened scrutiny, with regard to a zoning ordinance that discriminated against a group home for mentally retarded adults in a "residential" area. *J.W. v. City of Tacoma, Wash.,* 720 F.2d 1126 (1983).

Little purpose would be served by additional discussion of this question. The *Cleburne* case is now before the U.S. Supreme Court. If the Court holds that the mentally retarded form a "quasi-suspect" class and that zoning ordinances that discriminate against them violate the fourteenth amendment, then discriminatory restrictive convenants would likewise prove unenforceable. *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

It should be noted, however, that the converse need not be true. Even if the Supreme Court holds that the mentally retarded do not form a "quasi-suspect" class, lower

courts could still find that discriminatory zoning ordinances are unconstitutional because they do not serve any "rational" purpose at all. The State of Pennsylvania has urged the U.S. Supreme Court to adopt precisely such an approach — which is significant because Pennsylvania was the prevailing party in a recent Supreme Court case that deferred to the "reasonable" judgment of qualified professionals in dealing with care of mentally retarded patients involuntarily committed to a state institution. See *Youngberg v. Romeo*, 457 U.S. 307 (1982).

III. *Public Policy Considerations*

The final obstacle to enforcement of a restrictive covenant such as the one outlined in your letter is the fact that state courts, completely apart from constitutional considerations, have found such covenants unenforceable on public policy grounds. In doing so, some courts have relied upon declarations of legislative intent found in zoning statutes similar to the Idaho statutes you quote in your letter. Idaho Code §§ 67-6530 et seq.

It could be argued that these statutes, by their own terms, apply solely to zoning and other local ordinances and restrictions and have no persuasive value in determining public policy regarding private restrictive covenants. The Michigan Court of Appeals rejected this argument:

> The fact that a zoning statute limits its declaration of policy to zoning does not lessen to any degree the policy of this state to protect and foster facilities for the mentally handicapped.

McMillan v. Iserman, 327 N.W.2d 559, 563 (Mich.App. 1983).

The New York Court of Appeals has recently held that a statute preventing discrimination against group homes by "local laws and ordinances" was a sufficiently clear indication of public policy to prevent discrimination by private restrictive covenants as well. In so doing, the court held that:

> even if use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so would contravene a longstanding public policy favoring the establishment of such residences for the mentally disabled.

Crane Neck Ass'n v. N.Y. City/Long Island County Services Group et al., 472 N.Y.S.2d 901, 904 (1984).

The legislative policy in Idaho favoring deinstitutionalization and community living for retarded citizens is also clear. See Idaho Developmental Disabilities Services and Facilities Act, Idaho Code §§ 39-4601 et seq.; Respite Care Services Act, Idaho Code §§ 39-4701 et seq.; and Personal Care Services Act, Idaho Code §§ 39-A4701 et seq.

Finally, as the author of the leading article on this matter observes, the legislature "could relieve the courts from having to determine whether these restrictive cove-

nants violate public policy by enacting specific statutes." Guernsey, "The Mentally Retarded and Private Restrictive Covenants," 25 William and Mary Law Review, 421, 455 (1984). Four states (California, Indiana, North Carolina and Wisconsin) have adopted such statutes. The statutes routinely provide that the licensing process address such legitimate concerns as the size and outward appearance of the structure, the number of residents allowed in the group home and care to avoid a concentration of such units in a single neighborhood.

CONCLUSION:

Restrictive covenants limiting property use to a "single housekeeping unit" have been narrowly construed by the courts to permit group homes for the mentally retarded in residential neighborhoods. Similarly, a covenant banning any "place for institutional care" of the mentally retarded might not be construed to ban group homes — because the Idaho legislature has found that such homes are "alternatives to institutionalization." Covenants that *expressly* aim to exclude such homes face severe constitutional problems even under the lowest level of court scrutiny. Finally, state courts that have addressed the question have found such covenants to be unenforceable on public policy grounds. Against this background, it is our opinion that a restrictive covenant banning group homes from residential neighborhoods would probably be unenforceable in Idaho.

Cordially,

JOHN J. McMAHON
Chief Deputy

JJM:cjm

February 2, 1985

The Honorable Mike Strasser
House of Representatives
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Strasser:

The Attorney General has requested that I respond to your letter of January 22, 1985. Your letter poses two questions: (1) Is it possible for the state Liquor Dispensary of Idaho to break the lease referred to in your letter without becoming liable for the entire ten years' financial commitment and (2) if the liquor dispensary wished to sublet the premises, could the consent of the lessor be unreasonably withheld? Our conclusion is that as the rights and responsibilities of a state under an ordinary business contract are, with few exceptions, the same as those of individuals, the state could remain liable for the remaining financial obligation of the lease. However, because

the drafters of the lease failed to define certain key terms, it is impossible to predict what liability a court would impose upon the state. Further, the state could sublet the demised premises and the consent of the lessor could not be unreasonably withheld.

It is axiomatic that the state has the authority to enter into contractual agreements. If the contract is not for an illegal purpose or in violation of any statutory or constitutional provision, the state remains obligated to perform its obligations under the contract. Under such circumstances, an individual contracting with the state is entitled to payment pursuant to the contract, *Aerial Service Corp. (Western) v. Benson,* 374 P.2d 277, 84 Idaho 416. Therefore, unless there was some particular exception or impediment to the performance of a contract, the state would remain liable for payment of the agreed consideration thereunder.

In analyzing this particular lease, a major problem becomes readily apparent: the lease agreement is not well drafted. The document does not define certain key understandings, such as a definition of what constitutes a breach of the agreement, what events constitute a default in the performance of the agreement or what might occur if by operation of law the lease became incapable of performance. This lack of specificity makes our analysis most difficult, as most drafters try to avoid problems of this nature by covering anticipated contingencies with specific language or general provisions as needed.

In reviewing this lease it is important to note this factor. The lease expressly provides that the premises can only be used for a state liquor store. If the legislature were to eliminate state liquor stores entirely, an argument could be advanced that the lease is no longer capable of being performed. However, it is extremely difficult to evaluate this argument because the lease in question contains no express provisions concerning what effect this possibility would have in relationship to the intent of the contracting parties. Because of this, we are unable to evaluate whether or not the lease could be breached without corresponding state liability.

In considering this matter, you may wish to explore other options which would mitigate any state liability. For example, if state liquor dispensaries were turned over to private industry, the new parties could be required to assume the state lease and hold the state harmless from any liability. There would be quite an incentive for private businessmen to do this as the location of state liquor dispensaries is well known to local customers. In short, the lease in question may or may not be enforceable; but if the intent of the legislature is to turn the liquor dispensary business over to private industry, other arrangements can be made to avoid the financial liability exposure to the state.

Concerning your second inquiry, the Idaho Supreme Court has recently ruled that the consent of the lessor may not be unreasonably withheld. If there is any further information we can provide, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

February 4, 1985

The Honorable Gail Bray
State Senator, District 19
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Proposed Day Care Licensing Act — House Bill 94

Dear Senator Bray:

You have requested our advice on matters pertaining to House Bill 94, the proposed Day Care Licensing Act. Specifically, your inquiry poses two questions:

a) is there any issue of equal protection under the proposal, and

b) will a county administered program have force and effect within the limits of incorporated cities?

Short Answer

a) There appear to be no equal protection problems, so long as objective standards are followed except for the questions noted on section 31-4606(c) in the discussion that follows.

b) As a general rule, county ordinances have no force and effect within municipalities. Thus, so long as the program is a county program, it will only affect the unincorporated areas of the county.

ANALYSIS:

a) *Equal Protection*

Your first question asks whether HB 94 would deny equal protection of the laws in any manner.

Equal protection of the laws is guaranteed to all persons by virtue of section I of the fourteenth amendment, United States Constitution and article I, section 2, Idaho Constitution. In essence, the provisions stand for the proposition that all persons similarly situated shall be treated in a like manner. To treat persons differently who have the same status is to deny them equal protection of the law. However, reasonable classification of persons is not unlawful; only that which is discriminatory.

As an example, in the case of *Weller v. Hopper,* 85 Idaho 386, 392, 379 P.2d 792 (1963), the court considered a statute which prohibited known felons from ever renewing liquor licenses, but allow them to acquire new licenses five years after completion of their sentence. In holding the classifications to be a denial of equal protection, the court said:

> . . . The classification, attempted to be set up by such statutory provision, is unreasonable, arbitrary and discriminatory; it attempts discrimination against one who happened to hold a retail liquor license at the time of his conviction of a felony, as against one who did not hold such a license at the time of his felony conviction; no reasonable ground or basis for such a distinction between them, as prospective licensees, exists.

85 Idaho at 392.

A review of HB 94 in light of the foregoing discussion reveals no equal protection problems except for the problems noted at (c) below.

Those problems may exist in section 31-4604(c) which allows the county commissioners to issue licenses, at their discretion, even when persons may fail to meet all the standards set forth in the bill.

b) *County/City Jurisdiction*

Your second question asks whether county licensing of day care centers/providers creates any jurisdictional conflicts with cities; i.e., would those licenses have any force and effect within incorporated municipalities?

Article XII, § 2, Idaho Constitution provides that:

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

The section is considered to be a constitutional grant of power to cities and counties at least in the area of the police power. *"Home Rule For Idaho Cities,"* 14 IDR 143 (1977).

The police power is the authority of government to regulate or prohibit conduct for the protection of the public health, safety, welfare or morals. *Winther v. Village of Weippe,* 91 Idaho 798, 430 P.2d 689 (1967). HB 94 purports to do just that by regulating day care.

The Idaho Supreme Court has had numerous occasions to reflect upon the meaning of article XII, § 2, in relation to county jurisdiction within the limits of an incorporated city.

The first major case was *State v. Robbins,* 59 Idaho 279, 285, 81 P.2d 1078 (1938). There, the court opined that county ordinances were not "general laws" and, thus, had no application within cities. The defendant in the case had secured a license from the City of Moscow to purvey beer but had no county license. He was convicted of violating the county ordinance. In reversing, the court stated:

> Since, therefore, a municipality is a distinct governmental entity, entirely independent of the county as such, and is, consequently, subject to no local legislation which it is within the power of the governing board of the county to enact, it is wholly immaterial whether or not the municipal authorities exercise or put into operative effect all the powers conferred upon it by its charter and the Constitution. The county, in brief, has no legal right to legislate for a municipality located within its limits upon any subject which is within the scope of the powers granted to the municipality, and particularly upon any matters involving the police power of the state . . .

59 Idaho at 285.

The same proposition has been reinforced in subsequent decisions of the supreme court. In *Clyde Hess Distrib. Co. v. Bonneville County,* 69 Idaho 505, 512 210 P.2d 798 (1949), the court prohibited the enforcement of a county ordinance within a city, even where the city had no conflicting enactment. In finding against the county, the court stated that:

> . . . An attempt by the legislature to grant authority to a county to make police regulations effective within a municipality would be an infringement of such constitutional right of a municipality. A police regulation made by a county is not a general law for a municipality within the meaning of the constitution. *Ex parte Knight,* supra; *State v. Robbins,* supra. . . .

69 Idaho at 512. *See also Boise City v. Blaser,* 98 Idaho 789, 572 P.2d 892 (1977) (holding that county building permits are unnecessary and ineffective within a municipality).

Thus, county regulations and ordinances are ineffective and without force in duly organized Idaho cities. As the cases indicate, it makes no difference whether the county acts upon its own initiative or as a result of a legislative mandate; in either case, the result is the same.

Analogies can be drawn between HB 94 and other programs which may serve to better illustrate the foregoing legal principles. For example, title 67, chapter 65 of the Local Planning Act mandates the enactment of a comprehensive plan and zoning ordinances by counties. Exhaustive requirements are set forth which require county compliance. However, as a matter of law, county ordinances have no effect within

cities. *Boise City v. Blaser, supra.* Instead, the city must enact its own plan and ordinances in compliance with the general (state) laws.

The same holds true for the liquor laws and a host of other state mandated programs and regulations. Where local governments are given discretion to act, even severely limited discretion, their ordinances have no effect within a coequal jurisdiction.

The only circumstances where a county operated program would have force and effect within a city is where the county has absolutely no discretion, but merely acts as an agent for the state. An example of this would be the issuance of driver's licenses. In that circumstance, the county merely gives the test and collects the fee. The Department of Transportation exercises all discretion, such as license revocation.

In light of the foregoing, it is our opinion that any county ordinances adopted in response to HB 94, as proposed, will be without force and effect in cities.

c) *Review of the Bill*

As a courtesy, we have reviewed the proposed legislation, and have the following comments and suggestions:

Section 31-4601. The statement of policy clearly states that both cities and counties have jurisdiction to pass more stringent regulations. (lines 24 & 25) This should be deleted if local jurisdiction is not desired.

Section 31-4602. The definitions section fails to take into account "baby-sitters," i.e., the casual or occasional sitter who handles the children of more than one family for an evening out, etc.

Section 31-4604(1). The commissioners are given discretionary authority to establish the kind of information required for submission. This should be deleted or altered if local jurisdiction is not desired.

Section 31-4606. Same comment as Section 31-4604. In addition, reference should be made in sub-paragraph (3) to the name or description of Chapter 3, Title 66, Idaho Code.

Sub-paragraph (c) may present equal protection problems on the basis of insufficient standards for granting a license in spite of the absolute prohibition against such issuance. Furthermore, it is inconsistent to forever prohibit licensure on some basis and then allow it anyway at the government's discretion.

Section 31-4608. Again, discretion is allowed.

Section 39-1209. Parentheses should be used instead of periods if consistency of form is desired.

Section 39-1211. "DAY CARE HOMES AND DAY CARE CENTERS" should be deleted from the section title.

If you have further questions, please contact us.

Sincerely,

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

RGR:cjm

February 4, 1985

The Honorable Christopher R. Hooper
Idaho State Representative
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Proposed Daycare Licensing Acts — House Bills 94 and 95

Dear Representative Hooper:

As I indicated to you at the committee hearing on February 4, 1985, our office would be providing written comments concerning the above-referenced bills. I am enclosing for the review of your committee an informal guideline provided to Senator Gail Bray concerning House Bill 94 and a written analysis of House Bill 95.

In part C of the analysis provided to Senator Bray, deputy attorney general Robie Russell correctly points out certain changes that would be necessary in order to comply with decisions of the Idaho Supreme Court. See for example *Benewah County Cattlemen's Association, Inc. v. Board of Commissioners of Benewah County,* 105 Idaho 209, 668 P.2d 85 (1983), and *Hobbs v. Abrahams,* 104 Idaho 205, 657 P.2d 1073. The basic problem identified by Mr. Russell is that House Bill 94 provides for too much discretion to local county commissioners. This defeats the requirement of article XII, § 2, of the Idaho Constitution of being a true state mandated program which exists, for example, with driver's licenses.

The other approach I mentioned to your committee in relationship to House Bill 94 would be to create a state mandated program administered by cities and counties. I have attached for your committee's review handwritten modifications to House Bill 94 which would accomplish this purpose. If there is anything further we can provide, please feel free to call upon us.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

February 11, 1985

The Honorable Walter E. Little
Representative, District 10
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Resort Cities Tax — Curative Legislation

Dear Representative Little:

In September of 1983, The Sun Valley Company initiated litigation against the City of Sun Valley seeking a determination that the city ordinances promulgated under the "City Property Tax Alternatives Act of 1978," Idaho Code § 50-1043, et seq., were invalid and that the authorizing statutes were unconstitutional. The scope of the litigation later expanded to include similar ordinances enacted by the City of Ketchum. While the litigation was in process, the Idaho Supreme Court decided a significant case dealing with the issues raised by the Sun Valley and Ketchum litigation. In *Greater Boise Auditorium District v. Royal Inn of Boise,* 106 Idaho 884, 684 P.2d 286 (1984), the Idaho Supreme Court upheld the constitutionality of legislation authorizing auditorium districts to impose a sales tax on receipts derived from furnishing hotel and motel rooms. In so holding, the supreme court resolved some of the ambiguities and problems which have plagued this area since *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923). The supreme court read *State v. Nelson* as forbidding the delegation of unrestricted and unguided taxing power to municipal entities. However, the court rejected the former interpretation of *State v. Nelson* which allowed the legislature to delegate only the power to levy ad valorem taxes to municipal entities. Judge Granata relied heavily on the *Greater Boise Auditorium District* rationale when he held the City Property Tax Alternatives Act of 1978 was unconstitutional as an overbroad delegation of the legislative power to levy taxes. Curative legislation has now been proposed to meet the judge's objections. We have been asked to discuss some of the issues raised by this curative legislation.

I. *Proposed Curative Legislation.*

We have been provided with House Bill No. 73, which is the text of the curative legislation. It consists of approximately five single-spaced pages of legislative material. Accordingly, we will cite only to the significant portions of the statute in discussing the particular issues raised by your request.

(i) In general, the legislation allows resort city residents and city governments to act in concert to impose any combination of three authorized sales taxes. The qualifying condition for a resort city is that the local governing body pass an ordinance which shall contain finding of facts that:

(a) The city derives a major portion of its economic well-being from businesses catering to recreational needs and from meeting the needs of people traveling to that destination city for an extended period of time, and

(b) The city has a tourist population which exceeds the residence population of the city during at least 14 days in any calendar year.

(ii) If the city government passes an ordinance to assess the tax and the electorate approves by a 60% majority of all votes cast on the question, then the city may levy any or all of the three specified sales taxes.

(iii) The statute also provides limitations on the manner of the election, the purposes for which the tax-generated funds may be expended, sets out requirements of cooperation with county local option and nonproperty sales taxes, and provides mechanisms for collections and administration of the sales taxes. The various sales taxes are limited to 5% in amount on each of the areas subject to taxation and to a total of 5% on any single sales transaction.

Taken together, these limitations should pass constitutional muster. In the *Boise Greater Auditorium District* case, the Idaho Supreme Court upheld the sales tax which auditorium districts were authorized to impose under Idaho Code §§ 67-4917A through 67-4917C. The court noted that those statutes specifically defined the incidence of the tax, set forth the applicable exemptions, set a maximum amount which may be imposed, and delineated the administration and collection of the tax through incorporation of the Idaho Sales Tax Act.

A. *Incidence of the Tax.*

The proposed curative legislation specifically defines the incidence of the tax. It allows the resort city to impose any of three specifically defined taxes. The first is an occupancy sales tax on receipts derived from sleeping accommodations. The second is a sales tax on receipts derived from the sale of liquor by-the-drink, wine, and beer sold at retail for consumption on the premises. The third is a general retail sales tax on receipts derived on sales subject to the Idaho Sales Tax Act. The resort city may adopt any one or more of the authorized alternatives. While this delegation is somewhat broader than that represented in the *Greater Boise Auditorium District* case, it still meets the requirement that the enabling statute define the incidence of taxation. The legislation permits the imposition of three distinct taxes, each of which individually meet the

stringent requirements of the *Greater Boise Auditorium District* case. Since the legislation limits the tax imposed on any one sale to a 5% tax and each of the separate taxes would be valid if standing alone, it would be illogical to say that the combination is improper.

B. *Maximum Amount of Tax.*

As noted above, the individual options and the overall rate are limited in amount to a 5% maximum. This explicitly meets the standard set forth in *Greater Boise Auditorium District.*

C. *Administration and Collection.*

The curative legislation also incorporates the Idaho Sales Tax Act in administration and collections provisions to the same extent as that approved in *Greater Boise Auditorium District.* While this specific mechanism was approved in *Greater Boise Auditorium District,* both statutes lack a mechanism for providing due process in the adjudication of disputed tax liabilities. A simple inclusion of a reference to the administrative procedures in the Idaho Sales Tax Act is suggested as a prudent amendment to the legislation or a prudent inclusion in the municipal ordinance authorizing the taxation.

D. *Exemptions.*

The curative legislation is at least as explicit defining exemptions to the authorized tax as was the legislation at issue in the *Greater Boise Auditorium District* case.

Since there is no indication in the *Greater Boise Auditorium District* case that it represents the minimum standard and the protections provided in the proposed curative legislation are at least as good as those represented in *Greater Boise Auditorium District,* the proposed curative legislation is constitutional.

II. *Other Issues Raised by the Curative Legislation.*

A. *Tourist Population.*

The definition of resort cities has raised some questions regarding the determination of tourist population. We see no constitutional problem with such a determination. The tax law has long dealt with the issues of residence, domicile, situs and nexus. While a particular person's status with respect to each of these issues is subject to determination on a case-by-case basis, such terms have never been held too vague or indefinite so as to invalidate authorizing legislation.

The indefiniteness of the "tourist population" term here is mitigated by two circumstances. The first is that it's subject to a reasonable determination by the resort city government when it makes its findings of fact regarding its status as a resort city. Reasonable administrative determinations of status ques-

tions arising under taxing statutes have long been upheld. Secondly, the contrast with "resident population" clearly indicates that the tourists who are to be counted are those who are spending the night in the city limits of the proposed resort city.

B. *Campgrounds.*

A second question has been raised because the option on hotel and motel rooms does not also extend to campgrounds and parking facilities for recreational vehicles. The *Greater Boise Auditorium District* case answers this question. The sales tax there did not extend to the campgrounds or parking facilities and was nevertheless upheld. This omission causes no constitutional problem.

C. *14-Day Rule and Off Premises Sales.*

Two other questions regarding discrimination have arisen: (1) whether resort cities and, specifically, only those resort cities which have a tourist population exceeding the resident population during at least 14 days, can be made the subject of the curative legislation; and (2) whether it's discriminatory to tax only the alcoholic beverages sold for consumption on the premises as opposed to the same products sold for consumption off the premises. The standard by which such discrimination arguments are to be judged is that there must be some rational relationship between the legitimate purpose of the statute and the method the statute uses in establishing various categories. Put another way, the person attacking the constitutionality of the statute must negate every possible rational explanation for the legislative classification. See *School District No. 25 v. State Tax Commission,* 101 Idaho 283, 612 P.2d 126 (1980), and *Sheppard v. State Department of Employment,* 103 Idaho 501, 650 P.2 643 (1982).

It is clearly rational for the legislature to determine that resort cities face greater demands on their city services compared to their ad valorem tax base than nonresort cities, and provide accordingly. The proper analysis then ascertains if it is rational for the legislature to determine that the resort cities most likely to be affected by these excessive demands for services are those where the tourist population exceeds the resident population for at least 14 days in any calendar year. Since a tourist population exceeding resident population is a measure of the demand on the city services and the 14-day period is a qualification related to the duration of that demand, the overall limitation is rational and should be upheld. It is not a proper analysis to question legislative motives in drawing the line at 14 as opposed to 12 or 16 days if the 14 days is a rational measure of demands for city services. It clearly is, and should be upheld.

Opponents of the bill question whether the requirement that the resort city make a finding of fact based on evidence presented to it or by it that it qualifies as a resort city is a sufficient limitation. Even though there are no due process standards stated in the statute, the Idaho Supreme Court has never hesitated to imply such standards where quasi-judicial fact-finding is undertaken by a

municipal entity. See *Cooper v. Board of County Commissioners of Ada County,* 101 Idaho 407, 614 P.2d 947 (1980).

D. *Delegation of Taxing Authority.*

There is a question regarding the delegation of the general sales tax power to the cities which authorizes them to tax all or any portion of the transaction under the Idaho Sales Tax Act. Thus, the cities have the power to pick certain sales transactions as being subject to their general sales tax. The outside limits are the sales transactions taxable under the Idaho Sales Tax Act. This limited discretion on the part of the cities is probably valid for the same reasons that providing multiple options for the cities to choose from is valid. The legislature has limited the outside bounds of the cities' discretion. Within those limits, the legislature could certainly delegate the choice of several different taxing schemes to the resort cities. The sum of all such delegations should meet the constitutional limitations, provided that each delegation meets the standards set forth in the *Greater Boise Auditorium District* case. Even if a court took issue with the city's actions, at most, the exemptions from sales taxable under the Idaho Sales Tax Act might be invalidated. However, this is clearly not such a broad delegation as would invalidate the enabling statutes. As stated above, the enabling statutes meet the requisites of the *Greater Boise Auditorium District* case.

III. *Validation and Retroactive Application.*

The curative statute, by its terms, ratifies, confirms and approves any tax imposed by a resort city under the sections of the Idaho Code which were held to be unconstitutional. The ratification and approval relates back to November 28, 1984. Such a validation and confirmation is probably permissible. In *3 Sutherland, Statutory Construction,* § 41.17, page 303, is stated:

> In most jurisdictions, however, it seems settled that by subsequent act, the legislature may ratify unauthorized taxes, and give them retroactive validity. Defective tax assessments may be validated. (cites omitted)

The district court held Idaho Code §§ 50-1043 through 59-1049 to be unconstitutional as an overly broad delegation of legislative power. Where the legislature later upholds the delegation and ratifies the taxes imposed thereunder, the legislative enactment should be honored.

Although the statute purports to be retroactive to November 26, 1984, it does not appear that the legislature intends to authorize resort cities to enact a tax which dates back to November 28, 1984. Rather, the intent appears to be to ratify those taxes which were put into effect on or after November 28, 1984. Because of the nature of the sales tax, it is doubtful that the courts would uphold retroactive imposition of a new sales tax. Thus, while the legislature can remedy the defects found by the district court and ratify the existing taxes, it probably cannot authorize the resort cities to now enact a new tax with retroactive application to November 28, 1984.

If we can be of any further assistance, please contact us.

Sincerely,

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

C. A. DAW
Deputy Attorney General
Idaho State Tax Commission

RGR/CAD:jas

February 12, 1985

The Honorable Dean Sorensen
Idaho House of Representatives
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 65

Dear Representative Sorensen:

You have requested our review of House Bill 65 to determine whether or not the term "public place" as defined by the proposed Clean Indoor Air Act includes private offices. It is our conclusion that the bill as drafted was not intended to apply to private offices. Nevertheless, it may be advisable to amend the definition of "public place" to specifically exclude private offices.

The term "public place" has been interpreted by many courts on numerous occasions. Generally, the courts have indicated that "public place" means an enclosure, room or building considered as one in which, by public invitation, members of the public attend for reasons of business, entertainment, instruction or the like and are welcome as long as they conform to what is customarily done there. See *People ex rel. Cheever v. Harding,* 72 N.W. 2nd 33, 35 343 Mich. 41; *Nelson v. City of Natchez,* 19 So.2d 747, 197 Miss. 26. The term "public" as applied to "place," is not an absolute, but a relative term and is used in contradiction to the term "private." *State v. Sowers,* 52 Ind. 311, 312; *State v. Waggoner,* 52 Ind. 481; *Cahoon v. Coe,* 57 N.H. 556, 595 cited and approved in *Territory v. Lennon,* 22 P. 495, 9 Mont. 1. "Public place" is, generally speaking, a place openly and notoriously public, a place of common resort; a place where all persons have the right to go and be; a place which is in point of fact public, as distinguished from private; a place that is visited by many persons and usually accessible to the neighboring public; every place which is for the time made

public by the assemblage of people. *People v. Whitman,* 165 N.Y.S. 148, 149, 178 App. Div. 193. A place may be public during some hours during the day and private during other hours. *Gomprecht v. State,* 37 S.W. 2nd 734, 735, Tex.Crim.Rptr. 434; *Parker v. State,* 26 Tex. 204, 207.

Specific cases dealing with the definition of the term "public place" have generally dealt with gambling matters, indecent exposure or drunk in public charges, and the requirement that notices must be published in public places. Cases dealing with offices have found that lawyers' offices *(Burdine v. State.* 25 Ala. 60, 63, *Parker v. State,* 26 Texas 204, 207) and physicians' offices (*Sherwood v. State,* 25 Ala. 78, 79) are not "public places" in relationship to the enforcement of gambling laws, while hotel offices are. See *Goodwin v. Georgian Hotel Company,* 84 P.2d 681, 684, 197 Wash. 173. In short, the term "public place" means a place which in point of fact is public, as distinguished from private, but not necessarily a place devoted solely to uses of the public. *State v. King,* 151 S.E. 2d 566, 567, 268 N.C. 711.

It is our conclusion therefore that the term "public place" as used in the statute would probably not apply to a private office. Nevertheless, the following language could be added to clarify this point:

> Public place shall not include a private enclosed office occupied singly or jointly by less than (insert number) employees.

I hope this analysis is useful. If there is anything further I can provide, please do not hesitate to call upon me.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

February 19, 1985

The Honorable At Parry
Idaho State Senate
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Personnel Commission Reclassifications

Dear Senator Parry:

The questions drafted by Ray Stark, which accompany your letter to Attorney General Jim Jones, ask when an agency incurs the obligation to adjust an employee's salary after an upward or downward reclassification, and whether an agency would be subject to a grievance for failure to pay a salary increase after an upward reclassification.

The short answer is that salaries are adjusted at the time a reclassification takes effect. In practice, an employee subject to a downward reclassification will not experience a salary decrease because the employee has salary protection up to step G of the new classification's pay grade. An employee whose position is reclassified upward can bring a grievance if the agency does not grant a corresponding pay increase; in practice, this situation does not arise.

ANALYSIS:

Mr. Stark's memo refers to "conflicting testimony on the results of reclassifications performed by the Personnel Commission." According to the memo, agencies say that any resulting salary increase is effective immediately, whereas the Personnel Commission says the increase does not take effect until the next budget year.

Perhaps the conflict derives from the distinction between a "reclassification" and a "reallocation." A "reclassification" means a change of *position* from one class to another. This occurs whenever the Idaho Personnel Commission determines that the domain and responsibilities of a particular job have changed so significantly that a new classification more properly characterizes that job. When a position is reclassified upward, it results in that position being paid at the higher pay grade, usually a 5% salary increase (e.g., Records Clerk, pay grade 19, upwardly reclassified to an Automated Records Clerk, pay grade 20). The agency pays the increased salary upon receiving word of the reclassification from the Idaho Personnel Commission.

In theory, a downward reclassification also results in an immediate salary adjustment. In practice, however, this rarely happens because the employee subject to a downward reclassification has salary protection up to step G (step G is the last step of a pay grade) of the new pay grade. For example, a former Accounting Technician, pay grade 25, step C, receiving $7.58 an hour, is reclassified downward to an Account Clerk, pay grade 22, but continues to receive $7.58 an hour, by being positioned at step F of pay grade 22. In the above example, if the former Accounting Technician had been receiving $8.36 an hour at step E of pay grade 25, that employee would receive only $7.96 an hour as an Account Clerk at step G of pay grade 25 (because the salary protection extends only to step G of the new pay grade).

"Reallocations" mean a change of a *class* from one pay grade to any other pay grade. Procedurally, the Idaho Personnel Commission does a study of a class to determine if the responsibilities of the entire class group have changed. If the responsibilities have changed substantially, the class itself is refactored pursuant to the Hay methodology. Such refactoring results in a higher or lower pay grade for the particular class. The refactoring must be submitted by the Personnel Commission to the Governor and the Legislature by October 1 for approval, effective the following July 1. The Personnel Commission forecasts resulting salary changes for the Division of

Financial Management, which then attempts to place money in the departments' budgets for reallocations.

No salary adjustments for upward reallocation are made until the beginning of the new fiscal year. Downward reallocations, like downward reclassifications, are generally subject to salary protection up to step G of the new pay grade.

Finally, a department may be grieved if it does not pay salary increases due under an upward reclassification or reallocation. The grievant would argue that failure to fund such a salary increase creates an inequity within the department or agency, grievable under Idaho Code § 67-5309A(1).

Such a situation, however, would not occur in the real world. Most reclassifications or reallocations occur at the request of a department. The requesting department would not ask the Personnel Commission for a study unless it had the money to fund an upward reclassification or felt that money would be forthcoming in the following fiscal year to fund a reallocation. Under either scenario, it is unlikely that an upward reclassification or reallocation would ever result in a grievance.

If you require further assistance, please contact me.

Sincerely,

JOHN J.McMAHON
Chief Deputy

JJM:lh

ANALYSIS BY:

JIM RAEON
Deputy Attorney General

February 21, 1985

The Honorable Norma Dobler
Idaho State Senator
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 120

Dear Senator Dobler:

You have asked the Attorney General for an opinion regarding House Bill 120.

That bill is apparently intended to overturn the recent Idaho Supreme Court decision in *Blake v. Cruz,* in which the court recognized a cause of action for "wrongful birth."

Three states have adopted similar statutes. In 1981, South Dakota adopted a statute barring causes of action based on "wrongful life," i.e., a claim by the child that, but for the negligence of another, he "would not have been permitted to have been born alive." The South Dakota statute likewise barred so-called "wrongful birth" causes of action, i.e., claims brought by another (usually the parent of a handicapped child) alleging that, but for the negligence of another, the child would not have been born alive.

The Minnesota legislature enacted similar measures in 1982. Like South Dakota, its law forbids both "wrongful life" and "wrongful birth" claims. (In Idaho, there has been no impetus to bar "wrongful life" claims because the Idaho Supreme Court itself rejected this cause of action in its opinion in *Blake v. Cruz.*)

Finally, in 1983, the Utah legislature enacted a "right to life" bill as chapter 167 of its session laws. The law states that:

> A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

It is this language that has been incorporated into House Bill 120.

In denying a cause of action for "wrongful life" or "wrongful birth," state legislatures rely on broad power to define or otherwise limit tort liability. For example, in Idaho, the legislature has structured the state's entire tort liability system around the concept of comparative negligence. Idaho Code § 6-801, et seq. Further, the Idaho legislature has frequently seen fit to limit various causes of action. See Idaho Code § 25-2119 (owners of animals on "open range" not liable for accidents occurring on highways between animals and motor vehicles); Idaho Code § 49-763 (failure to use child safety seats not admissible as evidence of contributory negligence); Idaho Code § 49-1401 (guest statute governing liability between car owners and their passengers). In addition, the legislature has taken the entire matter of industrial accidents out of the court system by its workers' compensation statute. Idaho Code §§ 72-201, et seq. Thus, there is ample precedent for legislative involvement in this arena.

Our research on the question of "wrongful birth" statutes reveals that, to date, no state or federal court has ruled on any of the statutes enacted by South Dakota, Minnesota or Utah. No challenges have reached an appellate court. A single suit, in Minnesota, was settled and dismissed. The offices of the Attorneys General in the three states inform us that there are no known challenges pending at any level of their state court systems.

Regarding your precise concern as to whether the language in House Bill 120 may be overly "broad" or unconstitutionally "vague," our research has uncovered only one article on point. This article is contained in the annual "Utah Legislative Survey," in

the Winter, 1984, issue of the *Utah Law Review*. It is pertinent because, as mentioned earlier, House Bill 120 is taken verbatim from the Utah statute. The author notes that the intent of the Utah legislature in passing its "wrongful life" and "wrongful birth" statutes was "to prevent abortions by curbing the perceived trend towards genetic counseling performed routinely." The link was seen as follows:

> Routinely performed genetic testing supposedly encourages abortions by informing parents of their unborn child's defects. Thus, to discourage such testing, the legislature passed legislation that purportedly removes malpractice liability due to a physician's failure to perform genetic tests routinely.

1984 Utah Law Review at 224.

The goal is probably the same in Idaho. The fact situation which gave rise to a "wrongful birth" claim in *Blake v. Cruz* was the failure of the physician to test for rubella at the time the mother's symptoms were present.

The author of the Utah law review article notes that the language adopted by the Utah legislature (and proposed in House Bill 120) may not perfectly carry out the sponsors' desired intent because it hinges on the question of whether the child "would have been aborted." But:

> a woman has a right to make a fully informed procreative choice, and courts have held that when negligent counseling interferes with that right a woman is entitled to damages, *irrespective of whether she would have had an abortion.*

Id. See *Berman v. Allan,* 404 A.2d 8 (1979). (Emphasis added.)

Indeed, a cause of action for "wrongful birth" due to negligent counseling was held to exist even in a situation where abortion itself was not available as a legal option. See *Jacobs v. Theimer,* 519 S.W.2d 846, 848 (Tex. 1975).

Thus, in response to your inquiry regarding the possible over-breadth of House Bill 120, it appears that certain fact patterns might elude the intended prohibitions. For the most part, however, the bill is drafted in a way that would succeed in overturning the Idaho Supreme Court decision in *Blake v. Cruz.* Nor do we discern any problems in the bill on the score of "vagueness."

CONCLUSION:

House Bill 120 bars a cause of action for "wrongful birth." It thereby seeks to overturn the Idaho Supreme Court decision in *Blake v. Cruz.* In general, the bill succeeds in this endeavor, though there may be fact patterns that slip through the cracks because of the bill's exclusive emphasis on the "abortion" context. The language of the bill, in our opinion, could not be challenged on the ground that its language was unconstitutionally "broad" or void for vagueness.

None of the three parallel laws enacted by other states have been challenged at the appellate court level as to their constitutionality, nor are any such challenges now pending.

Sincerely,

JIM JONES
Attorney General

JTJ/JMJ:lh

February 26, 1985

The Honorable Lydia Edwards
House of Representatives
State of Idaho
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 120

Dear Representative Edwards:

You have asked the Office of the Attorney General for an opinion regarding the constitutionality of House Bill 228. That bill makes it a misdemeanor to "use, possess, operate, keep, sell, or maintain for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever." The bill creates an exception in the case of "antique slot machines," i.e., exclusively mechanical (non-electronic) machines manufactured prior to 1950 "for purposes of display only and not for operation."

It is our opinion that H.B. 228 would be a constitutional exercise of power by the Idaho Legislature.

The Constitution of the State of Idaho provides, in article III, section 20, that, "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever." Chapter 38 of the Criminal Code (title 18) defines gambling as a misdemeanor and directs judges to issue warrants to seize and destroy gaming tables and other gaming devices.

The Idaho Supreme Court has held that an attempt by the legislature in 1947 to legalize slot machines was unconstitutional. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953). The court in that opinion held that slot machines were "lotteries" and that they could be "used for no purpose except to violate the law." Id. at 527. The court relied on an earlier decision which had held:

> that the only possible value they [slot machines] can have is for use in violating the penal statutes of this state; that in order to be valuable and command any price in the market, it is necessary that they be used in the commission of crime.

Mullen & Co. v. Moseley, 13 Idaho 457, 464 (1907).

In more recent decisions, the Idaho Supreme Court has backed away from holding that ownership of slot machines is criminal per se. In *State v. Johnson,* 77 Idaho 1, 287 P.2d 425 (1955), the court interpreted the *Garden City* case as standing for the proposition that "it is the *use* of the devices which violates the law." Id. at 10 (emphasis in original).

Finally, in *Prendergast v. Dwyer,* 88 Idaho 278, 398 P.2d 637 (1965), the court faced a challenge to the seizure of gaming devices by a defendant who claimed they were not, in fact, used for gambling purposes. The court there distinguished between:

> whether the device is malum in se and therefore contraband or whether it is capable of legitimate use . . .

Id. at 286.

The court held that it was unconstitutional to seize and destroy the property in question once the defendant had raised the defense that the gaming device was not one used for gambling.

Thus, the Idaho Supreme Court has chosen not to join those states that hold it is criminal per se to possess a gaming device (slot machine), regardless of whether it is in operation or even whether it is operable at all. See, for example, *In the Destruction of One Gambling Device,* 16 Wash.App. 859, 559 P.2d 1003 (1977).

It follows that the Idaho Legislature would be free to enact legislation criminalizing the use of slot machines but authorizing ownership of "antique slot machines" for the sole purpose "of display only and not for operation." It should be noted, however, that it is already criminal in Idaho to use or operate gaming devices and it is already legal to possess such devices if one does not intend to use them for gambling purposes. House Bill 228 would only be making this more clear.

Indeed, H.B. 228 would actually cut back on existing rights because it would criminalize "for use or operation *or otherwise,* anywhere within the state of Idaho, any slot machine *of any sort or kind whatsoever.*" At present, Idaho law makes it illegal to use or operate or provide such devices for gambling purposes, but it would be a good defense to show that the machines were used otherwise. It would also be a good defense to show that the machine was inoperable (unless one were providing parts for gambling purposes). H.B. 228 would take away both of these defenses, thereby criminalizing conduct now legal in Idaho.

If you have any further questions in this matter, please contact me.

Sincerely,

JOHN J. McMAHON
Chief Deputy

JJM:lh

February 26, 1985

The Honorable Pamela I. Bengson
Idaho House of Representatives
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Senate Bill 1105

Dear Representative Bengson:

You have requested legal guidance concerning the meaning of the phrase "state candidate" in Senate Bill 1105. Specifically you request guidance as to which state elected officials would be included within the meaning of "state candidate" as proposed in § 34-707A. Our conclusion is that a "state candidate" as proposed includes only candidates for state-wide political office and does not include "district candidates" such as those seeking election to the Idaho Legislature.

Chapter 7 of title 34 distinguishes between candidates for district and state office. For example, in Idaho Code § 34-705 it is provided that "all candidates for *district, state,* and *federal* offices shall file their declaration of candidacy with the Secretary of State." (emphasis added) In Idaho Code § 34-706 a distinction is drawn between "legislative candidates" and "candidates who have filed for federal and state offices." Therefore, within the context of chapter 7 of title 34 "state candidates" are those candidates who run for state-wide office and who would be selected by the state central committee in the event of a vacancy, as opposed to the legislative district central committee in cases of a legislative vacancy. See Idaho Code § 34-715.

Further our interpretation of the phrase "state candidate" is consistent with the practice of the Idaho Secretary of State's office and with their interpretation and application of the law. As you know, administrative interpretations of the law by the agency entrusted with their enforcement is entitled to considerable weight. See *State of Idaho v. Kleppe,* 417 F.Supp 873 (D.C. Idaho 1973). In summary it would appear that "state candidates" as used in S.B. 1105 would apply only to candidates for a state-wide office. If there is anything further we can provide, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

March 4, 1985

Chief James E. Montgomery
Boise City Police Department
7200 Barrister Drive
Boise, ID 83704

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Handicap Parking

Dear Chief Montgomery:

You have asked for legal guidance on two related questions: First, whether it is optional or mandatory for police officers to enforce handicap parking privileges; and, second, whether the officers may issue a summons by ticketing the illegally parked vehicle rather than personally citing the individual who parks the vehicle.

Handicap parking privileges may apply to parking in public parking areas as well as to parking on property which, though privately owned, is open to the public for vehicular travel. With regard to the former, there is a clear duty on the part of law enforcement officers to enforce all provisions of state law, including infraction provisions for interfering with handicapped parking privileges. Idaho Code §§ 50-209, 31-2202(2).

With regard to parking on private property open to the public, Idaho Code § 49-594 provides that the owner of real property which is open to vehicular travel by the public may require other, different, or additional conditions for motorists' use of the property than those provisions enumerated in state laws. In the words of the statute, nothing prohibits the owner of such real property from "otherwise regulating such use as may seem best to such owner." Idaho Code § 49-594. In keeping with this policy expression, Idaho Code § 49-698 allows, but does not require private property owners whose property is open to public use to designate parking zones and spaces for the handicapped.

Subsection 2 of Idaho Code § 44-698 makes it an infraction offense to park in spaces designated for the handicapped; because it relates back to Subsection 1, the prohibition applies whether the parking infraction occurs on public property or on private property open to public use where the landowner has designated handicapped

parking spaces. Subsection 5 states that "law enforcement officials are empowered to enter upon private property open to public use to enforce the provisions of this section."

The essence of the first question you ask is whether the phrase *empowering* officers to enforce handicap parking designations on private property thereby creates a duty on the part of law enforcement officers to enforce such provisions. Resolution of this question can only be reached by ascertaining the intent of Idaho Code § 49-698(5) and giving effect to that intent. Grammatically, the statute expresses in the indicative rather than the imperative mood the role of officers in enforcing parking provisions on private land. Because the statute does not say that officers *shall* enter upon private property to enforce handicap parking, it could be argued that though an owner of real property may have provided parking spaces for the handicapped, he may not want city police officers entering upon the property and writing citations. Thus, Idaho Code § 49-594 might be used to advance the argument that an owner could seek from users of his property compliance with handicapped parking designations in some manner other than through police citations. But this view is not persuasive; if a land owner does not want police enforcement of handicap parking, he simply need not make the statutory designations for the handicapped.

The grant of power to law enforcement officers to enforce handicapped parking was not intended to give officers a choice whether or not to enforce the law but to make it clear that though handicapped designations might be on private rather than public property, police officers may use their powers to enforce such regulatory provisions once the landowner has designated the handicapped parking area. We hasten to add, however, that nothing in this construction limits the discretion with which law enforcement officers approach their duties to enforce the law. The discretion which bounds their enforcement of parking provisions is the same as that which is inherent in such executive officers generally.

The second question which you have asked is whether police officers may issue a summons to the owner of an illegally parked car simply by ticketing the vehicle, or whether the officers must personally serve a citation upon the person whom they observe operating and parking the vehicle in contravention of the handicap provisions.

Traditionally, parking violations have led to a misdemeanor complaint enforced through the criminal process. Service of the complaint is made by attaching the parking citation to the car since it is presumed that the owner thereof is the offender. Challenges have been made to this mode of criminal enforcement because there usually is no proof as to *who* illegally parked the car. It is elementary, of course, that criminal sanctions operate *in personam,* against individual offenders and that proof of the identity of the offender is a jurisdictional element of criminal offenses.

While an infraction is not a criminal offense, but rather a "public civil offense," Idaho Code § 18-111, infractions are, nevertheless, enforced in much the same way that criminal offenses have traditionally been enforced — that is, by the issuance of a citation to the offender. (See, generally, Idaho Infraction Rule 5.)

Idaho's parking laws, like those of most states, are drafted to impose liability upon

the person committing the infraction. That the citation must accuse the violator and not the offending vehicle is clear from Idaho Code § 49-3402 which deals with the issuance of an infraction citation. It provides:

> It is unlawful and an infraction for *any person* to do any act forbidden, or fail to perform any act required by the provisions of Chapters 5, 6, 7, and 8, Title 49, Idaho Code.

Similarly, Idaho Code § 49-3406 sets out the penalties for violating an infraction statute. Subparagraph (1) says: "It is an infraction for *any person* to violate any of the provisions of Chapters 5, 6, 7, or 8, Title 49, Idaho Code," and then provides the punishment. Subparagraph (2) says: "It is an infraction for *any person* to violate any county, city, or other local ordinance" and then provides the punishment.

Subparagraph (2) of Idaho Code § 49-3402, however, contains the answer to the question which you pose. It provides that:

> A peace officer may issue an Idaho Uniform Citation for any infraction specified in the provisions of Chapters 5, 6, 7, and 8, Title 49, Idaho Code, in which he shall certify that he *has reasonable grounds to believe and does believe, that the person cited committed the infraction* contrary to law. (emphasis supplied)

For the issuance of a citation the code requires only that the police officer have "reasonable grounds" to believe that the person cited committed the parking violation. It is reasonable to believe that the registered owner of the car is the person who illegally parked it and, thus, a citation may properly be issued to the owner of the car. This procedure not only accords with the statute, but complies with Idaho Infraction Rule 5(a).

Idaho Infraction Rule 5(c) permits service by allowing the defendent to sign the citation promising to appear or by "personal delivery" to him where he fails or refuses to sign the citation. Recently, the Colorado Supreme Court has upheld service by attachment of the citation to a parked vehicle where that state's rule spoke of "personal service" but did not specifically address leaving of the citation on the car. "Although the method of service as seen here is not specifically sanctioned [by the rule], we hold that it is sufficient for the limited purpose of notifying the owner of an unattended motor vehicle of a parking citation." *Patterson v. Cronin,* 650 P.2d 531, 534 (Colo., 1982).

While Idaho's infraction laws operate *in personam* against the offending person who parked the car and not against the *res,* the parked car, it does not violate constitutional principles of due process to affix the summons to the vehicle rather than making personal service upon the owner or operator. Considering this issue, one court has said:

> We find no merit in defendant's contention that his constitutional rights were invaded because the parking tickets were not handed to him or to the driver of the car, but were placed on the automobile. This argument has been

> rejected by every court that has considered the question. . . . The existence and validity of the ordinances allowing placement of the citation upon the automobile is dictated by the practical and modern necessity of maintaining orderly traffic enforcement. *City of Seattle v. Stone*, 410 P.2d 583, 586 (Wash., 1966).

I hope this analysis will assist you in implementing the infraction laws which have been recently enacted in our state.

Sincerely,

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice Division

DMH:jas

March 25, 1985

Honorable Terry Sverdsten
Idaho State Senate
Box 51, Route 1
Cataldo, ID 83810

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: School Discontinuance Procedure

Dear Senator Sverdsten:

You recently addressed a letter to the Attorney General's Office concerning the proper procedures for the discontinuance of a school.

The procedure for discontinuing a school is set forth in Idaho Code § 33-511 3. I am attaching a copy of the statute for your convenience. The procedures outlined therein can be summarized as follows:

1. The board of trustees must give notice of a proposed discontinuance not later than the first of July preceding the date of discontinuance.

2. Upon petition of five or more qualified school electors filed not later than the first day of August following the notice of the proposed discontinuance, the board shall order an election to be held within fourteen days.

3. The board must then give notice of election, stating the date and place of the

election, etc., and describing the area of attendance unit and the school proposed to be discontinued. The ballot shall provide an opportunity to vote for or against discontinuance.

4. If ⅔ of the qualified voters vote against discontinuance, the school may not be discontinued.

In your letter you referred to an upcoming bond election in the district. I am unable to find any law or case that would prohibit a bond election when a discontinuance proposal is pending. Additionally, you asked whether the law had been tested. In *Wellard v. Marcum,* 82 Idaho 232 (1960), the Idaho Supreme Court held that the notice provisions of the statute are mandatory when a school meeting the definition of the statute is to be discontinued.

I hope this answers your questions. Please feel free to contact me if you need further clarification.

Sincerely,

BRADLEY H. HALL
Deputy Attorney General
State Department of Education

BHH:sj
Enclosure

April 12, 1985

Mr. Bruce Balderston
Legislative Auditor
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Your Letter of March 11, 1985

Dear Mr. Balderston:

You have requested legal guidance concerning whether or not a fee which is intended to reimburse costs incurred by a district board of health falls within the definition of rulemaking for the purposes of Idaho Code § 39-416 and the Administrative Procedure Act. In your letter you directed our attention to Attorney General Opinion 81-4 which concluded that an inspection fee schedule falls within the definition of rulemaking in relationship to the APA as outlined above.

As pointed out in our prior opinion, Idaho Code § 39-416 permits local health district boards to adopt such rules and regulations as deemed necessary to carry out the

purposes and provisions of the Public Health District Act. As you correctly noted in your letter, these rules and regulations must be adopted, amended or rescinded in a manner conforming to the provisions of the APA. Further, the statute requires that such rules must be submitted to the state board of health and welfare, each municipality within the public health district's jurisdiction and to the board of county commissioners of each county prior to their taking effect.

The broad policies contained within the APA make it clear that a fee which is intended to reimburse costs incurred by the district health department would also fall within the definition of rulemaking. As noted in the prior Attorney General Opinion, all fee schedules would probably be rules or regulations as such fees would have general applicability to the public. In fact, it would appear that Idaho Code § 39-416 only exempts regulations adopted in the operation of the district board in its administrative functions and duties from the requirements of the Administrative Procedure Act. An example of this exemption would be an internal operating memorandum designed to instruct clerical staff in the appropriate accounting procedures to be used in handling receipts.

It should be noted that Idaho Code § 39-414 was amended in 1982 to grant specific authority to the local districts to charge fees:

(ii) to establish fee schedules whereby the board agrees to render services to or for entities other than governmental or public agencies for a fee reasonably calculated to cover the cost of rendering such service.

At that time, the legislature could have, but did not, exempt fee schedules from the application of the APA. It appears, therefore, that all fee schedules should be adopted pursuant to the rulemaking process.

Finally, you have asked our advice concerning certain environmental fees promulgated by the state board of health in 1982. Specifically, you have asked whether or not a district board of health may establish a fee in the same area lower than the statewide promulgated fee schedule. As noted above, for a fee schedule to be effective when adopted by a district board, it must be submitted to the state board of health and welfare for ratification. If this procedure is followed, it would be possible for two different fees to be adopted which could result in an inconsistency between the two fee schedules. It is our recommendation that it would be advisable to have consistent fees in this area. Should you have any questions on this matter, please feel free to contact me.

Very truly yours.

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

April 26, 1985

The Honorable Jim Stoicheff
Representative, District One
615 Lakeview
Sandpoint, Idaho 83864

The Honorable Kermit V. Kiebert
Senator District One
P.O. Box 187
Hope, Idaho 83836

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Proposed Kootenai County Watercraft Licensing Ordinance

Dear Representative Stoicheff and Senator Kiebert:

We have received a number of inquiries in addition to yours concerning a watercraft licensing ordinance proposed by the Kootenai County Commissioners. We will use this guideline to respond to all the inquiries we have received to date concerning this important matter.

The concerns expressed by all correspondents may be generally summarized in two questions:

1. Is the proposed ordinance in conflict with or preempted by state law which governs boat safety and licensing; and

2. Is a greater license fee for non-residents than residents of the state a denial of equal protection of the law?

Short Answer

1. The proposed ordinance would not be in conflict with state law so long as it is reasonably related to the protection of the public health, safety and general welfare or amounts to a rental of county property.

2. Although differential licensing fees which discriminate between residents and non-residents have been upheld, we believe a single fee chargeable to all is more defensible.

ANALYSIS:

We have been provided several different drafts of an ordinance which has been proposed by the Kootenai County Commissioners. Although each is distinct, all are identical in their most important provisions.

Those provisions, if adopted, would require that all owners of vessels which use Kootenai County "boater facilities" pay an annual "boater service fee" for that privilege. A greater fee would be charged of non-residents, although the proposed ordinance states no reason for this disparity. Use of the "boater facilities" without the appropriate sticker would be punishable as a misdemeanor. The proposal cites no purposes other than the "cost of providing services to the boaters within Kootenai County" as a basis for the proposed fee.

For the purposes of this guideline, we assume that the term "Kootenai County boater facilities" refers only to those owned by the county and no others. If the county attempted to charge a fee to use state or privately owned property, it would of course be unlawful. We also note that the rental of county property may be subject to any federal or state grant restrictions if granted money was used to build or improve county facilities. For instance, recreational improvements such as boat docks have often been built with federal funds which are frequently given with "strings attached."

The questions posed by all correspondents in one form or another are whether the county may enact such an ordinance in light of state law in this area, particularly the Idaho Safe Boating Act, Idaho Code §§ 49-3201, et seq., and whether a greater fee may be charged to non-residents. We shall answer each question in turn.

Is County Regulation Preempted or Prohibited by State Law

Preemption

The doctrine of preemption provides that, just as federal law is superior to state law, so are state statutes superior to county ordinances. Preemption may be found where local regulations conflict with state law, where the matters are of statewide rather than local concern, where the state has completely occupied the field of regulation so as to exclude any local action, or where state law specifically prohibits local enactments on the same subject. Rhyne, *The Law of Local Government Operations,* § 19.11. Preemption generally will not be found where local law is consistent with state law or where local regulation is specifically authorized. *Voyles v. City of Nampa,* 97 Idaho 597, 548 P.2d 1217 (1976).

In discussing preemption, much is made of the nature or kind of regulation involved. The Idaho courts give greater deference to local ordinances which are an exercise of the police power. This view is predicated upon the constitutional grant of the police power to local governments found in art. 12, § 2, Idaho Const. It provides that, "[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Thus, any exercise of the police power which does not conflict with state law will generally be upheld unless specifically prohibited. *Hobbs v. Abrams,* 104 Idaho 205, 657 P.2d 1073 (1983); *Benewah County Cattlemen's Ass'n v. Bd. of County Comm'rs,* 105 Idaho 209, 668 P.2d 85 (1983); *Voyles v. City of Nampa,* supra; *Taggart v. Latah County,* 78 Idaho 99, 298 P.2d 979 (1956); *Clyde Hess Distrib. Co. v.*

Bannock County, 69 Idaho 505, 110 P.2d 798 (1949); *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946); *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902); *State v. Preston*, 4 Idaho 220, 38 P. 694 (1894).

A most recent example of this proposition is the *Benewah County* case, supra. There, the county enacted an ordinance prohibiting livestock from running at large. The plaintiffs alleged that such an ordinance was in direct conflict with the herd district law, Idaho Code §§ 25-2401 to 25-2409, either because the state had preempted the field or because such an enactment was in conflict with the general laws. The supreme court held that the legislature had not preempted and that:

> [E]ven assuming some legislative exercise of livestock control, we hold that *extension or amplification of that control by county ordinance is not prohibited* in the absence of constitutional or statutory provisions clearly evidencing intent [on the part of the state to occupy the field]. (Emphasis added.)

Thus, absent a clearly stated intent in the state law to preempt, the county is free to exercise its constitutional police power to regulate the conduct in question.

The regulation and licensing of watercraft is provided for in the Idaho Safe Boating Act, chap. 32, title 49, Idaho Code. Of particular interest is § 49-3229, which states in part that:

* * *

> (2) The provisions of this chapter shall govern the operation, equipment, numbering and all other matters relating thereto whenever any vessel shall be operated on the waters of this state or when any activity regulated by this chapter shall take place thereon; *provided however, that nothing in this chapter shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels, so long as such ordinances are not in conflict with the provisions of this chapter.*
>
> (3) *Any political subdivision of the state of Idaho may at any time, but only after sufficient public notice is given, adopt local ordinances with reference to the operation of vessels on any waters within its territorial limits* or with reference to swimming within areas of intense or hazardous vessel traffic, provided such ordinances are intended to promote or protect the health, safety and general welfare of its citizenry. (emphasis added.)

The language clearly contemplates local regulation not in conflict with general law. Thus, it is our opinion that local ordinances on this subject are not preempted by state law. In fact, they appear to be specifically authorized.

Since the proposed ordinance does not attempt to alter or prohibit state regulation, it is probably lawful, if it is found to be an exercise of the police power. However, it is difficult to ascertain whether the proposed ordinance is such an exercise since it only purports to "shift the cost of providing services to boaters." We suggest that a careful

redrafting of the proposal is in order if it is intended to protect and promote the public health, safety and general welfare.

Revenue vs. Regulation

Some concern may be raised as to whether the proposed ordinance is truly a regulatory measure under the police power, or merely a disguised revenue measure. In either case, the ordinance could be lawful if properly drafted.

Generally, the cost of regulating conduct may be charged to those whose conduct is being regulated. *Foster's, Inc. v. Boise City,* 63 Idaho 201, 118 P.2d 728 (1941). If the proposed ordinance is an exercise of the police power, i.e., regulatory, then the fee must be reasonably related to the cost of enforcement. Otherwise it may be a tax. *Foster's Inc.,* supra; *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923). Graduated fees have often been held to be taxes rather than regulatory fees. *Chapman v. Ada County,* 48 Idaho 632, 284 P. 259 (1930); 71 Am.Jur.2d, State & Local Taxes § 18, pp.353-4.

However, even if the fee is a tax, it may still be valid if it provides services which were formerly provided by ad valorem taxation. Idaho Code § 31-870. Such a determination is factual in nature and beyond the reach of this guideline. If such is the case, the ordinance should be drafted in a manner which states with some specificity exactly what services were funded by ad valorem taxes and are now being replaced by a fee.

Are Differential Fees Unlawful

Questions of different treatment under the law based upon status generally fall within the constitutional guarantees of equal protection of the laws. Article 1, § 13, Idaho Const. Simply stated, the law requires that all persons be treated the same unless there is some very good reason not to. Thus, the question is whether there is any valid reason to charge nonresidents a greater fee than residents for the same service.

Some familiar examples of this practice are resident vs. nonresident fish and game license fees, in-state vs. out-of-state tuition for college and university students, and different rates for the use of state parks. The same practice also occurs in-state for residents and nonresidents of junior college districts, school districts, and other services.

The basic premise underlying all of these differential fees is that since a substantial portion of the cost of the services provided is funded by ad valorem taxes, and since nonresidents do not pay these taxes, they should pay a greater fee in order to equalize the differential. However, the difference must be reasonably related to the actual cost of the service. 16 Am.Jur.2d, Const. Law § 773; 35 Am.Jur.2d, Fish & Game §§ 34 and 35.

A fairly good summary of the cases in this area may be found at 57 A.L.R.3d 998, *Fees Charged Nonresidents.* However, the cases therein go both ways. In addition, the lead case, *Neptune City v. Avon by the Sea,* 61 N.J. 296, 294 A.2d 47, 57 A.L.R.3d, 983 (1972), holds that differentials are unconstitutional.

While a differential fee is defensible if it is properly based, it will undoubtedly be challenged as discriminatory. A flat rate would be less likely to be overturned and thus avoid possible litigation and later refunding of previously collected fees. In addition, as previously stated, a graduated or differential fee is more indicative of a tax rather than a regulatory fee. Thus, we would recommend a flat fee for residents and nonresidents alike.

CONCLUSION:

County regulation of boat use and safety is authorized by Idaho law. The costs of regulation are generally chargeable to those who are regulated. However, regulatory fees which go beyond the costs of regulation may amount to revenue measures and must comport with state law in regard to taxation.

The county has the power to charge fees for the use of county property, but not state or private property. State property includes the beds and banks of navigable waters. In addition, rental fees may be subject to grant restrictions if the property was built or improved with grant monies.

Finally, although differential fees have been upheld, they are generally found to be revenue rather than regulatory measures. A flat rate fee is more defensible.

If we may provide further assistance upon this matter, please contact us.

Sincerely,

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

RGR:cjm

cc: Senator Vern T. Lannen
Kootenai County Commissioners
Kootenai County Prosecuting Attorney
E. J. Fennessy
Leslie M. Mossburgh
Ray Kyer
Frank Parson

May 24, 1985

Ms. Betty Brown
Acting Executive Director
Idaho Commission on the Arts
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Request for Legal Guidance

Dear Ms. Brown:

Your letter of April 26, 1985, requests legal guidance regarding a proposed commission rule relating to funding. It is our understanding that Representative Ron Slater has presented two proposals. The language of the first proposed rule is as follows:

> Grants will be denied to either groups or individuals who present material which, when considered as a whole can be reasonably said to constitute a gross indignity to either a religious or ethnic interest. Such grant denial shall remain in effect for one (1) year after such presentation has been made.
>
> Appeals from any judgment made by the acting Commission executive will be heard by the Executive Board of the Commission. Public comment will be considered.

In the alternative, Representative Slater suggests that the first paragraph might read as follows:

> The board or a political subdivision shall not provide grants, loans or other forms of assistance to artistic activities which, taken as a whole, have the effect of defaming or inciting contempt against persons on the basis of race, color, creed, religion, or national origin.

QUESTION PRESENTED:

You have requested that we review whether the proposed rules, if adopted, would survive constitutional scrutiny.

CONCLUSION:

Your question involves complex areas of constitutional law, and court decisions on similar issues have produced nonuniform and sometimes contradictory results. However, we believe that the proposed rules may fail to pass constitutional muster in that a court might hold them to: (1) result in a pattern of discrimination impinging upon First Amendment rights; (2) impose an unconstitutional condition on the award of a governmental subsidy; (3) be impermissibly vague; and/or (4) be overbroad.

ANALYSIS:

A. *Pattern of Discrimination Impinging Upon First Amendment Rights*

The First Amendment protects the rights of the viewers of productions.[1] The Constitution also appears to protect program producers, who occupy a position analogous to performers in auditoriums or speakers in public areas whose rights are clearly protected.[2] A content-based decision by a governmental agency may constitute an unlawful prior restraint upon a producer whose program cannot be produced and upon

viewers who are unable to view it if the editorial judgment of the governmental agency is based on constitutionally impermissible factors.[3]

The fact that the commission is engaged in an activity involving editorial decision-making does not automatically violate the First Amendment. The commission necessarily must exercise an editorial function and be selective in what it funds. The state's possession of editorial power will not, however, foreclose inquiry into the method of its exercise.

In the case of *Advocates for the Arts v. Thomson*,[4] the Governor and Council of New Hampshire refused to approve an art grant for a literary magazine on the ground that it had published a poem which contained offensive language and imagery. The New Hampshire Commission on the Arts, created to administer the grants of the National Endowment for the Arts, routinely submitted grants of over $500.00 to the Governor and Council for review.

Several organizations and individuals sought federal judicial intervention, arguing that the Governor's action constituted a prior restraint in contravention of the First Amendment. The Court of Appeals for the First Circuit found the doctrine of prior restraint inapplicable:

> But public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech," courts have no particular institutional competence warranting case-by-case participation in the allocation of funds.[5]

The *Thomson* case thus appears to stand for the principle that the "disappointed grant applicant" cannot expect to have a federal court adjudicate the relative "literary or artistic worth of competing applicants." Nor will a federal court "require an objective measure of artistic merit as a matter of constitutional law."[6]

The First Circuit cautioned, however, that its decision did not countenance a pattern of discrimination. The court stated:

> A claim of discrimination would be another matter. The real danger in the injection of government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because counterbalanced by the hope that public funds will broaden the range of ideas expressed. But if the danger of distortion were to be evidenced by a pattern of discrimination impinging on the basic first amendment right to free and full debate on matters of public interest, a constitutional remedy would surely be appropriate.[7]

The court then noted that distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the Equal Protection Clause, if not the First Amendment, by penalizing the exercise of those freedoms.[8]

In the *Thomson* case, the New Hampshire authorities had not adopted a written regulation regarding the appropriate content of projects eligible for funding. By contrast, if the Idaho commission were to adopt Representative Slater's prepared regulations, it would formalize by codification rules requiring the commission to temper its otherwise subjective judgment regarding the artistic merit of a proposal by consideration of issues extraneous to artistic merit such as whether a project constitutes a "gross indignity to either a religious or ethnic interest" or "incites contempt against persons on the basis of race, color, creed, religion, or national origin." Such codification may give rise to the very type of a pattern of discrimination which the *Thomson* case proscribed.

In short, while adoption of concise and clear standards may be impractical in the present context, the commission may not adopt a regulatory framework which inhibits its review of a project's artistic merit and clearly implicates the First Amendment rights of producers and consumers of artistic projects. The Idaho Legislature created the commission to stimulate and encourage the arts and assist freedom of artistic expression.[9] The proposed regulations would instead require the commission to review issues extraneous to artistic merit in making its funding decisions. Should the commission adopt such regulations, litigation is likely. In any such litigation, the commission would be in a position of defending a rule which restricts the freedom of artistic expression which the commission is statutorily charged with encouraging.

B. *Unconstitutional Condition*

The United States Supreme Court has long held that the government may not deny a valuable governmental benefit on a ground that infringes upon a constitutional right.[10] Denial of a benefit on such a basis requires an individual to forego a constitutional right to receive a governmental benefit, thus placing an unconstitutional condition on the benefit:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It *may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."[11]

Theatrical productions and other forms of live artistic expression supported by the commission are protected by the First Amendment.[12]

The proposed rules would require the commission to condition its grant of the benefit of funding upon the content of the material presented by individuals or groups. Because fundamental First Amendment rights are involved, an extremely strong showing is necessary to support a finding of constitutionality. The proposed rules would have to "survive exacting scrutiny" by a court.[13] In a challenge, the state would bear the burden of justifying the rule.[14] Furthermore, the state must show a weighty state interest underlying the rule.[15] The state must also show that the rules represent the least drastic means of protecting the governmental interest involved.[16].

Finally, while the government must necessarily make a content-based decision when it seeks to *promote* free expression in areas such as public broadcasting and subsidization of the arts,[17] a court will "review with particular care any claim that the governmental body is actually attempting to suppress controversial, political, or other forms of expression, rather than attempting to promote certain limited forms of entertainment."[18] In face of such a claim, the court will examine whether the commission has employed a "clear, precisely drawn, objective standard" in choosing the productions it wishes to promote.[19] The Ninth Circuit has stated:

> [T]he more subjective the standard used, the more likely that the category will not meet the requirements of the First Amendment; for, *when guided only by subjective, amorphous standards, government officials retain the unbridled discretion over expression. That is condemned by the First Amendment.*[20]

The two standards proposed in this case may be too amorphous to satisfy the First Amendment. What constitutes "a gross indignity to . . . a religious or ethnic interest" or has "the effect of defaming or inciting contempt against persons on the basis of race, creed, religion, or national origin" is necessarily a subjective judgment which could be held to place "unbridled discretion" in the commission's hands.

In addition, when the decision will be made by a body subject to political pressures, the court will scrutinize it most carefully because "at times the will of the majority may for the moment run contrary to the protections that the First Amendment affords political and other controversial forms of expression."[21] The attempt in the proposed rules to involve the public in such decisions may only serve to politicize the process and thus exacerbate rather than cure the problem.

In summary, the commission cannot condition a governmental benefit upon forfeiture of a First Amendment right. Because a fundamental right is involved, the state must meet a heavy burden to support the proposed rule. A reviewing court would subject the proposed rule to strict scrutiny — especially in light of the commission's duty "to encourage and assist freedom of expression."[22] It is our opinion that the proposed rule would probably not withstand judicial scrutiny.

C. *Vagueness and Overbreadth*

The United States Supreme Court has stated that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[23] Vagueness in the First Amendment area must be strictly curtailed because

ambiguity may have a "chilling effect" by inhibiting citizens from exercising their fundamental constitutional rights.[24] A greater degree of specificity is therefore demanded when a regulation impinges on the First Amendment.[25] The complementary doctrine of overbreadth is based on the principle that a "clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct."[26]

The standard used in determining whether a challenged rule is vague is whether "men of common intelligence must necessarily guess at its meaning."[27] The proposed rules are both vague. Men of common intelligence would not necessarily agree as to what constitutes "a gross indignity to either a religious or an ethnic interest." Similarly, men of common intelligence would likely disagree regarding what "has the effect of . . . inciting contempt against persons on the basis of race, color, creed, religion or national origin." In addition, both alternatives can apply to cover constitutionally protected expression. For example, even the works of Shakespeare and Mark Twain are periodically assailed as "inciting contempt" or presenting "a gross indignity" to various religious and ethnic groups.

In the Seventh Circuit case of *Collin v. Smith,* an ordinance which prohibited dissemination of material "which promotes and incites hatred against persons by reason of their race, national origin or religion, and is intended to do so" was struck down as unconstitutional based on the doctrine of overbreadth and to a lesser degree on the doctrine of vagueness.[28] As one of the proposed commission rules is almost identical to that ordinance, the *Collin* case offers compelling authority for the proposition that the proposed rule would be held overbroad and vague.

In summary, the Constitution requires that administrative rules, like laws, have sufficient clarity to allow for uniform interpretation and application. In addition, a rule must not be overbroad so as to prohibit protected expression in an attempt to reach unprotected expression. It is probable that both formulations of the proposed rule would fall short of the constitutional requirements.

SUMMARY:

It is the opinion of this office that if the proposed rules were subjected to a constitutional challenge they would likely be held to: (1) result in a pattern of discrimination impinging upon First Amendment rights; (2) impose an unconstitutional condition on the award of a governmental subsidy; (3) be impermissibly vague; and/or (4) be overbroad.

Very truly yours,

SHEILA GLUSCO BUSH
Deputy Attorney General
Administrative Law and Litigation Division

SGB:ams

[1]*See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

[2]*See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 56, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

[3]*See* Note, "Freeing Public Broadcasting from Unconstitutional Restraints," 89 Yale Law Journal 719, 738 (1980).

[4]532 F.2d 792 (1st Cir. 1976), *cert. denied,* 429 U.S. 894 (1976) (citations omitted).

[5]*Id.* at 795-796 (citations omitted).

[6]*Id.* at 797.

[7]*Id.* at 798 (citations omitted).

[8]*Id.* at 798, n.8.

[9]*See* Idaho Code § 67-5605.

[10]*Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[11]*Id.* (emphasis added) (citations omitted).

[12]*Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 65, 101 S.Ct. 2176, 2180, 68 L.Ed.2d 671 (1981).

[13]*Buckley v. Valeo,* 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

[14]*Rosen v. Port of Portland,* 641 F.2d 1243, 1246 (9th Cir. 1981).

[15]*Id.*

[16]*Id.*

[17]*Advocates for the Arts v. Thomson,* 532 F.2d 792 (1st Cir. 1976), *cert. denied,* 429 U.S. 894 (1976).

[18]*Cinevision Corp. v. City of Burbank,* 745 F.2d at 575.

[19]*Id.*

[20]*Id.* (emphasis added).

[21]*Id.*

[22]*Id.*

[23]*Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[24]*Id.* at 108-09.

[25]*Smith v. Goguen,* 415 U.S. 566, 572-73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

[26]*Grayned v. City of Rockford,* 408 U.S. at 114.

[27]*Broadrick v. Oklahoma,* 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973).

[28]*Collin v. Smith,* 578 F.2d 1197, 1207 (7th Cir. 1978), *cert. denied* 439 U.S. 916 (1978).

June 3, 1985

Mr. Philip H. Robinson
Bonner County Prosecutor
P.O. Box 1486
Sandpoint, ID 83864

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Obtaining Blood Samples from Minors
Who Drive Under the Influence of Alcohol

Dear Mr. Robinson:

Workloads and priorities have made it impossible to answer your request for an opinion until now. I hope the following analysis will still be of benefit to you.

Narrowly framed, your question is whether it is necessary, when a minor is arrested for driving under the influence of alcohol, to get parental consent before a sample of blood is drawn from the minor for evidentiary purposes. Succinctly, the answer is that the legislature intended to make the implied consent law applicable to all drivers of motor vehicles, including minors. Therefore, there is no requirement that parental consent be obtained before blood can be drawn for an evidentiary test.

Analysis begins with the express, basic provision that:

> *Any person* who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to an evidentiary test for concentration of alcohol, drugs, or other intoxicating substances . . . provided that such test is administered at the request of a police officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or

> any other intoxicating substances. Idaho Code § 18-8002 (emphasis supplied).

This statute is clear and all-inclusive; it makes no distinction between adult drivers and minor drivers — it applies to "any person who drives." The test to which a driver is deemed to have consented is not for treatment or blood donation purposes, but is an "evidentiary test" to determine the ability of the motorist to safely drive a car. The evidentiary test is defined in Idaho Code § 18-8004 as an analysis of *blood,* urine, breath, or other bodily substance for alcohol content.

The policy and provisions of a statute are to be given effect where there is no ambiguity on the face of the statute, where the intent of the legislature is clearly manifested, and where no irreconcilable conflict with other laws vitiates the force of the statutes. *Umphrey v. Sprinkel,* 106 Idaho 700, 682 P.2d 1247 (1983); *Smith v. Department of Employment,* 100 Idaho 520, 602 P.2d 18 (1979).

Your letter conveys the opinion of some persons in your jurisdiction who suggest that statutes dealing with other subjects and predating the implied consent law should be given controlling effect over the express provisions referred to above in Idaho Code § 18-8002. Specifically, it is suggested that provisions of blood donation laws, ch. 37, title 39, Idaho Code, and laws dealing with consent for treatment of minors, ch. 38, title 39, Idaho Code, counteract the clear intent of the law that any driver of a motor vehicle who is reasonably believed to be under the influence of alcohol or drugs has consented to an evidentiary blood analysis. A review of the donation and parental consent provisions shows that these statutes do not conflict with or derogate from the implied consent law.

Idaho Code § 39-3701 provides that "any person who is seventeen (17) years of age or older shall be eligible to donate blood in a voluntary and noncompensatory blood program without the necessity of obtaining parental permission or authorization." This law deals with the very specific subject of *blood donations* by minors. It is not in conflict with the provisions of Idaho Code § 18-8002 requiring that *blood tests* for evidentiary purposes be administered to drivers who are believed to be operating a motor vehicle while under the influence of intoxicants. The intent and purpose of both laws can be given full effect for they are not in conflict.

Idaho Code § 39-4303 does not specifically deal with drawing of blood from a minor; it deals with consent before medical and surgical *care, treatment,* or *procedures* are administered to minors and persons who are temporarily or permanently incapacitated and unable to give informed consent for treatment. (Idaho Code § 32-101 defines a minor as a person under the age of eighteen.)

The purpose of the consent provision is far different from and of more general import than Idaho Code § 18-8002 which deals with evidentiary tests of blood of drivers suspected of being under the influence of alcohol or drugs. A basic rule of statutory construction is that a statute of general import will not control an area covered by a more specific statute. *Mikelson v. City of Rexburg,* 101 Idaho 305, 612 P.2d 542 (1980). The *Mikelson* case also stands for the principle that if two statutes are in irreconcilable conflict, the one enacted later in time will govern. Idaho Code § 39-4303

relating to consent to medical procedures was enacted in 1975; the more specific statute, Idaho Code § 18-8002, dealing with implied consent of drivers to evidentiary tests for alcohol, was enacted in 1984. Being both later in time and more specific, the implied consent law will control over the parental consent provisions in areas where the two laws may be perceived to be in conflict.

It is proper in construing legislation not only to consider the literal wording of the statute, but also to take into account other matters such as context, evils to be remedied, history of the times, legislation upon the subject and public policy. *Local 1494 of I.A.F. v. City of Coeur d'Alene,* 99 Idaho 630, 586 P.2d 1346 (1978).

The legislature issued a policy statement when it revised its laws pertaining to driving under the influence of intoxicants. It said:

> The use of the public highways of the state is a privilege granted by the state for the enjoyment and well being of all citizens. It is a privilege and not a right. In order to make sure that this privilege is not abused, it is necessary that such privileges be controlled or restricted. . . . It is the purpose of the several sections of law contained within this act [including the implied consent provision] to provide the necessary administrative and judicial procedures to insure that the highways are safe for travel by law-abiding citizens, to restrict or control the use of the highways by those persons who cannot or will not conform their actions to the accepted standards of civilized behavior. . . . [I]t is the intent of the Idaho state legislature . . . that those who abuse the privilege of driving upon the highways while under the influence of alcohol, drugs, or other intoxicating substances shall be viewed . . . as a serious threat to the health and safety of law abiding users of the highways. 1983 Idaho Session Laws, ch. 145, pp. 368-369.

It would defy logic and common sense to argue that minors who drive under the influence of intoxicants are in any substantive way different from or less of a threat to law abiding motorists than those over the age of 18. Having been given the privilege of driving a vehicle upon Idaho's highways, a minor accepts also the responsibilities that go with this conditional privilege. One of the conditions of the privilege to drive is that a person consents to an evidentiary blood, breath, or urine test when there is reason to believe the driving privilege is being abused. Implicit in the effect of Idaho Code § 18-8002 is the policy that, having accepted the privilege of engaging in an activity reserved to persons of mature judgment, a minor must also abide by the standards and responsibilities that must accompany that activity. For this reason, the legislature provided that the implied consent law should have universal application: "*any person* who drives . . . shall be deemed to have given his consent to an evidentiary test." Idaho Code § 18-8002. There is no lesser standard for minors; nor will minors avoid the consequences of refusing a test because it lacks the consent of their parents. The drawing of blood for an evidentiary test is not such a life or health threatening procedure that parental choice or counsel is implicated.

An analogous provision of Idaho Code § 18-8002(2) is also worth noting: The statute does not even permit a person suspected of driving while under the influence of alcohol to consult with his attorney before deciding whether or not to submit to an

evidentiary test. The significance of limiting the motorist's consultation with a wise and responsible person to whom one would naturally turn when in difficulty — much like a child turns to a parent — illustrates the deliberate choice of the legislature that any motorist suspected of being intoxicated must submit to an evidentiary test or pay the consequences of refusal.

In recognition of the reluctance of medical personnel to take "legal" blood samples — evidence — from a patient so that the patient can be prosecuted criminally, and in recognition of the needs of law enforcement officers to obtain necessary medical assistance against intoxicated drivers, the law makers have given medical personnel complete immunity from civil and criminal liability for "any act arising out of administering an evidentiary test for alcohol concentration at the request of a police officer. . . ." Idaho Code § 18-8002(6). The statute gives this shield of immunity to hospitals, hospital officers, hospital agents, hospital employees, and health care professionals licensed by the state of Idaho. Medical personnel or institutions do not enjoy legal standing to question on behalf of minor drivers whether they should submit to an evidentiary test.

In conclusion, it is readily apparent that the statutes on blood donations and consent for treatment deal with far different policies than those embodied in the implied consent law. They are effectual in their context. But where the legislature has at a later date and in a more specific manner addressed a different policy concern — enforcement of traffic laws in order to assure safety of travel on state highways — the intent is that the statutes dealing with health care of minors and blood donations by minors will not control. When minors or any other persons drive and there is reason to believe that they are under the influence of an intoxicant, they are deemed to have already consented to an evidentiary test — including a blood test. Lack of parental consent to the drawing of blood will not frustrate the requirements of the DUI laws.

Sincerely,

D. MARC HAWS
Deputy Attorney General
Chief, Criminal Justice Division

DMH:jas

July 17, 1985

The Honorable Phil Childers
Representative, District 15
3440 Quail Place
Boise, ID 83704

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Auditorium Districts

Dear Representative Childers:

Your letter poses several questions concerning the powers and duties of auditorium districts generally and the Greater Boise Auditorium District in particular.

1. *Is it constitutional to bind current electors of the district (many of whom were not even born in 1959)* to current projects of the district which are entirely different from the objective of the original district's petitioners and the cost for which is entirely different from that for which the original petitioners gave their approval? [emphasis in original]

2. The original legislation did not authorize the auditorium district to fund a Visitor's Bureau such as the Greater Boise Auditorium District has done. *** Is this activity constitutional?

3. [paraphrasing] May other properly formed auditorium districts conduct similar activities?

4. The Greater Boise Auditorium District is presently seeking a pledge of "full faith and credit and discharge of bond elections." *** Did the original petition authorize this?

5. Do current residents of the district have the right to request a new petition to authorize all the new activities this district has now become involved in?

Short Answer

1. The authority of special purpose taxing districts is granted by the legislature, not by petition. It is that body that establishes their powers and duties and may change them from time to time. The sole purpose of a petition under the auditorium district law is to request an election to decide whether a district shall be formed according to law.

2. It is arguable that the support of a "Convention and Visitor's Bureau" is a lawful expenditure since, in the judgment of the Board, it serves to "promote" the functions and purposes of the district. However, we are unsure whether the management, ownership or construction of a facility is a prerequisite to such promotional activity. A determination, based on the particular facts of a given case, would have to be made by a court of law.

3. Districts formed according to law would have identical powers.

4. As stated in answer to question No. 1, petitions do not authorize activity on the part of taxing districts; the legislature does. If the legislature amends the law, the district would be bound thereby, regardless of prior petition language.

5. Once formed, the district may carry on any statutorily authorized activity until it is dissolved by the legislature or by election. A "new" petition is not autho-

rized by law for any purposes other than calling for a dissolution election or seeking the annexation or severance of real property.

ANALYSIS:

The statutes providing for the formation and operation of auditorium districts are found in chapter 49, title 67, Idaho Code. Originally adopted in 1959 (1959 Session Laws, ch. 137, p. 299) and amended some 11 times since, the chapter provides a fairly detailed framework for the conduct of auditorium district business. To date, the only district formed under the chapter is the Greater Boise Auditorium District. It was formed after a vote of the electorate in 1959.

The questions propounded in your correspondence deal with the district's formation and its present funding of a "Visitor's and Convention Bureau" operated jointly with the Greater Boise Chamber of Commerce. Generally, you ask whether the district's activities are "constitutional." This opinion will address both the constitutional and the statutory authorization for the district's present activities.

The Petition

Question Nos. 1, 4, and 5 deal with formation petitions generally, and the 1959 Greater Boise Auditorium District petition in particular. Each revolves around the question of whether the language contained in a petition to form a special purpose taxing district somehow binds the district *in futuro*. Such is not the case. The petition does not create the district and thus does not provide the organic basis for its subsequent activities.

Special purpose taxing districts are quasi-municipal corporations whose formation and function are authorized by the legislature. As such, they are subject to the same rules that govern cities and counties. *Strickfaden v. Greencreek Highway District,* 42 Idaho 738, 248 P. 456 (1926). 1 McQuillin on Municipal Corporations §§ 302a-305. As such, they exercise only those powers granted by the legislature or necessarily implied therefrom. Limitations on those powers may only come by way of legislative enactment, statewide initiative, or constitutional amendment. Formation petitions do not accomplish this.

A petition is a formalized request or application made in writing to a person or body of authority to beget some action or thing. *Ballantine's Law Dictionary* (3rd Ed., 1969). Its purpose is to generally set forth the matters upon which the petitioners desire some action be taken.

Petitions are commonly used in the governing process to provide a means whereby the citizenry may invoke some legal process or otherwise make their wishes known. Examples include nominating petitions (which are non-binding in that a vote is not required for the candidate whose petition is signed); city incorporation petitions, Idaho Code § 50-101 (which requires a legal description of the proposed city, but which may be altered after incorporation by annexation, dissolution, etc.); junior college districts, Idaho Code § 33-2104; herd districts, Idaho Code § 25-2402; local improvement districts, Idaho Code § 50-1706; and numerous other special purpose taxing dis-

tricts. They all have two things in common: First, the formation petition does not create the district, it merely invokes the process by which the district is formed. Second, the powers of the district derive not from the formation petition, but from the enabling legislation. Once created, the district is governed by the specific statutes enacted and amended from time to time by the legislature.

The formation petition requirements for auditorium districts are found in Idaho Code § 67-4904. It provides the information which must be placed in the petition in order to put the signatories on notice as to what they are signing. The requirements are general in nature. For example, the statute merely requires "a *general* description of the facilities," "the *estimated* cost," and "a *general* description of the boundaries." The use of those kinds of terms indicates the general notice nature of the petition. Nothing in the statute prohibits the district or the legislature from amending those statements once the district is formed. Such a result would be both unconstitutional and illogical. First, no legislature may bind future legislatures by enacting laws which may not be changed, art. I, § 2, Idaho Constitution. In addition, the legislature may not delegate its discretionary authority to make subsequent changes in the law to another body or group, art. II, § 1, Idaho Constitution. Making formation petitions binding would violate both these constitutional principles. Secondly, logic dictates that special districts, once formed, must be able to change with changing needs and conditions. An example is contained within the act itself: the authority to include or exclude property within the bounds of the district, Idaho Code §§ 67-4918 and 4919. If the district was forever bound by the legal description contained in the original petition, it could not expand or contract, irrespective of subsequent requests. However, the act specifically authorizes such conduct. Thus, the legislature has recognized the informational nature of the formation petition. *See also,* 1 McQuillin on Municipal Corporations §§ 3.27 et seq.

In direct response to your petition questions, it is our opinion that the district is not forever bound by the statements made in the original formation petition. The purpose of those statements was to inform potential signatories of what they were signing. The purposes announced in the original formation petition for which the district was formed may be altered over time; by the district in accordance with the law or by the legislature through statutory amendment. Once created, the district is bound solely by the statutes as they existed at the time of formation or as they may be amended from time to time.

Subsequent requests for statutory amendments are not governed by the original petitions. Proposed changes in the laws may be advanced by anyone, citizens, legislators, or members of the district board. Such is the normal political process. No law prohibits local governments, acting through their elected officials, from seeking changes in laws which affect their operations.

Finally, once formed, the only petitions authorized in connection with the district are those for the inclusion or exclusion of property, Idaho Code §§ 67-4918 and 4919, and petitions calling for an election to dissolve the district, Idaho Code § 67-4930. No provision is made in the law for new formation petitions for an existing district. Persons who wish to participate in or influence the district may do so by using the normal processes available for that purpose. They include: seeking district office, attending

meetings, seeking changes in state law, influencing public opinion and any other lawful means of participation in the affairs of government.

Convention and Visitor's Bureau

You have also asked whether an auditorium district is authorized to expend monies for the operation of a "Visitor's Bureau" since such "was not authorized in the original legislation." The activity you inquire after is known as the "Boise Convention and Visitors' Bureau." It is operated by the district in conjunction with the Greater Boise Chamber of Commerce. To the best of our knowledge, its purpose is to promote Boise to tourists and conventions in order to attract them to the area.

In order to answer your question, we must first ascertain whether public funds may be expended for the purposes of advertising or promotion:

> 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 . . .

14 *McQuillin on Muni. Corp.* § 39.19. The same rule prevails in Idaho:

> It is a fundamental constitutional limitation upon the powers of government that activites engaged in by the state, funded by tax revenues, must have primarily a public rather than a private purpose. A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Idaho Water Resources Bd. v. Kramer, 97 Idaho 535, 559, 548 P.2d 35 (1976). See also *Gem Irrigation Dist. v. Van Deusen,* 31 Idaho 779, 176 P. 887 (1918).

Also of note is the corollary proposition that while public funds must be expended for public purposes, it is immaterial that some of the benefits from the expenditure of public funds may fall to private entities so long as the overriding purpose of the expenditure is public in nature. *Board of Commissioners of Twin Falls County v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1974); *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969).

A thorough review of Idaho Supreme Court cases reveals no decisions concerning the expenditure of district funds to advertise and promote the district. However, the question has been considered in other contexts and other jurisdictions. Cases have held that expenditures for advertising or promoting a city, its resources, and other attributes are expenditures for a public purpose. *City of Tucson v. Sunshine Climate Club,* 64 Ariz. 1, 164 P.2d 598 (1946); *Sacramento Chamber of Commerce v. Stephens,* 299 P. 728 (Cal. 1931); *San Antonio v. Paul Anderson Co.,* 41 S.W.2d 108 (Texas 1931); see *Jarvill v. City of Eugene,* 40 Ore. App. 185, 594 P.2d 1261 (1979); 15 *McQuillin on Muni. Corp.* § 39.21, n. 56.

Although the Idaho Supreme Court has not directly considered this exact question it has had occasion to consider closely related issues. In the case of *State v. Enking,* 59

Idaho 321, 82 P.2d 649 (1938), the Supreme Court had to decide whether a tax on produce levied for the purpose of providing a fund for advertising was lawful. In upholding the tax, the court stated that:

> [T]he tax having been levied for the purpose of providing an advertising fund for advertising such fruits and vegetables is valid and for a public purpose in that the protection of the apple, prune, potato, and onion industry is as much a matter of public concern to Idaho as the citrus fruit industry is to Florida....

An earlier case, *Bevis v. Wright,* 31 Idaho 676, 125 P. 815 (1918), held the levying of a tax to provide a fund for exhibition of the products and industries of the county at domestic and foreign expositions for the purpose of encouraging immigration and increasing trade in the products of the State of Idaho was for a public purpose and therefore constitutional.

Advertising and promotion have also been found to be public purposes by the Idaho Legislature. The Idaho Code contains several authorizations for public entities to promote themselves and their commodities. For example, Idaho Code § 22-2918 authorizes the Idaho Bean Commission to advertise commodities; Idaho Code § 67-4703 authorizes the state Division of Economic and Community Affairs:

> ... [T]o engage in advertising the State of Idaho, its resources, both developed and undeveloped, its tourist resources and attractions, its agricultural, mining, lumbering and manufacturing resources, its health conditions and advantages, its scenic beauty and its other attractions and advantages; and in general either directly, indirectly or by contract do anything and take any action which will promote and advertise the resources and products of the state of Idaho, develop its resources and industries, promote tourist travel to and within the state of Idaho, and further the welfare and prosperity of its citizens.

Other examples can also be found within the code.

Based upon the foregoing it is our opinion that auditorium districts may lawfully expend public funds for the purposes of advertising and promoting themselves, their citizens and their industry since such advertising and promotion has been found to be a public purpose both by the courts and by the legislature. Furthermore, the courts have found such practices to be in harmony with constitutional prohibitions against public aid in support of private endeavors.

Authorization for the creation and operation of auditorium districts is contained in title 67, ch. 49, Idaho Code. Idaho Code § 67-4901, entitled "Purpose of Act," states that:

> It is hereby declared that the organization of auditorium or community center districts, having the purposes and powers provided in this act, will serve the public need and use and will promote the prosperity, security, and general welfare of the inhabitants of said districts.

Section 67-4902, entitled "Definitions," states that:

> An auditorium or community center district is one to build, operate, maintain and manage for public, commercial and/or industrial purposes by any available means public auditoriums, exhibition halls, convention centers, sports arenas, and facilities of a similar nature, and for that purpose any such district shall have the power to construct, maintain, manage and operate such facilities. ***

Section 67-4912 outlines the general powers of the board. Among those powers are § 67-4912(m):

> *To promote any functions for said district,* provided that such board shall not engage in operations that are inconsistent with the purpose of said district; and it shall be the policy of the board not to compete with existing facilities and services in the district, whenever practicable; (emphasis added)

And § 67-4912(o):

> To have and exercise all rights and powers necessary or incidental or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this act.

The general rule is that a municipal corporation has no power to spend money for advertising or other forms of promotional activity absent legislative authorization. 56 Am.Jur. 2d *Municipal Corporations* § 205.

Since the board is authorized "to promote the functions of the district," (§ 67-4912(m)) and one of the functions of the district is "to build, operate, maintain, and manage . . . public auditoriums, . . . convention centers, . . . and facilities of a similar nature, . . ." (§ 67-4902), it can be argued that the board possesses the corresponding authority to promote the use of those facilities to groups most likely to use them — tourists and conventions.

The question that remains is whether the planning, construction, ownership, or management of an authorized facility is a prerequisite to the promotion thereof.

On the one hand, it can be argued that the presence of a facility is unnecessary for the reason that the construction or ownership of a facility is merely one of several purposes for which a district may exist. As previously stated, the others are the promotion of "the prosperity, security, and general welfare" of the district's citizens. Bringing business to town would seem to serve that purpose.

Moreover, since conventions are booked several years in advance, it can be argued that promotion prior to construction is necessary in order to assure facility use and income at the time of completion.

On the other hand, it can be argued that the authorization to promote and advertise

goes hand in hand with the construction or ownership of an authorized facility. Simply stated, the district can't promote what it doesn't have.

A review of the case law has revealed no cases which answer this question. Additionally, any determination would depend largely upon the particular facts of each case. We do not possess such information. Thus, we are unable to offer any firm opinion on the matter.

Other Districts

You also asked whether other properly formed districts could conduct activities similar to those engaged in by the Greater Boise Auditorium District. In our opinion, the foregoing analysis would apply equally as well to any other auditorium districts.

Sincerely,

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

RGR:cjm

August 29, 1985

Mr. Bill Wallis
State Fire Marshal
Department of Insurance
700 W. State Street
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Bill:

ISSUES:

Your letter asks three questions:

1. Does the state fire marshal have arrest powers in arson cases?

2. Does the state fire marshal have authority to carry weapons when dealing with arson investigations?

3. Is the office of state fire marshal recognizable as a law enforcement agency under state law?

CONCLUSIONS:

1. The state fire marshal has arrest powers in arson cases.

2. The state fire marshal has the ability to carry a concealed weapon during an arson investigation.

3. The state fire marshal is properly recognized as a law enforcement official and peace officer.

ANALYSIS:

The first two questions raised in your letter turn on the answer to the third question, namely, whether the office of state fire marshal is recognizable as a law enforcement agency under state law. Idaho Code § 19-5101(c) provides a useful definition of "law enforcement" as "any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency." Thus, a law enforcement agency is any agency dealing with the prevention or reduction of crime and the enforcement of state laws.

The office of state fire marshal falls within this definition. Under Idaho Code § 41-254, the state fire marshal has the power and duty to "enforce the uniform fire code." Under Idaho Code § 41-255, he has the duty to "administer and enforce this act," i.e., sections 41-253 through -269 of the Code. Further, in his capacity as the state's chief arson investigation officer, the state fire marshal has broad powers in matters of "fire prevention and arson investigation." See Idaho Code § 41-257.

Even more importantly for purposes of this opinion, the position of state fire marshal should be recognized as that of a "peace officer" of the State of Idaho. Idaho Code § 41-257 gives the state fire marshal the "same responsibility and power in arson investigation as a county sheriff." He thus shares in the county sheriff's status as a peace officer under Idaho Code § 19-310. In short, the state fire marshal, when shouldering the "same responsibility and power in arson investigation as a county sheriff," must enforce the state laws. In view of the state fire marshal's responsibility to reduce or prevent arson and to exercise the powers of a sheriff in arson investigations, he comes within the definition of a "law enforcement" official and a "peace officer" whenever he is involved with an arson investigation.

Because the state fire marshal is a peace officer, he may exercise arrest powers in the course of an arson investigation. Idaho Code § 19-601 defines arrest and states that an arrest may be made by either a "peace officer or by a private person." Idaho Code § 19-603 enumerates the circumstances in which a peace officer can make an arrest, including the commission of a felony, of which arson is one. See Idaho Code §§ 18-801 through -804. Idaho Code § 41-257 circumscribes the exercise of the state fire marshal's powers as follows:

> He will not, however, interfere at any time in the operation or administration of any fire department or sheriff's office except in matters of fire prevention and arson investigation when requested by the local fire jurisdiction, sheriff's office or written and signed complaint of any person served by the local fire jurisdiction.

Thus, the fire marshal has been given the equivalent of the sheriff's power, including the power to arrest, but only with respect to fire prevention and arson investigation when requested. In the nature of things, an arson investigation would rarely present a situation justifying a warrantless arrest. Here, as elsewhere, the statute envisions close cooperation between the state fire marshal and local law enforcement officials.

The second question concerns the ability of the state fire marshal to carry weapons when dealing with arson investigations. Idaho Code § 18-3302 outlines the concealed and dangerous weapons which are illegal in Idaho and the punishments for violation of the law. It also excepts from the law possession of the specified concealed weapons by, among others, officials of the state of Idaho and peace officers. The chief arson investigation officer, appointed by the director of the department of insurance with the approval of the governor, is an official of the state of Idaho and, as set forth above, a peace officer. He is therefore allowed to carry a concealed weapon during arson investigations.

Sincerely,

JOHN J. McMAHON
Chief Deputy

JJM:lh

September 18, 1985

The Honorable Laird Noh
Idaho State Senator
Route 1, Box 65
Kimberly, ID 83341

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Letter of August 31, 1985

Dear Senator Noh:

Pursuant to your request we have reviewed Section 36-202(r)(1) of the Idaho Code. That section provides as follows:

> Idaho residents shall not lose their residency in Idaho if they are absent from the state for religious (not to exceed two (2) years) or educational (not to exceed five (5) years) purposes and do not claim residency *or* use resident privileges in any other state or county for the purposes of hunting, fishing or trapping. (emphasis added)

You have asked whether this section precludes a person from obtaining an Idaho resident hunting and fishing permit if they claim residency in another state for any purpose other than hunting and fishing. Our conclusion is that the statute would prevent a person from obtaining an Idaho resident hunting, fishing or trapping permit if they claim residency in another state for any purpose.

As written, the use of the disjunctive word "or" in this section sets up two possible ways for a person to lose their resident hunting and fishing privileges while absent from the state for religious or educational purposes. If the individual claims residency in another state, the Idaho hunting and fishing privileges are lost. Secondly, if the individual uses resident hunting and fishing privileges in another state, their corresponding Idaho privileges are lost.

While our analysis is based upon the language of the statute, we have made a few inquiries concerning the history of this section of the code. Mr. Schlechte of the Legislative Council and Mr. Greenley, former director of the Department of Fish and Game, indicated to our staff that the intent of the Legislature was to not allow students to have multiple residencies such as one for tuition purposes and another for fishing and hunting.

I hope this is of assistance to you. If we can be of further help, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

October 3, 1985

Mr. E. Dean Tisdale
Idaho Transportation Department
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Request for Definition of "Chauffeur"

Dear Mr. Tisdale:

Your letter of June 25, 1985 asks the attorney general to interpret the statutes in the Idaho Code that define the term "chauffeur." You state that confusion exists as to whether the term "chauffeur" covers "driver salesmen" who operate pop, beer and bread trucks, and drivers who own or lease their own trucks transporting exempt commodities such as sand and gravel, timber and agricultural products. The examples

cited present variations based on (a) whether the driver owns the vehicle; (b) whether the driver owns the items being hauled; and (c) whether the items hauled are "exempt" products.

A history of the pertinent statutes is helpful. Idaho Code section 49-347 states:

> "Chauffeur," wherever used in this chapter, shall be taken to mean any person operating motor vehicles on the public highway for hire.

Section 49-347 has remained unchanged since 1925. If it were the last word, there would be no difficulty in answering the questions posed by your letter. This statute is all-encompassing. It draws no distinction between those who drive their own vehicles and those who drive vehicles owned by another. Nor does it distinguish between types of goods hauled. Under its plain language, *any person* who operates a motor vehicle on the public highway for hire is a "chauffeur." However, the compiler's notes accompanying the statute observe that, "This section is probably superseded by § 49-303(c)." It is our opinion that the compiler's note is correct.

Section 49-303(c) was enacted in 1935. In its original version, "chauffeur" was defined as:

> Every person who is employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.

This definition pulls back from the all-encompassing wording of the 1925 statute by drawing several distinctions. Under the 1935 definition in §§ 49-303(c), one is a "chauffeur" if one meets either of two conditions. The first condition stresses the driver's employment status. In order to be a chauffeur, a person must be employed for the principal purpose of operating a motor vehicle. It thus appears that a self-employed operator might not qualify. Second, regardless of ownership or employment, a person engaged in public or common carriage is a chauffeur. It thus appears that private hauling might not result in chauffeur status.

Both of these readings are reinforced by subsequent amendments to section 49-303(c).

> Chauffeur. — Every person who is employed *by another* for the principal purpose of driving a motor vehicle and every person who drives a motor vehicle while in use as a public *contract* or common carrier of persons or property.

The italic words were added in 1951. The first condition now makes clear the legislative intent to distinguish between those who are self-employed and those who are employed *by another*. It is only the latter who are chauffeurs.

Second, the terms "contract" and "common" carrier are terms of art coined by the same 1951 legislature in its revision of the Motor Carrier Act in the Public Utilities Law, ch. 8, title 61. These terms are distinguished from another term of art coined in 1951, viz., "private" carrier. Every person who engages in contract or common car-

riage, regardless of ownership or employment status, is a chauffeur. These two terms are defined at Idaho Code §§ 61-801(f) and (g) as follows:

> f. The term "common carrier" means any person, which holds itself out to the general public to engage in the transportation by motor vehicle in commerce in the state of Idaho of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes.
>
> g. The term "contract carrier" means any person which, under individual contracts or agreements, engages in the transportation, other than transportation referred to in paragraph (h), by motor vehicle of passengers or property in commerce in the state for compensation.

By contrast, a "private carrier" was defined by the 1951 legislature in Idaho Code § 61-801(h) as:

> [A]ny person not included in the terms "common carrier" or "contract carrier" who or which transports in commerce in the state by motor vehicle property of which such person is the owner, lessee, or bailee, when such property is for the purpose of sale, lease, rent, or bailment, or in the furtherance of any commercial enterprise.

Thus, as matters stood for three decades after the 1951 amendment to section 49-303(c), the extent of the term "chauffeur" was clear. The term covered "every person" who was employed by another for the principal purpose of driving a motor vehicle, *regardless of the type of carriage engaged in.* It also covered "every person" engaged in common or contract carriage, *regardless of the status of ownership of vehicle or goods.*

The story does not end there. In 1982, the Idaho Legislature enacted H.B. No. 645, "repealing sections 49-301 through 49-306, Idaho Code" and "amending ch. 3, title 49, Idaho Code, by the addition of a new section 49-301, Idaho Code, to provide definitions." Idaho Sess. Laws, ch. 95, p. 185.

As a result of the 1982 amendments, section 49-301(2) of the Idaho Code now defines "chauffeur" as:

> a person who is employed by another for the principal purpose of driving a motor vehicle and a person who drives a motor vehicle while in use as a public contract or common carrier of persons or property.

The new definition poses a problem. Under section 49-303(c), as it existed from 1951 to 1982, it was clear that every person employed by another primarily to drive a motor vehicle and every person engaged in common or contract carriage was a chauffeur. The plain language of the statute— "every person who . . . and every person who . . ." — left no doubt that a person was a chauffeur who met *either* of these two conditions. The wording of the new definition — "a person who . . . and a person who . . ." — makes it possible to argue that one must meet *both* conditions in order to be a chauffeur. Under this reading, a person would not be a chauffeur unless he or she was

both employed by another *and* engaged in common or contract carriage. In short, anyone who owned his or her own rig would be exempt from "chauffeur" status, even though engaged in common or contract carriage for compensation on the public highways of the state of Idaho.

It is our opinion that the legislature did not intend this result by its amendment of Idaho Code § 49-303 in 1982. For one thing, the language of the amendment itself does not require such a reading. The new definition does not identify a single "person" and then enumerate two conditions to be met. Rather, the statute identifies two conditions under either of which "a person" shall be a chauffeur.

More importantly, there is no indication that the 1982 legislature intended to work any significant change in the definition of "chauffeur" by its amendments to section 49-303. The purpose of the 1982 amendments was to "transfer the administration of certain functions from the Department of Law Enforcement to the Idaho Transportation Department." Idaho Sess. Laws, ch. 95, p. 185. The result was a complete recodification of statutes spread throughout titles 40, 49, 61 and 67 of the Idaho Code. Significantly, the 1982 legislature did not announce, as did the 1951 legislature, that it was "amending section 49-303, Idaho Code, *to redefine* a chauffeur." Chapter 183, Idaho Sess. Laws, 1951 (emphasis added).

Finally, as a matter of public policy, it is inconceivable that the 1982 legislature would have intended to exempt all those who own their own rigs from qualifying as a "chauffeur," even though they might be engaged in common or contract carriage. The preamble to the 1951 statute states:

> The legislature, being mindful that the operation of motor vehicles on the highways of the state of Idaho is a privilege and not a right, and that control of the granting, exercise and use of such privilege is necessary in order to insure that the public highways of the state shall be safe for the transportation of persons and property, reaffirms its belief that the privilege of operating motor vehicles on the public highways shall not be extended to persons not properly qualified to hold and exercise such privilege . . . .

Id. The 1951 preamble merely "reaffirms" an existing policy. That policy of insuring the safety on public highways has not been abrogated by the amendment of the underlying statute in 1982.

We conclude, in direct response to the questions posed by your letter, that nearly all operators whose livelihood depends on the transportation of persons or goods must have a chauffeur's license. This includes all contract and common carriers and their employees. Nothing in the statutory history leads us to conclude that carriage of "exempt" commodities (such as sand and gravel, timber or agricultural products) would serve to exempt the carrier from status as a chauffeur.

Among commercial haulers, the only persons exempt from chauffeur status under Idaho Code § 49-303(2) are those who are self-employed *and* who transport property of which they are the "owner, lessee, or bailee, when such property is for the purpose of sale, lease, rent or bailment, or in the furtherance of any commercial enterprise."

Idaho Code § 61-801(h). A bailee is one who bears the risk of loss if the goods being transported are lost or destroyed while in his or her possession.

In most instances, "driver salesmen" will be chauffeurs. Again, the only exception would be for a driver salesman who was self-employed *and* who was the owner, lessee or bailee of the goods being transportated.

I hope this has answered the questions posed by your letter. If you need further information, please contact me.

Sincerely,

JOHN J. McMAHON
Chief Deputy Attorney General

JJM:cjm

October 21, 1985

The Honorable Larry Harris
Idaho State Representative
1925 Montclair Drive
Boise, ID 83702

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Harris:

You have asked whether Idaho Code §§ 20-413 and 414 prohibit the sale of inmate manufactured goods to retail or wholesale establishments within the state. It is our conclusion that these two sections of the code do not have that effect.

These two provisions of the code are part of the Correctional Industries Act adopted in 1974 by the Idaho Legislature. Common rules of statutory construction provide that these two sections should, if possible, be construed together in a rational and harmonious manner. Your constituent has interpreted these sections inconsistently in reliance upon the title of Section 413. However, titles of code sections are for guidance only and are not substantive law.

It is our opinion that the intent of the legislature in enacting the law in this fashion was to avoid a conflict with federal law which generally forbids the transportation of inmate manufactured goods through interstate commerce, with certain exemptions. See 18 U.S.C. 1761. This opinion is supported by a close reading of the two sections in question. Idaho Code § 20-413 authorizes the use of inmate labor for the production and manufacture of items for sale to and use by government agencies, non-profit or-

ganizations, public uses, and to retail or wholesale establishments within the state. Idaho Code § 20-414 mandates that these same products must be disposed of to public and non-profit entities *"except as allowed by the preceding section (Idaho Code § 20-413)"* (emphasis added). It is our conclusion, therefore, that the legislature authorized Correctional Industries to sell inmate made goods to governmental and non-profit institutions wherever located, and retail and wholesale establishments within the state. This approach was taken to avoid potential conflicts with federal law.

As you know, this matter has also been under review by the local United States Attorney. Our analysis does not cover the issue of under what circumstances and authority inmate made goods leave Idaho for other states. If we can be of further assistance, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK:tg

November 14, 1985

Mr. Bruce Balderston
Legislative Auditor
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Children's Trust Account

Dear Bruce:

This is in response to the questions which Steve Keto asked you regarding the Children's Trust Account.

1. Is it correct to assume the revenue will be deposited with the State Treasurer who will be responsible for its proper investment and for posting any earned interest to the account?

The State Treasurer invests the idle funds in the account. Interest earnings after investment expenses will be paid to the account. Idaho Code § 67-1210 provides in pertinent part:

> It shall be the duty of the State Treasurer to invest idle monies in the state treasury, other than monies in public endowment funds . . . .

Since the idle funds are trust funds other than public endowment funds, the funds are invested by the State Treasurer. Idaho Code § 67-1210 also provides, as to such accounts, that the Treasurer will charge the account a fee equal to ¼ of 1% per year on the average daily balance of the account to cover the Treasurer's investment expenses. The balance of interest earnings will be paid to the account.

Questions 2 and 3 are related and are discussed together. The questions are:

2. It appears the board's chairman, or its designee has the ultimate authority to expend funds in accordance with the purposes specified in the bill. Does this mean we must process expenditures which are authorized by the board but may not be approved by the department director?

3. The department's duties relative to the management and accounting of the account seem to be subject to the direction of the board. Should the financial affairs of the board be subject to the same procedures and accountability required for other department units?

Idaho Code §§ 39-6001 through 39-6005 clearly give to the Children's Trust Account Board authority to administer the account and discretion in determining which contracts for service programs to fund and the manner in which those contracts will be structured within the statutory guidelines established in those sections. Idaho Code § 39-6007(4) provides:

> Disbursements of monies from the account shall be on the authorization of the children's trust account board or a duly authorized representative of the board.

The Department's duties and authority with regard to the Children's Trust Account are set forth in Idaho Code § 39-6008 which provides:

> The Department of Health and Welfare under the direction of the children's trust account board shall be responsible for the management and accounting of monies expended from the children's trust account.

Thus, the Department's responsibility is to see that expenditures are managed and accounted for properly in accordance with the requirements imposed by law. Presumably, this responsibility was placed with the Department since the appointed board would not have sufficient familiarity with state expenditure and accounting requirements to effectively carry out this function on its own.

Therefore, it appears that all discretionary powers and duties regarding the Children's Trust Account have been delegated to the Board. The Department is responsible to see that expenditures are managed and accounted for in accordance with the requirements imposed by law.

For example, if the Board entered into a contract to establish a service program, the Department would have no authority to refuse to process expenditures for the program on the basis that a different program would be better or that a different contract

would be preferable. The Department's responsibility would be limited to determining that the expenditures called for are properly processed and accounted for consistent with legal requirements for expenditure of state funds.

4. Does the Department have the authority to assess indirect charges to the account?

As noted above, the Department's only statutory responsibility regarding the Children's Trust Account is the management and accounting for money expended from the account. To the extent the Board desires additional goods or services to be provided by the Department, an interagency billing agreement could be entered into pursuant to Idaho Code § 67-3516.

If you have any questions regarding this letter, please contact me.

Sincerely,

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

DGH:jas

cc: Mr. Steve Keto, Administrator
Division of Management Services
Department of Health and Welfare

December 19, 1985

Mr. Reginald R. Reeves
Denman & Reeves
P.O. Box 1841
Idaho Falls, ID 83401

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Child Support/Garnishment

Dear Mr. Reeves:

The Department of Health and Welfare's Bureau of Support Enforcement has asked us to respond to your letter of October 30, 1985, regarding garnishments in child support cases. You advise that some local prosecutors in your area are requiring

an application or motion to the court as a condition precedent to the issuance of a "continuing" garnishment directed to the employer of a parent who is delinquent on his or her support obligation. You question whether such a motion is necessary.

As you correctly indicate, Idaho Code § 11-103(b) imposes no requirement that an application be addressed to the court in order for a child support garnishment to be deemed continuing in nature. That statute provides in relevant part:

> Where an execution or a garnishment against earnings or unemployment benefits for a delinquent child support obligation is served upon any person or upon the state of Idaho and there is in possession of such person or the state of Idaho any such earnings or any unemployment benefits of the judgment debtor, the execution and the garnishment shall operate continuously and shall require such person or the state of Idaho to hold the nonexempt portion of earnings or unemployment benefits of each succeeding earnings or unemployment benefits disbursement interval until released by the sheriff at the written request of the judgment creditor or until the judgment for child support debt . . . is discharged or satisfied in full; . . .

The quoted language renders these garnishments automatically continuous. The statute does not require any special procedure before any court.

You indicate that some local officials have interpreted § 8-509(b) as imposing a requirement that a written motion be directed to the court and an order obtained from the clerk before *any* garnishment (including those for child support directed to employers) can be deemed continuing in nature. We disagree with this interpretation.

Subsection (b) was added to § 8-509 by the legislature in 1985. That paragraph states in part:

> When the garnishee is the employer of the judgment debtor, the judgment creditor, *upon application to the court,* shall have issued by the clerk of court, a continuing garnishment directing the employer-garnishee to pay to the sheriff such future monies coming due to the judgment debtor as may come due to said judgment debtor as a result of the judgment debtor's employment. . . . (emphasis supplied).

This section does seem to contemplate a formal motion directed to a court before a "continuing" garnishment may issue. The question thus becomes whether § 8-509(b) can be reconciled with § 11-103(b) or whether the two provisions are in conflict.

If there is an irreconcilable conflict between § 11-103(b) and § 8-509(b), the most recent enactment, § 8-509(b), would govern. *See, Rydalch v. Glauner,* 83 Idaho 108, 113, 357, P.2 1094, 1097 (1961); *St. v. Mayer,* 81 Idaho 111, 116, 338 P.2d 270, 273 (1959). However, it is a well recognized rule of statutory construction that where two statutes which seem to address the same subject matter can be reconciled and construed so as to give effect to both, it is the duty of the courts to so construe them. *See, St. v. Roderick,* 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962); *Idaho Wool Marketing Ass'n v. Mays,* 80 Idaho 365, 371, 330 P.2d 337, 340 (1958); *Storeth v. St.,* 72 Idaho 49, 51, 236 P.2d 1004, 1005 (1951).

Sections 8-509(b) and 11-103(b) are only inconsistent if the former statute is construed to apply to garnishments for child support obligations directed to the employer of a delinquent parent. If faced with this question, a court could either rule that § 11-103(b) had been impliedly modified by § 8-509(b), or interpret the statutes so as to remove any contradiction. The latter is the preferred course of action. *St. ex rel. Good v. Boyle,* 67 Idaho 512, 523, 186 P.2d 859, 866 (1947); *Golconda Lead Mines v. Neill,* 82 Idaho 96, 101, 350 P.2d 221, 223 (1960).

The clearest means of resolving any conflict would be to limit the application of § 8-509(b) to all garnishments except those specifically addressed in § 11-103(b). Section 8-509 could simply be deemed irrelevant to child support garnishments since that subject matter is covered by § 11-103(b).

We believe that § 8-509(b) must be read in the preexisting statutory context and, therefore, be viewed as applying solely to those garnishments which are not otherwise rendered automatically continuing by prior law. Through this construction, a conflict between the provisions can be avoided and both statutes can continue to coexist. It is, therefore, our conclusion that the "application to the court" cited in § 8-509 is not necessary in child support enforcement efforts aimed at a delinquent parent's employer; this latter class of cases is addressed by § 11-103(b) and garnishments falling within the scope of that section are automatically deemed continuing.

Thank you for your inquiry. If you have any further questions, please do not hesitate to contact us.

Yours truly,

P. MARK THOMPSON
Deputy Attorney General
Chief, Administrative Law and
Litigation Division

PMT:jas

cc: Deborah Kristal
Child Support Enforcement
Department of Health & Welfare

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and

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