

3-8
RECEIVED

MAR 10 2011

DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON, LLP
113 Main Avenue West, Suite 303
PO Box 485
Twin Falls, Idaho 83303
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	
Case No. 39576	)	Subcase Nos. 01-00217, 01-00218,
	)	01-04024, and 01-04025
	)	(Minidoka Power Right)
	)	
	)	Subcase Nos. 01-2068 and 01-4054
	)	(Palisades Power Rights)
	)	
	)	AFFIDAVIT OF TRAVIS L.
	)	THOMPSON RE: SWC'S AMENDED
	)	JOINT MOTION FOR
	)	RECONSIDERATION
_____	)	

STATE OF IDAHO)
) ss.
County of Twin Falls)

Travis L. Thompson, being first duly sworn upon his oath, deposes and states the
following:

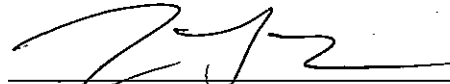
**AFFIDAVIT OF TRAVIS L. THOMPSON RE: SWC'S AMENDED JOINT MOTION FOR
RECONSIDERATION**

1. I am an adult over the age of eighteen and otherwise competent to testify as to the matters set forth herein. I am one of the attorneys representing A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, and the Surface Water Coalition in the above identified subcases.

2. Attached hereto and incorporated herein as Exhibit A is a true and correct copy of Attorney General Opinion 91-7.

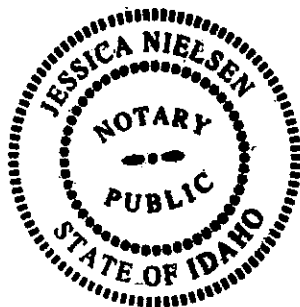
3. Attached hereto and incorporated herein as Exhibit B is a true and correct copy of a November 16, 1966 Letter from then watermaster of Water District 36, Henry C. Eagle.

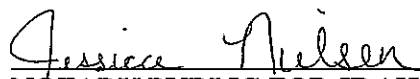
FURTHER YOUR AFFIANT SAYETH NAUGHT.



Travis L. Thompson

SUBSCRIBED AND SWORN to before me this 8 day of March, 2011.





NOTARY PUBLIC FOR IDAHO
Residing at: Twin Falls
My Commission Expires: 4/3/12

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2011, I served a true and correct copy of the foregoing document on the person(s) listed below via First Class U.S. Mail, pre-paid:

Clerk of the SRBA Court
253 Third Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Natural Resources Division Chief
State of Idaho
Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St., MSC 033
Boise, Idaho 83724

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

IDWR Repository
P.O. Box 83720
Boise, Idaho 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Jerry Rigby
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 83440-0250

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Randy C. Budge
Candice M. McHugh
Racine Olson
101 S. Capitol Blvd, Suite 208
Boise, Idaho 83702

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Regional Director – PN Region
U.S. Bureau of Reclamation
1150 N. Curtis Rd., Suite 100
Boise, Idaho 83706-1234

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Adam DeVoe
Brownstein, Hyatt, Farber & Schreck LLP
410 17th Street, 22nd Flr.
Denver, Colorado 80202

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Josephine P. Beeman
409 W. Jefferson St.
Boise, Idaho 83702

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

James C. Tucker
Idaho Power Company
P.O. Box 70
Boise, Idaho 83707

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email



Travis L. Thompson

EXHIBIT A



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720-1000

LARRY ECHOHAWK
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

TELECOPIER
(208) 334-2530

NATURAL RESOURCES
TELECOPIER
(208) 334-2650

ATTORNEY GENERAL OPINION NO. 91-7

TO: Bruce Balderston, CPA
Legislative Auditor
Statehouse
Boise, Idaho 83720-1000

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Define: (a) the nature of Water District 1, (b) its term of existence, and (c) the existence of officers capable of transacting business for the district.

2. Does Water District 1 have responsibility and control over all water bank funds and if so, are these funds subject to the same requirements imposed on other district funds?

3. Does the Committee of Nine, which is the advisory committee for Water District 1, have any control over the use and distribution of any retained water bank funds?

4. Does the watermaster for Water District 1 have authority to invest regular water district funds or water bank funds in common stocks, corporate bonds, mutual funds and other types of equity securities?

CONCLUSIONS:

1. (a) Water District 1 is an instrumentality of the state established by a predecessor of the Director (Director) of the Department of Water Resources, pursuant to Idaho Code § 42-604, for the purpose of assisting the Department in carrying out its responsibility to distribute the public waters of the state in accordance with the rights of prior appropriation.

(b) The term of existence of Water District 1 as an

administrative and geographic unit is continuous from its date of creation until dissolved by order of the Director. Water District 1 is active year-round.

(c) The current officers of Water District 1 are the chairman and secretary whose primary duties are (1) presiding over the annual meeting of the district, (2) transmitting a certified copy of the budget to the Idaho Department of Water Resources (IDWR) and the county auditor in some circumstances, and (3) preparing, maintaining and transmitting the minutes of the meeting to the IDWR. The daily business activities of the district are transacted by a watermaster elected by the water users and appointed by the Director. The watermaster of Water District 1 presently serves as treasurer.

Idaho law provides four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments. Idaho law does not permit the watermaster to act as treasurer for a water district. Thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible.

2. Water District 1 has responsibility and control over water bank funds associated with the operation of the Upper Snake Rental Pool. The funds are of two types, monies held for the benefit of persons leasing water into the rental pool, and monies assessed by the district as an administrative charge on water rented from the Upper Snake Rental Pool. New rules provide that the district must assess a 10% surcharge which is transferred to the IDWR as reimbursement for its costs. The district retains the remainder of any assessment. Water bank funds must be handled in the same manner as other district funds, but must be maintained in a separate bank account. Water bank funds retained by the district can only be used to pay for the district expenses, improvements and projects authorized by Idaho Code § 42-613A and must not be paid to water users or used to reduce assessments to water users.

3. Idaho Code § 42-1765 does not vest in the local committee of a water district, here the Committee of Nine, any responsibilities regarding the collection, investment, or disbursement of water bank funds. The water district retains authority over water bank funds.

4. The watermaster of Water District 1 should not have custody of the funds of Water District 1. Assuming Water District 1 has elected to follow Idaho Code § 42-619, a district treasurer should be elected to have custody of Water District 1 funds and to make disbursements from these funds. The district treasurer is prohibited by the provisions of the Public Depository Law, chapter 1, Title 57, Idaho Code, from investing any district funds in common stocks, corporate bonds, mutual funds and other types of equity securities.

INTRODUCTION

Water District 1 includes all of the area of the state served by water from the Snake River from the Wyoming border to the Milner diversion dam near Twin Falls. The issues you seek guidance on arose in the course of your performance of an audit of Water District 1 requested by state legislators for fiscal years 1988, 1989 and 1990. The issues raised involve the proper handling of funds generated (1) by the assessment of water users to pay for watermaster services, and (2) by an administrative rental pool charge on each acre foot of stored water rented from the Upper Snake Rental Pool.

ANALYSIS:

Question No. 1

The first question asks us to define the nature of Water District 1, its term of existence and the existence of officers capable of transacting business for the district. Your letter states that you are informed by the watermaster that Water District 1 and its officers are active only one day per year at the annual meeting in March, except for the watermaster who also serves as the treasurer for the district.

The existence and operation of state water districts, such as Water District 1, are governed by the provisions of chapter 6, Title 42, Idaho Code, first enacted in 1903. Act of March 11, 1903, 1903 Idaho Sess. Laws 223. State water districts are instrumentalities of the state that exist for the purpose of assisting the IDWR in carrying out its duty under Idaho Code § 42-604 to provide for the distribution of the public waters of the state in accordance with rights of prior appropriation.¹ Idaho Code § 42-602 imposes upon the IDWR a duty

¹ The public waters distributed by Water District 1 provide water for approximately 1.3 million acres of irrigated farm land in the Snake River Plain. Water District 1 is the largest water district in Idaho and is sometimes cited as the largest district of its kind in the country. Records for diversions from the area that became Water District 1 and on file with the IDWR commence

to exercise immediate direction and control over the distribution of water from all of the streams to the canals and ditches diverting therefrom. The doctrine of prior appropriation provides that as between appropriators, "the first in time is first in right." Idaho Code § 42-106.

Idaho Code § 42-604 directs the IDWR to create water districts for each public stream and its tributaries, or other independent source of water supply within the state. The statutory requirement applies only to streams or other water supplies for which the relative dates of priority of appropriation have been determined by court decree. There are currently 108 state water districts in Idaho of which 84 are active in 1991. Once established, a district remains in existence as an administrative and geographic unit until dissolved by a subsequent order of the Director. Depending upon the water distribution needs of the water users, a water district may be active year-round or only during the irrigation season. According to IDWR records, Water District 1 has been active year-round since 1919.

After a water district is established by the IDWR, Idaho Code § 42-605(1) provides that the district shall hold an annual meeting for the purpose of conducting its business. Unless otherwise set by the district, the time for the annual meeting is the first Monday in March of each year. The affected water users consist of all persons owning or having the use of decreed, licensed or permitted water rights in the waters of the stream or water supply comprising the district.

Idaho Code § 42-605(4) requires the water users at the annual meeting to choose a chairman and secretary. The primary duties of the chairman and secretary are to preside over the meeting, to send a certified copy of the approved budget to the county auditor² and IDWR, to keep the minutes of the annual meeting and to forward a certified copy of the minutes to the IDWR. Idaho Code §§ 42-605 and 42-613.

Idaho Code § 42-605(3) also requires the water users to elect a watermaster at the annual meeting. The watermaster must subscribe an oath to faithfully perform the duties of the office. The primary duties of a watermaster are to make reports about the distribution of water to the IDWR, to deliver the water in accordance with the prior rights, and to prepare the annual

in 1912.

² This duty to send the approved budget to the county auditor does not apply to those water districts that elect to proceed under some alternative procedures in Idaho Code §§ 42-618 and 42-619.

(budget for the water district. Idaho Code §§ 42-606, 42-607 and 42-615. Although a watermaster generally serves only during an irrigation season, Idaho Code § 42-608 authorizes the water users to employ a watermaster throughout the year. Water district records on file with the IDWR indicate that the watermaster for Water District 1 has served on a year-round basis since 1919.

The Idaho Supreme Court has held that a watermaster is a public administrative officer who holds office until a successor is elected or appointed and qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927). A watermaster does not serve as an agent of the water users, but is a ministerial officer. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055 (1924).

The last part of your first question asks us to define the officers capable of transacting business for Water District 1. We take your question to mean all the ordinary types of transactions of an operating water district, such as disbursements for expenses and payment of salaries.

Idaho Code § 42-613, previously codified as Idaho Code § 41-513, states the general procedure for adoption of a water district budget, collection of the monies and payment of the expenses. The basic procedure is for the secretary of the water district to prepare a certified copy of the annual budget approved at the annual meeting and to send the certified copy to the county auditor.³ The county auditor then prepares an assessment roll and delivers it to the county treasurer who collects the assessments and deposits the funds collected into a special account. The county treasurer pays the expenses of the water district, including the salary of the watermaster and assistant watermasters, in accordance with the procedures for payment of bills by the county.⁴ The basic concept is for the water district to use existing county officers as its fiscal agents.⁵

In 1947, the Idaho Legislature enacted an optional procedure for the collection of the district budget for water districts

³ The requirement for an annual budget began in 1927, See Act of February 19, 1927, ch. 39, 1927 Idaho Sess. Laws 51.

⁴ Idaho Code § 42-611, repealed in 1989, specifically required the presentment of the bill for watermaster services at a regular meeting of the board of county commissioners.

⁵ The distribution of water on an organized basis began with the Act of March 11, 1903, 1903 Idaho Sess. Laws 223. We are not concerned with the initial collection and disbursement procedures of that act, however, because Water District 1 did not come into existence until 1919.

whose area includes land in more than four counties. Act of January 31, 1947, ch. 11, 1947 Idaho Sess. Laws 11, now codified at Idaho Code § 42-618. In 1969, this alternative procedure became available to all water districts with the enactment of the Act of March 27, 1969, ch. 305, 1969 Idaho Sess. Laws 913.

The relevant language of Idaho Code § 42-618 is as follows:

In water districts the water users, instead of following the provisions of sections 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617, may, at any annual meeting, authorize the watermaster to collect his compensation and that of his assistants, and other expenses of delivering the water of said district to the users thereof, directly from the water users, canal companies, and irrigation district. When so authorized the watermaster shall collect such compensation and expenses directly from the water users. (Emphasis added).

Idaho Code § 42-618 is ambiguous when read in the context of the balance of the chapter. First, this section could be interpreted to mean that the watermaster, if so authorized under Idaho Code § 42-618, has the authority to collect, hold and disburse the assessments collected from water users. This position interprets the phrase "instead of following the provisions of Idaho Code sections 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617" in Idaho Code § 42-618 as an expression of legislative intent to eliminate completely the application of those enumerated sections to water districts that elect to comply with the alternative procedure provided by Idaho Code § 42-618. This position also interprets Idaho Code § 42-618 as authority for the watermaster to collect the monies from the water users directly, to hold the funds, and to disburse the funds, including disbursement to his assistants and to himself. The argument is that, if the watermaster receives his compensation from someone other than himself, the watermaster is not receiving his compensation "directly." This is the current administrative interpretation of the statute by Water District 1 and represents a possible interpretation of an anomalous statute.

Second, as you suggest in your letter, this section may be interpreted as only authorizing the watermaster to collect the assessments of the water district; the county treasurer would still retain the authority to hold and disburse the water district funds in accordance with the general procedures for payment of bills by the county. Since Idaho Code § 42-613 distinguished between collection of assessments and disbursements of district funds, an amendment that only addresses collection could be interpreted as only changing the law regarding collection of assessments. This interpretation of Idaho Code

§ 42-618 is supported by the plain meaning of that section.

Since Idaho Code § 42-618 is ambiguous, we may review extrinsic evidence, such as existing administrative interpretation of statutes, to determine the legislative intent for enactment of that provision. While a long-standing administrative interpretation of a statute is entitled to great weight and will be followed unless there are cogent reasons for holding otherwise, *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979), we must also consider the consequences of this interpretation. *State ex rel. Evans v. Click*, 102 Idaho 443, 447-448, 631 P.2d 614, 618-619 (1981). If the first interpretation, which is the one made by Water District 1, were correct, then Water District 1 would not have to comply with the provisions of the enumerated sections regarding deposit of monies with the county treasurer. The logic of this interpretation would also mean, however, that Water District 1 would not be required to adopt an annual budget as provided in Idaho Code § 42-612;⁶ that the adoption of the budget would not cause the amount allocated to each ditch, canal company, irrigation district or other water user to become a debt thereof as provided in Idaho Code § 42-612; and that Water District 1 would not have specific authority to impose a minimum annual charge per water user.

We conclude that the Legislature did not intend to strip a water district of the powers stated in Idaho Code §§ 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617 simply because a district elects to use the alternative collection procedures of Idaho Code § 42-618. Indeed, this conclusion is bolstered by the fact that Water District 1 has generally complied with the procedures set forth in these enumerated sections, except for the collection procedures of those sections, and that the county treasurer continues to collect the assessments in the counties of Madison, Teton and Fremont for Water District 1. This inconsistent administrative practice undermines the argument that there is a long-standing administrative interpretation of Idaho Code § 42-618.

The first interpretation, which concludes that Idaho Code § 42-618 authorizes the collection, holding and disbursement of assessments by the watermaster, would also be in conflict with Idaho Code § 42-611, which was not repealed until 1989. See Act of April 4, 1989, ch. 286, 1989 Idaho Sess. Laws 710. Idaho Code § 42-611 required the watermaster and his assistants to present a bill for their services to the board of county commissioners. The board then orders a warrant to be issued to the watermaster and assistants. The first interpretation ignores the

⁶ Of course, a water district would not be prohibited from adopting an annual budget.

requirements of Idaho Code § 42-611 and would allow the watermaster to disburse the funds to himself in contravention of this section.⁷ The election of a water district to proceed under Idaho Code § 42-618 does not excuse compliance with Idaho Code § 42-611 because Idaho Code § 42-618 did not make reference to Idaho Code § 42-611.⁸

Idaho Code § 42-618 merely replaced the procedures for collection of monies stated in the enumerated sections with the alternative collection procedures provided by Idaho Code § 42-618. The enumerated sections otherwise remained in effect. Thus, if a water district only elects to proceed under Idaho Code § 42-618, the county treasurer retains the authority to hold and disburse the funds of the water district and not the watermaster.

This interpretation also preserves the division of responsibility that exists under the older and newer statutes between the watermaster and the designated treasurer. In 1989, the Legislature enacted Idaho Code § 42-619, an alternative procedure for the holding and disbursement of water district funds. In water districts for which the county commissioners

⁷ The above legal interpretation of these sections by Water District 1 differs from the actual practice. An agreement between the IDWR and the Committee of Nine regarding watermaster services became effective on March 4, 1979. The practice under this agreement, as we understand it, is for the watermaster of Water District 1 to transmit the monies he collects from the water users to the IDWR. The IDWR then issues checks for the salaries of the watermaster and his assistants. Accordingly, the watermaster has not been issuing the check for his own salary. Finally, the present practice of the IDWR issuing the salary checks to the watermaster further undermines the argument in favor of the interpretation that the watermaster must receive his compensation "directly" without any intervening actors.

⁸ We note that the last sentence of Idaho Code § 42-613 is in many respects duplicative of Idaho Code § 42-611. That last sentence of Idaho Code § 42-613 requires payment of the watermaster and his assistants "in the same manner as bills against the county are paid." Idaho Code § 42-611 provides a specific procedure for presentment to the board of county commissioners and for payment of the watermaster and his assistants. Idaho Code § 42-618 is somewhat anomalous because it lists Idaho Code § 42-613 but does not list Idaho Code § 42-611, even though all of Idaho Code § 42-611 and a portion of Idaho Code § 42-613 concern the same subject--payment of the watermaster and his assistants. The rationale for drafting Idaho Code § 42-618 in this manner is unknown. The existence of this duplication, however, does not change our conclusion.

elect to discontinue the county treasurer's duty to hold and disburse district funds, the water users are required to elect or appoint a treasurer. The statute imposes upon the district treasurer a duty to keep a complete, accurate and permanent record of all funds received by and disbursed for and on behalf of the district. The treasurer is required to deposit all funds of the district in a designated depository approved at the annual meeting, and must comply with the Public Depository Law, chapter 1, Title 57, Idaho Code. The statute also authorizes any water district to elect or appoint a treasurer to exercise the duties provided for in Idaho Code § 42-619 even if the county commissioners have not determined to stop providing the bill paying service for the district. Idaho Code § 42-619(3) and (10).

Under the original disbursement procedure, the county treasurer held and disbursed the funds of the water district. Idaho Code § 42-613. Similarly, under the more recent amendments in 1989, the treasurer of the water district holds and disburses the funds. Idaho Code § 42-619. The county auditor and treasurer collect the water district assessments unless the water district elects to use the alternative procedures of Idaho Code § 42-618; in that case, the watermaster collects the assessments.

Based upon the foregoing review of the applicable statutes, we conclude that the water districts have four options regarding the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments as provided in Idaho Code § 42-613; (2) the county auditor and treasurer may collect the assessments in accordance with the provisions of Idaho Code §§ 42-601 through 42-617, and the water district treasurer may hold and disburse the water district funds in accordance with Idaho Code § 42-619; (3) the watermaster may collect the assessments as provided in Idaho Code § 42-618, and the county treasurer may hold and disburse the assessments as provided in Idaho Code § 42-618; or (4) the watermaster may collect the assessments as provided in Idaho Code § 42-618, and the water district treasurer may hold and disburse the assessments as provided in Idaho Code § 42-619.

Although Water District 1 has apparently elected to proceed in accordance with the alternative procedures of Idaho Code §§ 42-618 and 42-619 described above, we are aware of no formal action adopting these procedures. Further, we note that Water District 1 has not implemented the provisions of Idaho Code § 42-619. For example, the local procedures for Water District 1 do not provide for a water district treasurer. Rather, the management of the monies received is vested in the watermaster with authority to disburse and invest funds. See Rule 4.3 of Water District 1 Rental Pool Procedures, approved by the Committee of Nine on May 29, 1991 and the Idaho Water

Resource Board on May 31, 1991. Since the treasurer's duties necessarily involve oversight of the expenditures of the watermaster, if the watermaster also acts as the treasurer, he holds an office incompatible with his office as watermaster.⁹

We recognize that our conclusions differ from current and past practices of Water District 1 and that a very real problem is how to proceed during the remainder of the present water year in light of this opinion. The next annual meeting of Water District 1 will occur in March, 1992. We recommend against continuing with the present arrangements until the next annual meeting because of the problems we have identified. Instead, the officers of Water District 1 or the Director should arrange for the election or appointment of a treasurer.

Question No. 2

Your second question asks whether Water District 1 has responsibility and control over all water supply bank funds, and if so, whether these funds are subject to the same requirements imposed on other water district funds? The records of the IDWR show that Water District 1 has operated a "rental pool" to facilitate the rental of storage water in the Upper Snake River

⁹ We are not aware of an Idaho Supreme Court decision that specifically adopts the common law doctrine of incompatibility of office as a part of our law, although other states have developed considerable case law on this doctrine. See *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636, 107 P.2d 388 (1940); *Township of Belleville v. Fornarotto*, 228 N.J. Super. 412, 549 A.2d 1267 (1988); 63A Am.Jur.2d *Public Officers and Employees* § 65 at 717-718 (1984). If the question were presented to the Idaho Supreme Court, we believe it would apply the doctrine to the present situation for two reasons: First, it is a part of the common law, and the Idaho legislature adopted the common law as the rule of decision in the courts of this state when not "repugnant to, or inconsistent with, the constitution or laws of the United States" Idaho Code § 73-116. Second, the Idaho Supreme Court would have the same policy concern that resulted in the creation of this common law doctrine in other states. These other states have generally applied the doctrine to prevent one person from holding an office that has a fiscal accounting function with respect to another office which is held by the same person. The obvious purpose of this prohibition is to protect the public monies, and the prohibition reduces the risk of improper use of public funds. Here, one person holds the offices of watermaster and of treasurer for Water District 1. Since the office of treasurer has a fiscal accounting function over the watermaster, the present administration of Water District 1 presents the precise situation that resulted in the initial creation of this common law doctrine.

Basin since the early 1930's. In 1979, the Legislature provided a statutory basis for the rental pool operation by enacting Idaho Code §§ 42-1761 to 42-1766.

These code provisions¹⁰ created the water supply bank to be operated by the Idaho Water Resource Board (Board). The Legislature directed the Board to adopt rules and regulations governing the management, control, delivery and use and distribution of water to and from the water supply bank. Idaho Code § 42-1762.

Idaho Code § 42-1765 authorizes the Board to appoint local committees to facilitate the rental of stored water. The statute provides that a local committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the Board. The Board adopted rules and regulations implementing its water supply bank authority in October, 1980. IDAPA 37.D, *Water Supply Bank Rules and Regulations* (1980). The Board adopted amendments to the *Water Supply Bank Rules and Regulations* on March 22, 1991. Pursuant to Idaho Code § 67-5204 the amended rules went into effect twenty days after being filed with the IDWR.

Rule 6 of the Board's current rules governs the appointment of local committees to facilitate the rental of stored water. The rule requires the local committee to adopt procedures governing the rental of stored water in a manner consistent with the Board's rules. The procedures must include provisions determining the price for water placed into the bank, the price of water rented out of the bank, and a provision determining the amount of the administrative rental pool charge to be paid to the local committee by persons renting water from the bank. IDAPA 37.D.6.1.2,3 and 4.¹¹

The Board by resolution renewed the appointment of the Committee of Nine as the local committee for Water District 1 for a five-year term on May 24, 1988. Previous Board rules did not address how the local committee is to manage the moneys generated by collection of the administrative rental pool charge. Rule 6,1,11 of the newly amended rules requires that local committee procedures provide for the "Management of rental pool

¹⁰ Idaho Code §§ 42-1761 through 1766.

¹¹ IDAPA 37.D.6.2 requires the local committee procedures to require a 10% surcharge for credit to the revolving development account and the water management account established by Idaho Code §§ 42-1752 & 42-1760. Therefore, the total price for water rented from the water bank is the sum of (1) the price paid to the lessor of the water, (2) the 10% surcharge paid to the IDWR, (3) the amount retained by the local committee.

funds as public funds pursuant to the Public Depository Law, chapter 1, Title 57, Idaho Code."

The Legislature in 1986 amended Idaho Code § 42-1765 to restrict how funds generated from the administrative charge may be used. The amendment provides that, "[a]ny proceeds retained by a district shall be used exclusively for public purposes as set forth in section 42-613A, Idaho Code." Idaho Code § 42-613A provides as follows:

42-613A. Proceeds from the lease of stored water -- District retention -- Control and use. Each water district created pursuant to section 42-604, Idaho Code, shall be authorized to retain in a special account the proceeds from the rental of storage water leased under the provisions of section 42-1765, Idaho Code. The account shall not be used to reduce assessments to water users nor shall it be paid to water users in any event. Notwithstanding the supervisory responsibilities of the department of water resources over the activity of water districts, the account shall be under the exclusive control of the water district within which the leased water is stored.

All proceeds from the lease of stored water which are retained by any district under this section shall be used solely for one or more of the following public purposes:

- (1) Expenses of the district.
- (2) Improvements to the district's facilities, including a reasonable reserve for future improvements.
- (3) Educational projects designed to increase public awareness in the area of water distribution, water rights and water conservation.
- (4) Other public projects designed to assist in the adjudication, conservation or more efficient distribution of water.

Idaho Code § 42-613A authorizes a water district to maintain a special account to retain the proceeds generated from its rental pool operation. The statute emphasizes that the account shall be "under the exclusive control of the water district." The Legislature could not have been more specific in its intent. The clearly expressed intent of the Legislature must be given effect. *Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison County*, 107 Idaho 1099, 695 P.2d 1238 (1985). We interpret the language of the statute to require that the funds generated by the district's operation of a rental pool must be maintained by the water district in the same manner as other water district funds are maintained but that use of the funds is limited as provided in the statute.

The statute requires that funds in the special account "shall not be used to reduce assessments to water users nor . . . paid to water users in any event." This requirement places a clear duty upon the water district to ensure that the rental pool funds are not intermingled with the normal operating funds of the district. All funds from the rental of water, other than the administrative charge, are held in trust to be paid to the owners of the water placed into the rental pool. Based upon the specific wording of the statute we conclude that Water District 1 does have responsibility and control over all water bank funds.

Question No. 3

The third question asks whether the Committee of Nine has any control over the use and distribution of retained water bank funds? As previously discussed, the Committee of Nine is the advisory committee for Water District 1.¹² The Committee of Nine is the entity approved by the Water Resource Board to serve as the local committee under Idaho Code § 42-1765.

Idaho Code § 42-1765 describes the role of the local committees in administration of the water bank. Idaho Code § 42-1765 states:

The water resource board may appoint local committees to facilitate the rental of stored water. The committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board. . . .

In exercising its authority under this section, the local rental committee shall determine, in advance,

¹² The Committee of Nine is elected annually by the water users at the annual Water District 1 meeting. The Committee of Nine functions as an executive body representing the interests of the water users throughout the year. The makeup of the Committee is structured so as to provide representation for both stored and natural flow water users throughout the several reaches of the approximately 300-mile stretch of the Snake River from the Wyoming border to Milner Dam. The initial establishment of the Committee of Nine in the spring of 1919 grew out of the need to provide organizational continuity to the complex task of distributing storage and natural flow water rights over the great distance encompassed by the district and to provide for the systematic collection of hydrographic information on the river. See 1919 Annual Report For Water District No. 36. The Commissioner of Reclamation at the time, W. G. Swendsen, approved of the establishment of the Committee of Nine. He also approved of the recommendation of the Committee that the district thereafter be operated on a year-round basis.

at the annual meeting of water users each year, that portion of the proceeds for the year from the lease of stored water to be paid to consenting contract holders of the storage water rights as reimbursement for their costs and that portion to be retained by the district in which the committee is located. Any proceeds retained by a district shall be used exclusively for public purposes as set forth in section 42-613A, Idaho Code. (Emphasis added.)

Idaho Code § 42-1765 does not vest in the local committee of a water district, here the Committee of Nine, any responsibilities regarding the collection, investment, or disbursement of water bank funds. The statute specifically requires the water district to retain authority over the funds and to administer the funds in accordance with Idaho Code § 42-613A.

Question No. 4

The fourth question asks whether the watermaster for Water District 1 is allowed to invest water assessment funds or water bank funds in common stocks, corporate bonds, mutual funds and other types of equity securities? It is apparent that since a water district is defined as an instrumentality of the state by Idaho Code § 42-604, the officers of such districts are subject to the general provisions of law governing the management of funds which come into their possession. This last question involves two issues: [1] What is the role of the watermaster in the management of the funds? [2] What are the authorized types of investments for these funds?

As explained earlier, Water District 1 has elected to proceed under the alternate procedures of Idaho Code § 42-619, which provides for a water district treasurer. The district treasurer has authority to "keep a complete, accurate and permanent record of all moneys received by and disbursed for and on behalf of the district." Idaho Code § 42-619(3). Since the district treasurer has an oversight authority regarding expenditures of the watermaster, that office is incompatible with the office of watermaster. One person cannot hold both positions. *Supra*, at note 9. Therefore, the watermaster has no authority to invest the funds of Water District 1.

Idaho Code § 42-619 requires that the water district treasurer comply with the provisions of the Public Depository Law, chapter 1, Title 57, Idaho Code, (the Act). The Act is designed to safeguard and protect the public moneys of all governmental entities having the power to levy taxes or assessments. The investment of public funds must be made in accordance with the Act even though interest so earned is less

than what might be earned by more speculative investments. *Oversmith v. Highway Dist. No. 2*, 37 Idaho 752, 218 P. 361 (1923). Statutes governing the general powers of governmental entities must be construed *in pari materia* with the provisions of the Public Depository Law. See *Id.*

Idaho Code § 57-105 defines "[p]ublic moneys" . . . [as] all moneys coming into the hands of any treasurer of a depositing unit Therefore, the monies received by Water District 1 as water user assessments or as payments into the water bank are "public monies under the provisions of the Public Depository Law." The district treasurer for Water District 1 must deposit in a designated depository all public monies of \$1,000 or more on hand. See Idaho Code § 57-127 (Supp. 1990). A designated depository in which public moneys may be authorized for deposit includes "any national bank, state bank, trust company, federal savings and loan association, state savings and loan association, federal credit union or state credit union, located in the state" Idaho Code § 57-110 (Supp. 1990). In most instances, the designated depository must be within the boundaries of the depositing unit. See Idaho Code §§ 57-128 and 57-130 (Supp. 1990). The statute contains an exception providing that upon appropriate approval the treasurer may invest surplus or idle funds of the depositing unit in investments permitted by Idaho Code § 67-1210. Section 67-1210 lists the types of investment vehicles authorized for use by the state treasurer in investing idle moneys in the state treasury. The list includes numerous types of obligation type securities issued by federal, state and local governmental entities and public corporations. The list does not, however, include common stocks, corporate bonds, mutual funds or other types of equity securities.

Consequently, Water District 1 is not authorized to invest any district funds, whether generated from water user assessments or water bank activities, in equity securities such as common stocks, corporate bonds or mutual funds.

/ / / /

/ / / /

AUTHORITIES CONSIDERED:

Idaho Statutes

Act of March 11, 1903, 1903 Idaho Sess. Laws 223.
Act of February 19, 1927, ch. 39, 1927 Idaho Sess. Laws 51.
Act of January 31, 1947, ch. 11, 1947 Idaho Sess. L. 11.
Act of March 27, 1969, ch. 305, 1969 Idaho Sess. Laws 913.
Act of April, 4, 1989, ch. 286, 1989 Idaho Sess. Laws 710.
Idaho Code § 42-106.

Idaho Code §§ 42-601 through 619.
Idaho Code § 42-1752.
Idaho Code § 42-1760.
Idaho Code §§ 42-1761 through 42-1766.
Idaho Code § 57-105.
Idaho Code § 57-110 (Supp. 1990).
Idaho Code § 57-127 (Supp. 1990).
Idaho Code § 57-128 (Supp. 1990).
Idaho Code § 57-130 (Supp. 1990).
Idaho Code § 67-1210.
Idaho Code § 67-5204.
Idaho Code § 73-116.
Chapter 1, Title 57, Idaho Code.

Idaho Cases

Bailey v. Idaho Irrigation Co., 39 Idaho 354, 227 P. 1055
(1924).
Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45
(1927).
Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979).
*Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison
County*, 107 Idaho 1099, 695 P.2d 1238 (1985).
Oversmith v. Highway Dist. No. 2, 37 Idaho 752, 218 P. 361
(1923).
State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614,
(1981).

Cases from other Jurisdictions

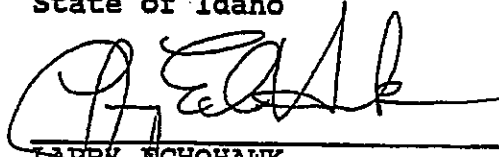
People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d
388 (1940).
Township of Belleville v. Fornarotto, 228 N.J. Super. 412,
549 A.2d 1267 (1988).

Other Authorities

IDAPA 37.D Water Supply Bank Rules and Regulations.
Rule 4.3 of Water District 1 Rental Pool Procedures.
63A Am.Jur.2d Public Officers and Employees § 65 (1984).
1919 Annual Report For Water District No. 36.

DATED this 5th day of August, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho


LARRY ECHOHAWK

Analysis By:

David J. Barber
Deputy Attorney General
Natural Resources Division

Phillip J. Rassier
Deputy Attorney General
Idaho Department of Water Resources

EXHIBIT B



ROBERT E. SMYLLIE, GOVERNOR
R. Keith Higginson
~~CARLTON DEBARK~~
STATE RECLAMATION ENGINEER

STATE of IDAHO
DEPARTMENT OF RECLAMATION
H. C. EAGLE, WATERMASTER
BOX 697
IDAHO FALLS, IDAHO
83401

WATER DISTRICT NO. 3

November 16, 1966

COPY

PARRY, ROBERTSON & DALY
RECEIVED

Mr. John A. Rosholt
Parry, Robertson & Daly
P. O. Box 525
Twin Falls, Idaho 83301

NOV 17 1966
A.M.
7 8 9 10 11 12 1 2 3 4 5 6 P.M.

Dear Mr. Rosholt:

Your letter of November 14 raises question regarding possible flood-water rights for American Falls Reservoir District No. 2. You state that they do not elect to become a party to the pending suit to establish supplementary rights prior to the 1939 Palisades right.

You will note that they were not included on the list of canals entitled to rights which was prepared by Mr. Grandall in 1958. There would, therefore, be no reason for them to take part in the action.

The normal flow right for this district is a complicated one. It is explained in detail in each of the Palisades Contracts under a section entitled "Priority of Certain Existing and Future Water Rights". This right is limited with reference to the status of American Falls storage and would not be affected by the introduction of Palisades Reservoir to the river system. There would be no advantage to obtain a 1939 floodwater decree which would be junior to their present right.

I should be glad to discuss this matter with the above company officials if they feel they are being overlooked in the pending river adjudication.

Very truly yours,

H. C. Eagle

H. C. Eagle
Watermaster

cc: Wm. Burpee
Leonard Graham
Glenn Simmons
W. S. Holden