WD65 File Copy

MEMORANDUM

TO: Helen Bivins, Mark Limbaugh, Bob Sutter and Glen Saxton

FROM: Dave Tuthill DT

DATE: February 15, 1995

RE: Payment of Last-To-Fill Reimbursements for the 1993-1994 Storage Season, Water District 65 Rental Pool

Recently Helen Bivins, Bob Sutter and I met to discuss disbursement from the Water District 65 Rental Pool for the 1994 irrigation season. This memorandum is provided as an explanation for payments relative to application of last-to-fill provisions as applied to the 1993-1994 storage season.

In accordance with the provisions Paragraph 8.1 of the approved Water District No. 65 Rental Pool Procedures (copy attached), the rental fee charged for water used downstream from the mouth of the Payette River is $5.40 per acre-foot. During the year of use, $2.00 per acre-foot is returned to the lessor, $.20 per acre-foot is due the Idaho Water Resource Board (IWRB), and $.50 per acre-foot is the administrative charge.

For the water which fills during the ensuing season, $2.20 per acre-foot plus interest is returned to the renter and $.50 is the administrative charge. For the water which fails to fill during the ensuing season, $2.00 per acre-foot plus interest is returned to the lessor, $0.20 per acre-foot is due the IWRB, and $.50 per acre-foot is the administrative charge.

Application of these parameters to the 1993-1994 storage fill in the Payette River basin has resulted in the computation described in Table 1, attached. Note that these computations will result in the following disbursements from the Water District 65 Rental Pool Account:

Idaho Water Resource Board:	$2,554.50
Idaho Power Company:	$48,900.50 plus interest
Farmer's Cooperative Ditch Company:	$17,539.00 plus interest
Noble Ditch Company:	$1,906.00 plus interest
Lower Payette Ditch Company:	$6,100.00 plus interest
Total Payout:	$77,000.00 plus interest

Table 1

Last to Fill 1993-1994

Water District No. 65 Rental Pool

Company	Acre-Feet	Payment from Rental Pool
Space that Filled		
Farmers Co-op	11,230.5	
Noble	4,047.0	
Lower Payette	6,950.0	
Idaho Power Co.	22,227.5	$48,900.50 + int
(Renter is returned $2.20+int/acre-foot for space that fills)		
Space that did not Fill		
Farmers Co-op	8769.5	$17,539.00 + int
Noble	953.0	$1,906.00 + int
Lower Payette	3050.0	$6,100.00 + int
Idaho Water Resource Board		$2,554.50
(Lessor is payed $2.00+int/acre-foot, and IWRB is payed $0.20, for space that does not fill)		
Total		**$77,000 + int**

PARA 8. RENTAL FEES AND PAYMENTS TO LESSORS:

8.1 The price of Stored Water (including the administrative fee of $0.50/acre-foot) rented from the Rental Pool for use upstream from the mouth of the Payette River is $2.50 per acre-foot plus any surcharge due the Board, under Idaho Water Bank rules and regulations. The price of Stored Water rented from the Rental Pool for use downstream from the mouth of the Payette River is $5.00 plus any surcharge due the Board, with $2.00 per acre-foot being paid to the Lessors, and $2.00 per acre-foot, plus a portion of the surcharge and any accrued interest, returned to the renter if the designated reservoir fills in the following year. In the case that the reservoir does not fill in the succeeding year, the Lessor shall be entitled to receive a payment from the $2.00 per acre-foot and accrued interest in proportion to the storage lost through the restriction associated with paragraph 3.6. The remaining portion of the $2.00 per acre-foot and accrued interest not disbursed shall be returned to the renter. In the case that another rental pool or space holder should lease water for the purpose of arbitrage and consequently seek to secure replacement water from the rental pool, the price shall be the amount charged by that rental pool or space holder plus an additional $0.50 per acre-foot administrative charge.

8.2 Payments to the Lessors shall be made in accordance with paragraph 6 and shall be based upon the data published in the annual report of the Watermaster. Payments to the Lessors shall be considered due and payable once the Watermaster has calculated the actual water used within the District for the annual Watermaster's Report. Payments to the Lessors for water delivered after submittal of the annual Watermaster's Report shall be made when delivery of the water is completed.

8.3 Any administrative revenue in excess of actual costs shall be held in a contingency fund, and may be used for other purposes that the Committee deems to be of benefit to Water District #65, provided, however, that such uses do not conflict with Idaho Public Depository Law, Chapter 1, Title 57, Idaho Code.

8.4 All rental monies shall be maintained in a separate interest-bearing account with accrued interest being distributed on a pro-rata basis at the time payments to Lessors are made.

LAST TO FILL – 1993-94

		AC-FT	
FARMERS –	FAILED TO FILL –	8769.5	($17,539.00)
NOBLE –	" –	953.0	($1,906.00)
LOWER PAMETTE –	" –	3050.0	($6100.00)

COMPANIES GETS $2.00
STATE GETS $ .20 (12,772.5 X.2 =$2,554.5)

			AC-FT
FARMERS	–	FILLED –	11230.5
NOBLE	–	FILLED –	4047.0
LOWER PAMETTE	–	FILLED –	6950.0

IPCO GETS $2.20

22,227.50 X = $48,900.5

TOTAL PAYOUT = $77,000.00

35000 AC-FT (2.20) = $77,000

Copy Sent to M.L.

MEMORANDUM

TO: DAVE TUTHILL DT

FROM: NORM NCY

SUBJECT: WATERMASTER AS LEGISLATOR?

DATE: July 11, 1995

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Phil has given this question a brief review. It is not clear what impact the Little Hatch Act may have on a noncertified employee. Another possible concern is the constitutional separation of powers requirement; ie, a member of the executive branch cannot serve in the legislative or judicial branch. However, it may be possible to run for elective office, if the watermaster duties are divested prior to taking office - see the highlighted portions of the attached court decision.

If Mark is serious about running for office, it would be wise for him to contact the Secretary of State's Office and discuss these matters.

Dave Tuthill
Phil
Let's discuss.
NCY

From: DWR80::DTUTHILL 7-JUL-1995 15:26:21.97
To: DWR03::NYOUNG (NCY)
CC:
Subj: Watermaster as Legislator?

Mark Limbaugh told me that he had been asked to consider running for the state legislature. He has not decided to do so, but wondered about the compatibility of such a position with his job as watermaster. I told him that I would run this one up the flagpole.

On one hand, I am aware of a teacher (public employee) who was a legislator. On the other hand, it could be that the Little Hatch Act prohibits electioneering activities for a person who has the breadth of influence of a watermaster. Regarding compatibility with position duties, the meeting period of the legislature possibly could be worked in with the duties of a year-around watermaster. To me, the concept of another non-attorney functioning as a member of our citizen legislature has some appeal. There could be conflict of interest with an IDWR semi-employee sitting in the legislature, but don't all legislators have similar conflicts depending on their employment?

Your thoughts?

Dave

429 P.2d 419

J. Argyle JORDAN, Plaintiff-Appellant,

v.

C. Kelly PEARCE, Emmette Spraker, and W. H. Jensen, Defendants-Respondents.

No. 9960.

Supreme Court of Idaho.
June 26, 1967.

Accident brought by resident, taxpayer and elector, who was also candidate for office of probate judge, to have declared invalid the declaration of candidacy of probation officer, who sought election to office of probate judge, of county commissioner, who sought election to office of clerk of district court, and of probate judge, who sought election to office of representative to the legislature. The Fifth Judicial District Court, Bannock County, Arthur P. Oliver, J., rendered summary judgment for the defendants, and plaintiff appealed. The Supreme Court, McFadden, J., held that the candidacy of each respondent was valid.

Affirmed.

1. Officers ⇐30

Neither state merit or personnel system nor Hatch Act purports to declare officeholder ineligible to run for another office; they merely purport to apply sanctions against those who so choose to run. I. C. §§ 34–2001, subd. 2, 34–2101, subd. 2, 67–5311, 67–5312.

2. Constitutional Law ⇐70(1)

Where Legislature provided express penalty for violation of "no politics" rule, additional unexpressed penalty could not be presumed. I.C. §§ 67–5311, 67–5312.

3. Officers ⇐30.2

Separation of powers provision of Constitution did not make probation officer ineligible to run for office of probate judge while he was still serving as probation officer. Const. art. 2, § 1; I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

4. Officers ⇐30

Merely running for office cannot be considered as exercising function of that office. Const. art. 2, § 1; I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

5. Officers ⇐19

Section of Organic Act providing that no member of Legislature shall hold any office which shall have been created, or the salary of which shall have been increased, while he was member, during term for which he was elected, and for one year after expiration of such term, was impliedly repealed by the enactment of specific exemptions from operation of the 1907 statute, prohibiting members of state Legislature from being appointed to office created when legislator was holding legislative office. I.C. §§ 49–210, 59–102, 67–4221 and subd. (f); Organic Act, § 8; Const. art. 6, § 2; art. 21, § 2.

6. Statutes ⇐159

Repeals by implication are not favored, but if inconsistency is found to exist between earlier and later enactments, such that Legislature could not have intended the two statutes to be contemporaneously operative, it will be implied that Legislature intended to repeal earlier by later enactment.

7. Clerks of Courts ⇐4

Evidence failed to show that chairman of board of county commissioners was disqualified from running for office of clerk of the district court on ground that he was not "qualified elector." Const. art. 6, § 2; I.C. §§ 34–605, 59–101.

8. Officers ⇐30

Person may not simultaneously hold both office of county commissioner and office of clerk of district court. I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

9. Officers ⇐33

Candidate may be elected to office while under disqualification, provided such disqualification can be and is removed before new term of office begins. I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

10. Officers ⇐27

Only where disqualification for office cannot be cured or where Constitution or statutory provision clearly shows intent that person be disqualified from seeking election can candidacy or election be invalidated on grounds of ineligibility. I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

11. Clerks of Courts ⇐4

Although at time county commissioner ran for office of clerk of district court he was ineligible to hold that office, where his term of office as county commissioner was to expire before commencement of his term of office as clerk of district court, he was not disqualified from seeking election and election could not be invalidated on grounds of ineligibility. I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

12. Officers ⇐30.2

Probate judge who sought election to office of representative to the Legislature could resign from his office of probate judge before the end of the term, thus rendering himself eligible to serve in the state legislature. Const. art. 5, §§ 2, 7; art. 18, § 6; Organic Act, § 9; I.C. §§ 1–702, 31–2001, 59–901, subd. 1, 59–902, subds. 2, 4, 59–905, 59–906.

13. Officers ⇐30.2

Constitutional provision that "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" was applicable only to justices of the Supreme Court, not to a probate judge. Const. art. 5, § 7.

14. Officers ⇐30.2

Nothing contained in canons of judicial ethics creates any disability to run for public office for one who violates the canons by being a candidate for office of state representative while still serving as probate judge. I.C. §§ 34–2001, subd. 2, 34–2101, subd. 2.

15. Constitutional Law ⇐50

Running for Legislature does not involve exercise of legislative powers or any powers peculiar to only one branch of government. Const. art. 2, § 1.

16. Officers ⇐30.2

Separation of powers provision of Constitution did not prevent probate judge from running for legislative office while still holding his judgeship. Const. art. 2, § 1.

17. Judgment ⇐181(1)

Where alleged factual issues were not material to decision, entry of summary judgment was not improper. Idaho Rules of Civil Procedure, rule 56(c).

J. Argyle Jordan, pro se.

Jones, Pomeroy & Jones, Pocatello, for appellee.

McFADDEN, Justice.

During the 1966 election year, respondent-defendant C. Kelly Pearce declared his candidacy and ran for the office of the Probate Judge of Bannock County while still occupying the appointive office of County Probation Officer of that county. During that year respondent-defendant Emmette Spraker declared his candidacy and ran for the office of Clerk of the District Court of Bannock County while still serving as Chairman of the Board of County Commissioners of that county, an elective office, and respondent-defendant W. H. Jensen declared his candidacy and ran for the office of Representative to the Legislature from the representative district of that county while he still served as Probate Judge of that county, an elective office.

J. Argyle Jordan, appellant herein, brought this action in 1966 to have each respondent declared to be ineligible to be a candidate for the respective office he sought. Appellant brought the action as a resident, taxpayer and elector of Bannock County and also as a candidate for the office of Probate Judge. Inasmuch as each respondent has, since instituting this action, been elected to the office he sought, appellant on this appeal now seeks to have each

respondent removed from his office on the ground that his candidacy was invalid. I.C. § 34–2001(2), § 34–2101(2).

Appellant concedes that each respondent has met the express statutory requirements for eligibility to run for office, such as "age, citizenship, residency, sanity, morality, and freedom from criminal activities," but she contends that each of them was ineligible to run for office without first resigning from his respective public office held while he was a candidate. Respondents admit that they did not resign from their offices and that they campaigned for their newly sought offices while still holding their old positions.

Following filing of appellant's complaint, the respondents filed a motion to dismiss, motion for separate trials and motion to strike. The trial court treated the motion to dismiss as a motion for summary judgment, and entered summary judgment dismissing the cause, from which judgment appellant perfected this appeal. Since the parties have dealt with the problems incident to each respondent separately, we shall do likewise.

C. KELLY PEARCE

Appellant's first contention is that respondent Pearce was ineligible to run for the office of probate judge while serving as a probation officer because of the provisions of both the state merit or personnel system (I.C. § 67–5311; Merit System Rule XV, § 1, P. 34), and by the Federal Hatch Act, in particular 5 U.S.C.A. § 118k(a) and (f). Both of these statutes, if applicable to Pearce, would prohibit him from taking active part in political campaigns and presumably from running for office.

[1, 2] Although the District Court in its memorandum opinion determined that respondent Pearce was not subject to the provisions of the law pertaining to the state merit or personnel system or to the Hatch Act, we find it unnecessary to discuss their applicability to Pearce. Neither piece of legislation purports to declare an office holder ineligible to run for another office; they merely purport to apply sanctions against those who so choose to run. I.C. § 67–5312 provides that anyone subject to the state personnel system who violates the "no politics" rule of I.C. § 67–5311 and the Merit System Rule XV shall be guilty of a misdemeanor. Appellant does not contend that conviction of a misdemeanor would render respondent Pearce ineligible to run for the office of probate judge. Since the legislature provided an express penalty for violation of the "no politics" rule, an additional unexpressed penalty cannot be presumed. State v. Fair Lawn Service Center, 20 N.J. 468, 120 A.2d 233 (1956). The Hatch Act, 5 U.S.C.A. § 118k(b), provides for withholding of federal funds from states that permit violators of the Act to stay in their old jobs in the face of federal demands that they be removed. The Act does not purport to say who is eligible for state office. Since neither the state merit or personnel system nor the Hatch Act gave appellant a cause of action against anyone to have his candidacy declared invalid, it becomes unnecessary to determine whether the two legislative enactments were applicable to respondent Pearce.

Appellant's second contention is that Idaho Const. art. 2, § 1, rendered Pearce ineligible to run for the office of probate judge while still serving as a probation officer. This constitutional provision reads:

> "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."

[3, 4] Although appellant asserts that as probation officer, Pearce was exercising executive powers and that by campaigning for the office of probate judge he was seeking to exercise judicial powers, it is self-evident that merely seeking the office of probate judge as a candidate does not in-

volve the exercise of judicial powers. Appellant further advances the theory that campaigning for office is one of the functions of the office campaigned for. However, merely running for office cannot be considered as exercising a function of that office.

EMMETTE SPRAKER

Appellant contends that the candidacy of respondent Spraker was invalid because he was seeking the office of Clerk of the District Court while he was still a County Commissioner. She cites Article 8 of the Organic Act of the Territory of Idaho, which provides:

> "Members of legislature—Restrictions on holding other public office.—No member of the legislative assembly shall hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased, while he was a member, during the term for which he was elected, and for one year after the expiration of such term; but this restriction shall not be applicable to members of the first legislative assembly; and no person holding a commission or appointment under the United States, except postmasters, shall be a member of the legislative assembly, or shall hold any office under the government of said territory."

Appellant then reasons that at the time Section 8 was enacted, the territory of Idaho had no counties; that when counties were later formed, county commissioners were delegated some of the powers formerly exercised by the legislative assembly, including the power to fix the salary of the clerk of the district court, and hence the prohibition set forth in the foregoing Section 8 thus applies to county commissioners. Appellant then points out that in the first year of Spraker's latest term of office as a county commissioner, he was instrumental in having the commissioners approve a sizeable salary increase for the clerk of the district court.

Respondent Spraker in turn points out that Section 8 of the Organic Act, supra, was not included in the Idaho Constitution, which however, does provide in Article 21, § 2:

> "All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature."

Even assuming that Section 8, supra, did not expire by its own limitation, and further assuming appellant's ingenious extension of that section to apply to county commissioners to be valid, it is our conclusion that the district court correctly determined that the legislature intended to repeal that section by enactment of subsequent legislation covering the same subject. Idaho Const. Art. 21, § 2.

[5, 6] In 1907 the legislature enacted what is now I.C. § 59–102, which prohibits members of the state legislature from being appointed to an office created when said legislator was holding legislative office, under penalty of being found guilty of a misdemeanor and subject to fine in an amount not less that $500 nor more than $5,000. Counties, of course, existed at the time of enactment of I.C. § 59–102, which dealt with the same evil as Section 8 of the Organic Act, although in a somewhat different manner. This evidences an intent to repeal Section 8, if it were still in existence. In 1952, in Extraordinary Session, the legislature enacted an act designated the "Idaho Motor Vehicle Reciprocity Act" which, among other things by I.C. § 49–210, provided that the provisions of I.C. § 59–102 "shall have no application to the provisions of this act * * *." In 1965 the legislature enacted I.C. § 67–4221, pertaining to the "Park Board" and its membership, appointment and terms of members thereof. Subdivision (f) of I.C. § 67–4221 exempted the provisions of that section from the provisions of I.C. § 59–102. Had Section 8 of the Organic Act remained in force during 1952 and 1965, the specific exemptions from the operation of I.C. § 59–102, as contained in I.C. § 49–210 and § 67–4221, would be meaningless. It is our conclusion that even

if enactment of I.C. § 59–102, did not effectively repeal the provisions of Section 8 of the Organic Act pursuant to Idaho Const. Art. 21, § 2, it was accomplished by the enactment of the two "exemption" provisions above mentioned.

> "Repeals by implication are not favored; but if inconsistency is found to exist between the earlier and the later enactments, such that the legislature could not have intended the two statutes to be contemporaneously operative, it will be implied that the legislature intended to repeal the earlier by the later enactment." (Citations omitted.) State v. Davidson, 78 Idaho 553, 559, 309 P.2d 211, 215 (1957).

[7] Appellant also contends that Spraker was ineligible to run for the office of clerk of the district court because he was not a qualified elector. However, Idaho Const. Art. 6, § 2, states:

> "Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; * * *."

Appellant does not point out any provisions of the constitution which would disqualify Spraker as an elector, nor any facts which reflect any disqualification. I.C. § 34–605 provides in part:

> "Any person legally qualified to hold * * * office is entitled to become a candidate for office, * * *."

And I.C. § 59–101 provides:

> "Every qualified elector shall be eligible to hold any office of this state for which he is an elector, except as otherwise provided by the constitution."

Appellant has failed to point to any additional qualifications required by the legislature, and hence we must conclude that respondent Spraker was not disqualified from running for office on the ground that he was not a "qualified elector."

[8–11] It is true that Spraker could not simultaneously hold both the office of county commissioner and clerk of the district court. Technically, therefore, at the time he ran for the office of clerk of the district court he was ineligible to hold that office; but his term of office as county commissioner expired before commencement of his term of office as clerk of the district court. Under Idaho law, a candidate may be elected to an office while under disqualification, provided such disqualification can be and is removed before the new term of office begins. Bradfield v. Avery, 16 Idaho 769, 102 P. 687, 23 L.R.A.,N.S., 1228 (1909). It is only where the disqualification cannot be cured or where the constitution or statutory provision clearly shows an intent that a person be disqualified from seeking election that candidacy or election can be invalidated on the grounds of ineligibility. Bradfield v. Avery, supra, 16 Idaho at 774–776, 102 P. 687, 689.

> "* * *. The word 'eligibility' as used in connection with an office or the person to be elected to fill an office has been variously defined by the courts and various constructions given to the use of such word with reference to whether the same applies to the election to office or the induction into office. The authorities upon both sides of this question are cited in 29 Cyc. 1376, and 10 Ency. of Law, pp. 970, 971. We are satisfied that the better reason is with the proposition that where the word 'eligibility' is used in connection with an office, and there are no explanatory words indicating that such word is used with reference to the time of election, it has reference to the qualification to hold the office rather than the qualification to be elected to the office." (Citations omitted.) 16 Idaho at 774, 102 P. at 689.

We conclude that respondent Spraker's candidacy was valid, and that I.C. § 34–2001 which authorized the contest of an election of any person to public office on the

ground: "2. When the incumbent was not eligible to the office at the time of the election", is of no avail to appellant.

W. H. JENSEN

Appellant contends that respondent Jensen, already holding the office of probate judge, was ineligible to be a state representative when he declared his candidacy for that office thus rendering his declaration of candidacy void. This is the same argument made in reference to respondent Spraker. Bradfield v. Avery, discussed supra, is controlling against appellant here.

Appellant, however, points out that Jensen's term as state representative began December 1, 1966, (Idaho Const. Art. 3, § 3), while his term of office as probate judge did not expire until January, 1967. Appellant cites Section 9 of the Organic Act with the following emphasis:

"Sec. 9. *Territorial Courts—Jurisdiction and Powers.*—The judicial power of said territory shall be vested in a Supreme Court, district courts, probate courts, and justices of the peace. The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually and they shall hold their offices during a period of four years, *and until their successors shall be appointed and qualified.* * * *."

Appellant calls attention to the similarity of that provision with Idaho Const. Art. 5, § 2, emphasizing that "The courts shall constitute a unified and integrated judicial system for administration and supervision by the Suppreme Court." She then refers to I.C. § 1-702, pointing out that the term of office for a district judge is four years and that when a new district judgeship is created, such judge holds office until the next general election, and "until his successor is elected and qualified." She concludes that by inference these provisions are applicable to probate judges and thus Jensen automatically was ineligible for office on December 1, 1966, because he had to serve as probate judge until after expiration of his term and until his successor was elected and qualified and could not resign from that position. From the statutory provisions themselves, they are inapplicable to respondent Jensen as probate judge. Sec. 9, Organic Act applied only to justices of the territorial Supreme Court, now extinct, and I.C. § 1-702 applies only to appointed district judges.

[12] Not only do the statutes fail to prohibit a probate judge from resigning before his term is over, but they expressly permit such resignation. I.C. § 59-901 provides:

"Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

1. The resignation of the incumbent.

2. * * *."

I.C. § 59-902 provides:

"Resignations of civil offices must be in writing, and may be made as follows:

1. * * *.

2. * * * by judges of the Supreme Court and district courts, * * * to the governor.

3. * * *.

4. By all county and precinct officers, to the county board; * * *."

Idaho Const. Art. 18, § 6, and I.C. § 31-2001 enumerate the "county officers" and include the office of probate judge in that category. I.C. §§ 59-905 and 59-906 provide that vacancies in county offices shall be filled by appointment of the county commissioners. See: Annot.: 19 A.L.R. 39, 40. Thus respondent Jensen could resign from his office of probate judge before the end of the term, thus rendering himself eligible to serve in the state legislature.

[13, 14] Appellant further contends that even if Jensen could resign, he would be ineligible to assume his new position as long

as his unexpired term lasted, citing Idaho Const. Art. 5, § 7:

> "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."

We must agree with the trial court's conclusion that this provision is applicable only to justices of the Supreme Court, and not to Jensen as a probate judge. Appellant asserts also that Respondent Jensen violated the canons of judicial ethics (Canon 30, Judicial Ethics) by being a candidate for office of state representative while still serving as a probate judge. However, nothing therein contained creates any disability for one who should violate such canon.

[15] Appellant also claims that respondent Jensen was prevented from running for legislative office while holding a judgeship by Idaho Const. Art. 2, § 1, supra, guaranteeing separation of powers. However, as above held, running for the legislature did not involve the exercise of legislative powers or any powers peculiar to only one branch of government. Appellant's contentions being without foundation, it is our conclusion that respondent Jensen's candidacy was valid.

[16] In her reply brief, appellant claims that several points presented by respondents and considered by this court should not have been so considered in the absence of a cross-appeal by respondents. A careful reading of respondent's brief reflects, however, that the points presented were by way of citations of law, statutes and constitutional provisions, and they presented no issues requiring any cross-appeal.

[17] Appellant also contends in her reply brief that there are material facts which are in dispute and hence entry of summary judgment without trial of the disputed facts is improper. The alleged factual issues were not material to this decision, i. e., whether respondent Pearce was subject to the state merit system or the federal Hatch Act, and hence there was no error in that regard to entry of summary judgment. I.R.C.P. 56(c).

The summary judgment below is affirmed as to all three respondents. Costs to respondents.

TAYLOR, C. J., SMITH and SPEAR, JJ., and BURTON, D. J., concur.

429 P.2d 425

STATE of Idaho, Plaintiff-Respondent,
v.
Phillip MOWREY, Defendant-Appellant.
No. 9825.

Supreme Court of Idaho.
June 29, 1967.

Defendant was convicted in the District Court, Bonner County, Robert E. McFarland, J., of failure to furnish necessaries for a minor child, and he appealed. The Supreme Court, Spear, J., held that since the information failed to allege that the offense was committed within the jurisdiction of the court, it failed to state facts sufficient to confer jurisdiction upon the District Court to try the defendant.

Reversed.

1. Criminal Law ⇐106

Questions of venue in criminal cases are not merely matters of formal legal procedure but raise issues of public policy in the light of which legislation must be construed.

2. Indictment and Information ⇐86(1)

Where an information fails to allege that the offense was committed in the state and within the jurisdiction of the court, it fails to state facts sufficient to confer jurisdiction on district court of county in which it is filed to try defendant.

WD 65___

MEMORANDUM

TO: D. Tuthill, Manager Western Region

FROM: J. Westra

DATE: November 27, 1995

RE: Lake Reservoir Company--Reservoir Storage Volumes

The following is information that was available in the Department files regarding storage volumes for the reservoirs in the McCall area:

Box Lake Reservoir
Active Storage--1295 ac-ft. (per Dam Safety File).
Surface Area--145 ac.
Active Storage Height--7.6 ft. (Dept. survey 1993)
Payette Decree #65-10520: 1300 ac-ft.

I could not find any documentation in the Department records where this volume evolved. Checked with the Forest Service (1993), they found no records.

Granite Lake
Active Storage--2800 ac-ft (per design plans 1960, attached)
Surface Area--195 ac.
Active Storage Height--Approx. 20 ft.
Payette Decree #65-10519: 200 ac-ft.
#65-02919: 2600 ac-ft.

Documentation for volumes are design plans and dam safety records.

Upper Payette Lake
Active Storage-- 3000 ac-ft (Dept. Dam Safety)
2400 ac-ft (Engineer Field Exam Report 1959)
2026 ac-ft (Dept. survey 1993)
Surface Area-- 315 ac. (Dam Safety)
300 ac. (Engineer Report 1959)
321 ac. (Dept. survey 1993)
Active Storage Height-- 8 ft.
Payette Decree #65-2918: 2400 ac-ft.

A survey was completed in 1993 by the Dept., attached.
No other documentation found

Big Payette Lake
Active Storage--27750 ac-ft.
Surface Area-- 5337 ac.
Active Storage Height-- 8.2 ft.
Payette Decree #65-2278: 27750 ac-ft.

Forest Service Topo map attached.