

**County Commissioners' Meeting Agenda**  
**Monday, May 12, 2014 - 8:30am**  
150 Courthouse Drive, Driggs, ID – 1<sup>st</sup> Floor Meeting Room



8:30 **Meeting Called to Order** – Kelly Park, Chair  
*Amendments to the agenda.*

**Monthly EODH (Elected Officials Department Head) Meeting**

1. Office Updates
2. Strategy for FY 2015 Merit Raises

9:30 **Open Mic** - *Public opportunity to address the board*

**Department Business**

Emergency Services – Greg Adams

Public Works – Jay Mazalewski, Engineer

1. Solid Waste
  - a. City of Driggs Tipping Fee Waiver
  - b. RFB-Solid Waste Hauling Services
  - c. RAD 6-month fee waiver (*cont. 4/28*)
2. Road & Bridge
  - a. RFB- Equipment/Chip/Material Hauling
  - b. Pneumatic Tire Roller Purchase
  - c. Bates Rd Extension/Ripplinger Sealcoat Request
  - d. W7000S/W8000S Sealcoat
  - e. Irrigation Culverts

Planning & Building – Jason Boal, Administrator

1. Hastings Farm – Minor Plat Amendment

**Recess @ 10:45am – Criminal Justice Meeting**

**Reconvene ~ 2:15**

LEC

1. Progress Report – Tom Davis
2. Artwork Selection
3. Open House
4. Future IT & Maintenance Needs & Oversight

**TBD Administrative Business** *will be dealt with as time permits*

1. Approve Available Minutes
2. Other Business
  - a. Bleacher Update
3. Committee Reports
4. Claims

**ADJOURN**

Upcoming Meetings

- May 12 – 6:00pm Work Session – DRAFT Recreational Plan  
May 14 – 10- 12noon IAC Webinar: Legislative Session Review  
May 16 – 2 – 5PM LEC Open House  
May 26 – CLOSED Memorial Day  
May 27 – 9:00am Regular Meeting of Board (Tuesday)  
June 9 – 8:30am EODH Meeting; 9:30am Regular Meeting  
June 23 – 9:00am Regular Meeting  
June 26 – 9:00am Board of Equalization



# Teton County

## Emergency Management &

### Mosquito Abatement

Department Report 4/9-5/8/2014

Greg Adams, Coordinator/Director

#### **Teton Creek Grant Project Update**

Major construction is finished for the project. The total amount spent on the project to date, (including all match) is \$1,249,616.70. 95% of the project tasks have been completed, along with most of our match obligations.

#### **Projects Accomplished**

The Law Enforcement Center move is finally over. However we still have a few things that we are finishing up. Last week we got the additional security cameras installed. Our wireless data project is partially done, with the main connection between the LEC and the courthouse completed, however Clark Wireless hasn't been able to finish up the other connections because of the weather. The body cooler for the coroner is finally finished, and we were able to get the majority of the installation charges paid with a grant from our regional ASPR group, and Tim paid the remaining amount. The Fire District, especially Scott Wood deserves our appreciation for all of their help in removing the old tower. Scott, 3 firemen and I took 2 days to remove it and saved the County about \$10,000 that it would have cost to have a contractor remove it. They have also assisted us several times in getting equipment on our new tower.

On April 23<sup>rd</sup>, Rob Veilleux, Bonnie Burlage, Ann Layola, and I participated in a multi-region tabletop exercise in Pocatello. Our region, as well as the Pocatello and the Twin Falls regions were there. This was the first time in my 10 years in Emergency Management that a multi-regional exercise like this has taken place. It was based on an earthquake scenario and focused on how the regions could come together to assist the impacted areas. They are hoping to do a full scale exercise on this scenario and with this group in 2 or 3 years. It was a great opportunity to come together and work with partners that we don't often see.

The Planned Event Ordinance that we have been working on in the Local Emergency Planning Committee has been adopted by the City of Victor, and I presented it to the City of Teton on the 14<sup>th</sup>. I will be presenting it to Driggs, following up with Teton, and getting it ready for the County as soon as I can.

#### **Future Projects**

On June 6<sup>th</sup> and 7<sup>th</sup> we will have a regional exercise at the Rexburg High School. So far 14 people from the County and myself have signed up to participate.

The Idaho Bureau of Homeland Security staff that oversees the State's Critical Infrastructure and Key Resources (CIKR) program will be coming to meet with me next week to discuss the best ways for our County to identify our local CIKR. I have been trying to get them out here for about 5 years, so it will be great to finally get some direction from them on that subject.

#### **Future Appointments**

- 5/13 Critical Infrastructure meeting with the State 9 to 11
- 5/14 Mosquito Abatement District meeting 6:30 to 8:30
- 5/15 ARES/RACES ham radio meeting 7 to 8:30
- 5/20 Eastern Idaho Volunteer Organizations Active in Disasters meeting in IF 2:30 to 5
- 6/3 Teton County Radio/LEPC meeting 2:30-5
- 6/6-7 Ragin Stagin regional exercise in Rexburg



WK: 208-354-3442  
CELL: 208-534-8710

**Teton County**  
**Solid Waste & Recycling**

1088 Cemetery Rd  
Driggs, ID 83422

May 9, 2014

TO: Board of County Commissioners  
FROM: Saul Varela-Solid Waste Supervisor  
SUBJECT: Solid Waste & Recycling Update

The following items are for your review and discussion at the May 12, 2014 meeting.

1. Discovery of Dynamite in Household Garbage Bins(see attached pictures)

On Saturday the 3<sup>rd</sup> of May (after closing hours) the staff was dumping/inspecting the bins into the garbage transfer building. Sticks of dynamite were discovered in two separate bins. The garbage transfer building was evacuated and the staff contacted the sheriff's office and fire department. At that time the solid waste staff stayed to make sure the proper authorities had all the information that could be provided by TCSW&R staff. Idaho Falls Bomb Squad was dispatched to the transfer station to dispose of the dynamite. After the Idaho Falls Bomb Squad inspected the dynamite, they determined that the dynamite was not real and was some type of prop. I want to thank the Teton County Sheriff's office, Teton County Fire & Rescue, and all other parties involved in this situation and helping resolve the situation including John Marley of the Idaho Falls Police Regional Bomb Squad and his team.

2. TCSW&R Volvo Contract expires on July 14<sup>th</sup> of 2014

The Contract on the Volvo L60 used by TCSW&R is coming to the final and buyout payment on July 14<sup>th</sup> of 2014. We are currently exploring all options as to what the best approach will be for the County as to whether this loader should be purchased, sign new lease on the same loader or sign a lease on a different piece of equipment.

3. Inspection of Animal Composting(See attached Pictures)

On April 16, 2014 TCSW&R performed the first inspection on the Animal Composting that was started in September of 2013. The conclusion is that butcher waste will break down fairly quicker than whole animal waste. The only material that was present in the butcher waste piles after six months were big bones, there was no evidence of any other types of materials in the pile and the odor was that of wet chips only. The full bones left in these piles will be added to new piles so that they can have enough time to break down completely.

The Whole animal waste piles were not as far in the composting stage. One pile of small animal waste still had fur/hide fully intact and obviously needed more time to break down. The last pile inspected was of full size cow and that had hide, bones and other materials that were still intact as well.

We believe that the whole animals will take a minimum of approximately nine months to fully break down and compost, where butcher waste will only need six months for the same type of breakdown.

4. Landfill Leachate Pond

The Leachate pond at the Landfill began flowing around the middle of April. On April 29<sup>th</sup> there was approximately 800 gallons of Leachate water pumped out and added to the holding tank located north east of the household garbage transfer building. Currently the pipe has a steady slow stream draining into the pond.

ACTION ITEMS:

1. City of Driggs: Community Cleanup Tipping Fee Waiver Form (See Attached Waiver)

The City of Driggs is requesting a waiving of fees for their city wide road side clean up that will be held on May 17<sup>th</sup>. The City of Driggs is planning on having the City's vehicles deliver the garbage collected from this community clean up to the transfer station. They are asking to have the fees waived for the 17<sup>th</sup> and the 20<sup>th</sup> of May to allow them enough time to dispose of the collected garbage. The City of Driggs would have made this request earlier to meet the one month notice prior to the event, but they were not aware of this being an option for them.

Recommended Motion:

**I move to approve the waiver of tipping fees for the City of Driggs for the 17<sup>th</sup> and 20<sup>th</sup> of May.**

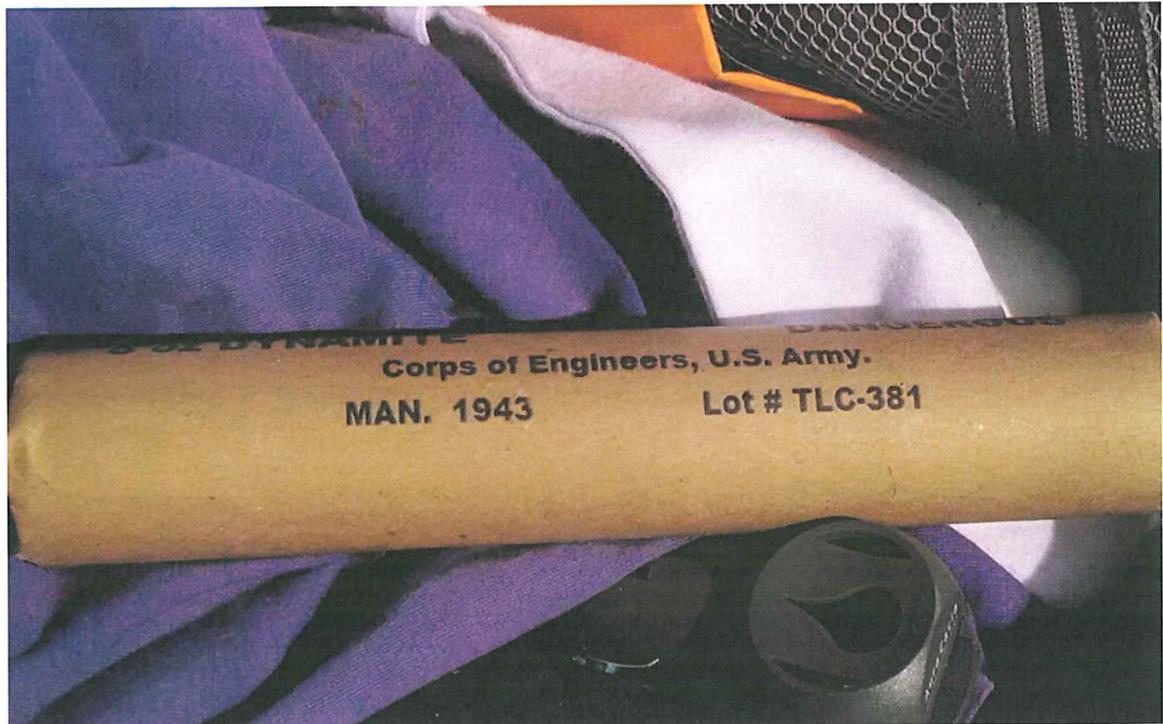
2. RFBs Due on May 09,2014 for Solid Waste Hauling

Bid Results are due on Friday, May 09<sup>th</sup> for Solid Waste Hauling to Circular Butte. We will present the bid results to the BOCC at Monday 12<sup>th</sup>, 2014 meeting. At that time we will make our recommendation for award of contract.

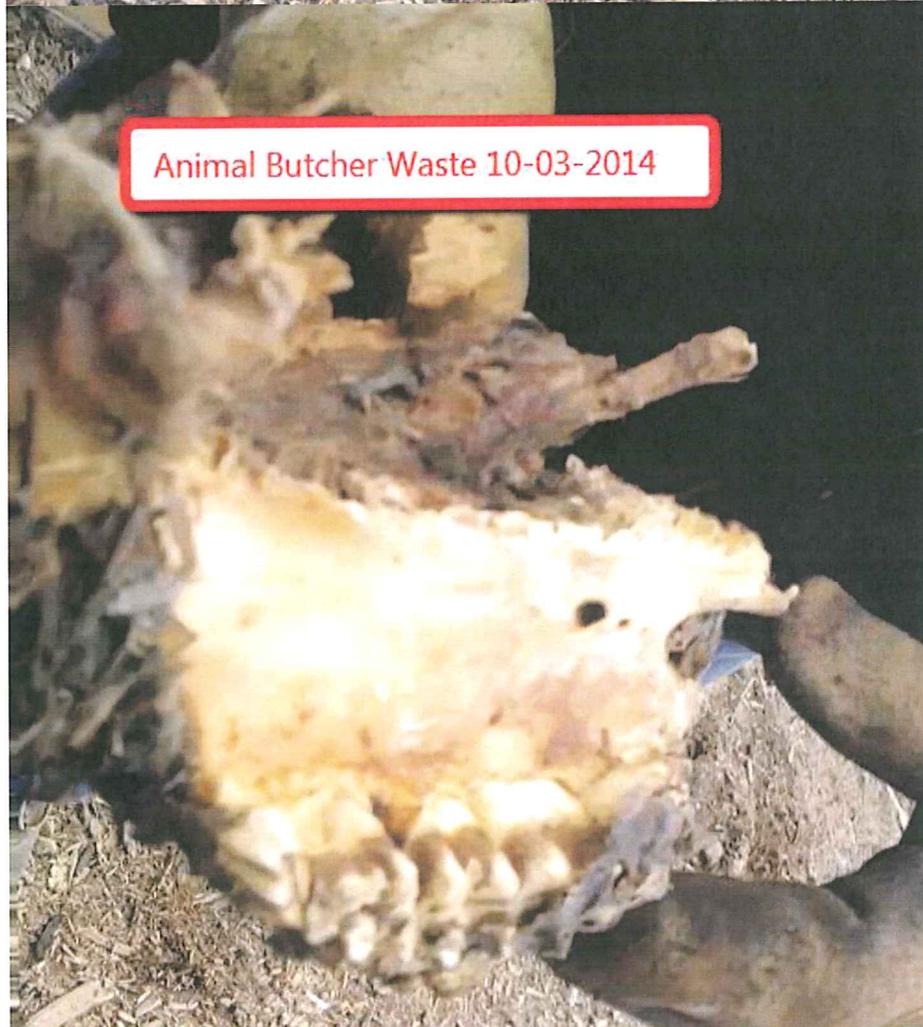
TETON COUNTY SOLID WASTE TETON COUNTY, IDAHO SOLID WASTE SUPERVISOR 150 Courthouse Drive Driggs, ID 83422			Project: 2014 Trucking Subject: Bid Comparison By: JTM Date: 5/9/2014			
note price is per haul	<b>Crapo</b>			<b>Action</b>		
	Tonnage	Cost	Cost/ton	Tonnage	Cost	Cost/ton
Trash Hauling						
No Restrictions	23	\$ 373.00	\$ 16.22	23.6	\$ 345.00	\$ 14.62
Partial Restrictions	23	\$ 405.00	\$ 17.61	23.6	\$ 374.00	\$ 15.85
Full Restrictions	20	\$ 405.00	\$ 20.25	23.6	\$ 407.00	\$ 17.25

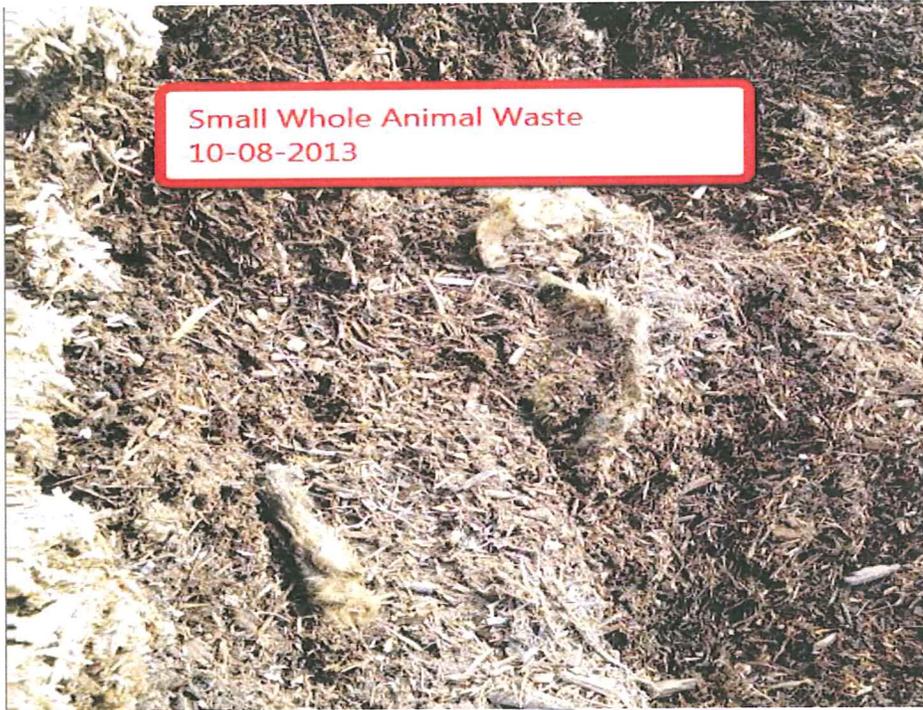
Recommended Motion:

**I move to award and contract to the low bidder ACTION EXCAVATION LLC. for Solid Waste Hauling Services.**

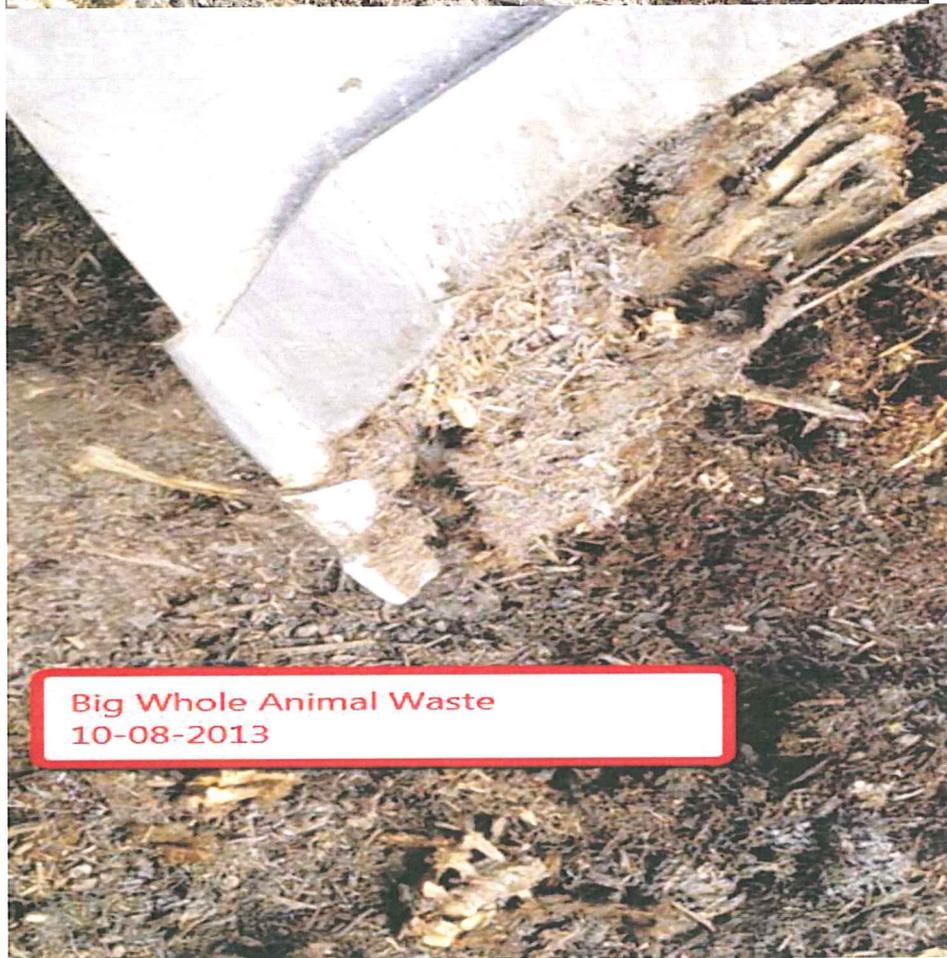








Small Whole Animal Waste  
10-08-2013



Big Whole Animal Waste  
10-08-2013



scarehouse: 208-354-3442  
Supervisor: 208-354-3443

Teton County  
Solid Waste

scarehouse: 1088 Cemetery Rd.  
150 Courthouse Dr.  
Driggs, ID 83422

### Community Cleanup Tipping Fee Waiver Form

Organization Requesting Waiver: City of Driggs

Contact Person: JARED COUNDERSON

Contact Phone Number: 390-1709 Contact Email: Pwdriggs@ida.net

Date of event: may 17 - 20

Area to be cleaned: City wide Road Side clean up

Identifying marker or vehicles bringing waste to the transfer station: (for example: company logo, license plate, driver's name, etc.)

City of Driggs vehicles bring bag trash on may 20 to Teton County Solid Waste Site

#### Criteria for Approval and Accepting Waste:

1. Request must be made at least one month prior to the event.
2. Only waste normally accepted by the transfer station will be accepted. For example no household hazardous waste will be accepted.
3. Waste will only be accepted at no charge from vehicles identified in the application.
4. Waste will only be accepted at no charge on the day specified in the application.

County Use Only:

Date Application Received: \_\_\_\_\_

Date Application Presented to BoCC: \_\_\_\_\_

Application Approved: \_\_\_\_\_

Date Applicant Notified of BoCC Decision: \_\_\_\_\_

From: Dave Hudacsko RAD [mailto:dave@theradrecyclers.com]  
 Sent: Thursday, May 08, 2014 5:48 PM  
 To: Dawn Felchle; Aaron Hamby - RAD  
 Subject: Re: Agenda Monday

Dawn  
 Please provide this to the County commissioners for the BOCC meeting on Monday for the RAD section.  
 - data points provided by Teton County have been highlighted in blue

**Landfill Bound vs. Recyclable Materials**

\* color indicates data was provided by Teton County

	Landfill bound	Diverted
2013 Total Tons	7095.81	
Percentage of Volumes	77%	23%
Tonnage Derivatives	5463.7737	1632.0363
Net Cost/Ton to manage factors in all expenses and revenues	\$ (76.00)	\$ (20.00)
Costs in 2013	\$ (415,246.80)	\$ (32,640.73)

**74%** Landfill bound waste is 74% more expensive for the county to manage compared to recyclable materials

2013 Estimated Transfer Station Expenses: \$ (447,887.53)

**Potential Financials associated with a 2% Diversion Increase**

		Differences
Total Tons	7095.81	
Percentage of Volume	75%	25%
Tonnage Derivatives	5321.8575	1773.9525
Cost/Ton	\$ (76.00)	\$ (20.00)
Costs in 2013	\$ (404,461.17)	\$ (35,479.05)
Total Expenses:	\$ (439,940.22)	
<b>Reduced Expenses by:</b>	<b>\$ 7,947.31</b>	

2.0% increase in diversion  
 141.9162 increase in tons diverted



WK: 208-354-0245  
CELL: 208-313-0245

**Teton County Engineer**  
**MEMO**

150 Courthouse Drive  
Driggs, ID 83422

May 8, 2014

TO: Board of County Commissioners  
FROM: Jay T. Mazalewski, PE  
SUBJECT: Public Works Update

The following items are for your review and discussion at the May 12, 2014 meeting.

SOLID WASTE

*See attached report from the Solid Waste Supervisor*

1. Landfill Cap Update:
  - a. DEQ accepted the submitted cap remediation timeline.
  - b. I am meeting with Forsgren the week of May 19 to review the preliminary engineering report and Forsgren is planning to update the BoCC on May 27.

ROAD & BRIDGE

1. R&B crews have begun patching pothole as the weather permits. The majority of roads throughout the county have been graded at least once. Some sections of roads are too wet to grade and will be graded once they dry out.
2. Smaller streams are beginning to see water and we should start experiencing minor flooding if this weather pattern continues.
3. We will be finishing up the gravel overlay on S1000E as weather permits and will then move to the E4000S gravel overlay project. The E4000S project include some shoulder/drainage improvements. Once Rammell Mountain Road dries out, we will continue the reconstruction project (approximately 0.5 miles remaining).
4. Asphalt Maintenance has 2.4 miles of crack sealing remaining.
5. On Wednesday, May 7 R&B spent 10hrs hauling approximately 620 CY of material to the fairgrounds for the bleacher pad (62 loads). This took 9 staff members, 6 trucks, 2 loaders (including SW Loader) and a motergrader. We backhauled 60 loads of overburden/topsoil.
6. The 2014 R&B Project Map has been updated on the County website. **Please note that the construction dates are approximate and may change.**

PUBLIC WORKS

1. I am going to contract/bid for grading & material at the Bates Road Access parking area. This will be done after spring run-off and paid from the Vessel Fund.
2. Attached is the agenda from the May 8, 2014 Region 6-Idaho Association of County Engineers and Road Supervisors (IACERS).

**ACTION ITEMS:**

1. Due to technical/computer/email difficulties, some of the local contractors did not receive the RFB for equipment and trucking. I would like to re-bid these requests to the local contractors.

Recommended Motion:

***I move to throw out all bids received for the Equipment & Operators and also for Chip/Material Hauling due to technical/computer notification issues associated with the county. These RFB's will then be re-released.***

2. Pneumatic Tire Roller (chip sealing process): R&B budgeted \$18,113 for a pneumatic tire roller this year. Bruce found and inspected a roller that meets our needs for a total cost of \$11,650 including shipping. In the past we have rented a roller (2012=\$4,000, 2013=\$2,000). This is the same model as the roller we are currently using and falls under the \$25,000 state bid purchasing requirement. We have been shopping/pricing rollers since January.

Recommended Motion:

***I move to purchase the Ferguson SP912 Pneumatic Tire Roller from Clyde/West not to exceed \$12,000 including shipping.***

3. Bates Rd/Ripplinger Sealcoat: Helen Ripplinger has requested that Teton County sealcoat the Bates Rd extension/Ripplinger Rd (see map) this year to complete road improvements agreed to by the county in 2000. Attached is documentation regarding the agreement. The estimated cost for this is approximately \$10K, not including R&B time and equipment.

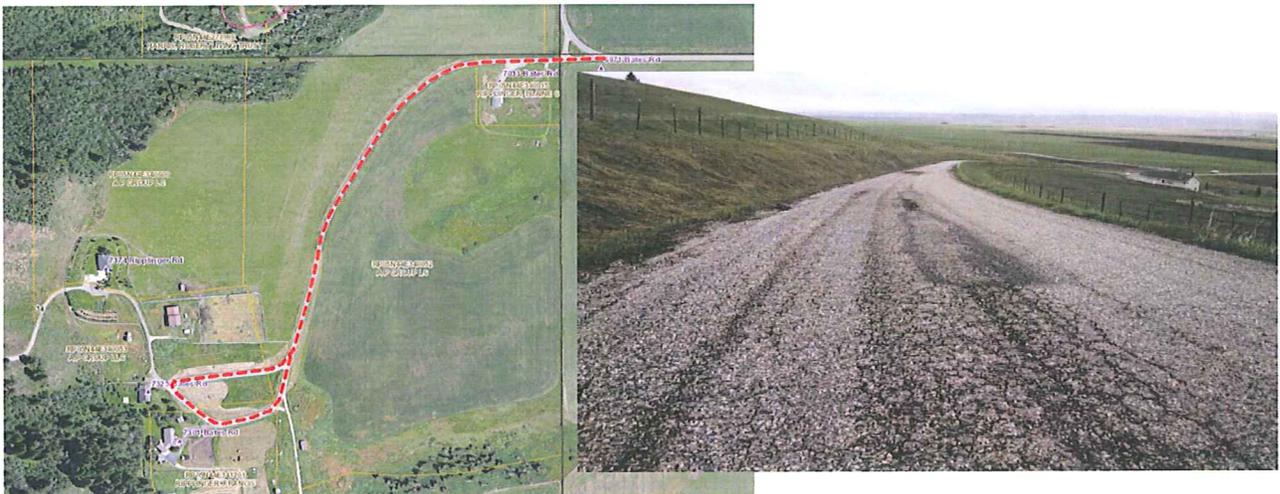
The road surface is in very poor condition and needs more than a sealcoat. If the BoCC decides to add this project, I would recommend zipping the majority of the surface, shaping the road, and then sealcoating the road.

Possible Motions:

***I move to sealcoat Bates Rd per the 2000 agreement made by the then Board of County Commissioners.***

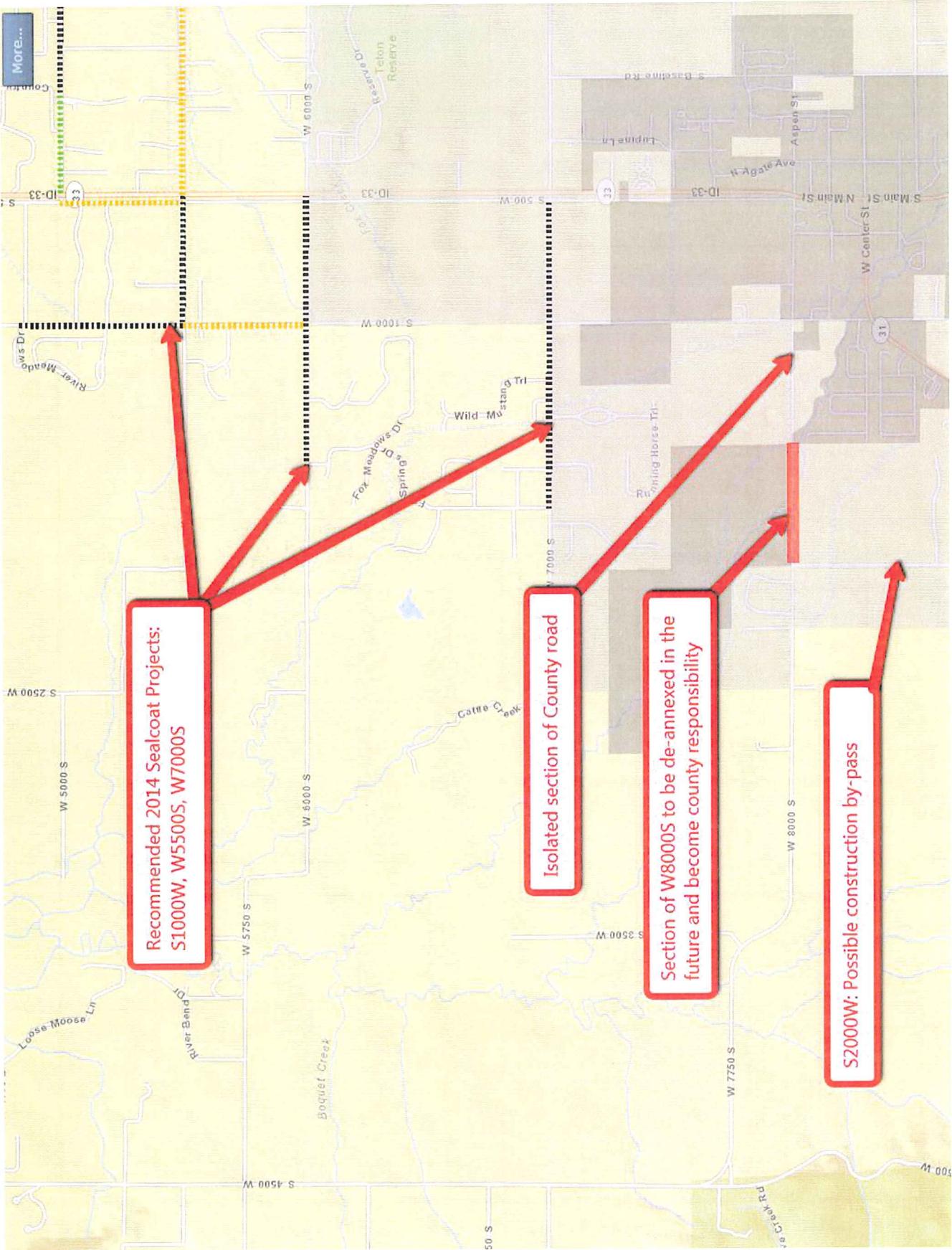
or

***I move to not to sealcoat Bates Rd in 2014 as the road condition has deteriorated beyond repair by a standard sealcoat and past BoCC's cannot obligate future BoCC's***



4. Sealcoat Project Change: Since my April 22<sup>nd</sup> update, I have received additional information that may impact the BoCC decision to sealcoat both W7000S and W8000S.
- a. We do not have sufficient funds to pay for both projects from the Chip Seal account. The additional \$60K that I identified for the widening can only be used for road/capacity expansion as it is from impact fees. I originally proposed switching these projects because they would have had the same expenditure from the Chip Seal Account (**widening was paid from Impact Fees**).
  - b. W8000S Sealcoat:
    - i. The City of Victor is planning on de-annexing a property that would add approximately 0.5 miles of 8000S east of our project, to the county system and would connect an isolated section of the county road (see attached map).
    - ii. The City of Victor Stoplight/Intersection Project is slated to begin in early August. I anticipate S2000W and W8000S being used as bypass/shortcut around the construction. This heavy loading on the fresh chip seal could damage the fresh oil/chips.
    - iii. The City of Victor has indicated they are interested in teaming with the county to seal their section of 8000S next summer, creating a 4 mile section of sealed road, from Hwy 33 to S4500W, which is on the same maintenance schedule.

Based on this information I believe it is best to wait until 2015 to sealcoat W8000S. Therefore, I recommend we continue with the original plan of fixing W7000S in 2014 and sealcoat W8000S in 2015.

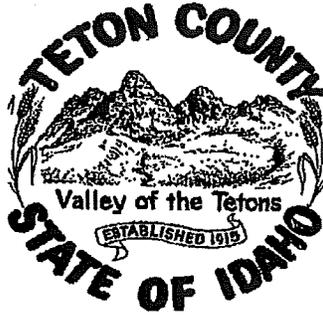


**Recommended 2014 Sealcoat Projects:**  
S1000W, W5500S, W7000S

**Isolated section of County road**

**Section of W8000S to be de-annexed in the future and become county responsibility**

**S2000W: Possible construction by-pass**



Telephone No. 208-354-2905  
FAX No. 208-354-8410

Teton County Commissioners

89 N. Main #1  
Driggs, Id. 83422

Monday, June 28, 2004

Mr. Weston Ripplinger  
732 W Bates Road  
Driggs, ID 83422

Re: Chip Seal of Ripplinger Road

Dear Mr. Ripplinger,

The County has reviewed all the documentation which you provided and agree that you and other adjacent landowners have completed your financial obligation in regards to the paving of your road. When Teton County (with adjacent homeowner participation) chip sealed the road, Teton County agreed to provide the third and final lift at a later date.

This has not been completed to date. Because of the additional cost involved in bringing a contractor to a road for chip sealing, the county has delayed the third lift until we have other chip sealing scheduled in the area. When Teton County has additional chip sealing in the Bates area we will at that time provide the third and final lift of chip seal. Until that time we will try to repair any cracks and potholes.

Thank you for your cooperation in this matter. If you have any questions please feel free to contact me at (208) 354-2932.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Ramirez", is written over a horizontal line.

Ron Ramirez, Chairman  
Teton County Board of Commissioners

6/26/2000 BOCC MEETING MINUTES

- **Chip sealing** will commence on August 1, 2000. Total 25.9 miles—breakdown is as follows:
  - Horseshoe ( 6.6 miles) 2 lifts
  - 100E (1 mile) 2 lifts
  - Val View (4.5 miles)
  - Fairgrounds ( 1 mile) prep up to arena
  - South Leigh (1.4 miles)
  - Fox Creek (2.8 miles)
  - Packsaddle patches (.5 mile)
  - Landfill Road patches (about .5 mile)
- Commissioner Trupp asked about Miller's Pond on Cedron road. Ralph stated that just about everything has been done except a fabric overlay.
- **400 S. 400W** widening will start June 27, 2000.
- **Employees**
  - One full time and two seasonal have been hired.
  - Bill Williams came back to work today. Ralph asked if he needs a medical release.
  - Commissioners said he would have to have a medical release and a current medical card for his CDL. All employees should have a CDL and medical card.
  - Ralph asked about the county's smoking policy in buildings and equipment
    - Commissioners feel that the new policy will address issue. There will be no smoking or use of tobacco products in the work place or vehicles. Commissioners asked Ralph to inform his crew that a no smoking policy will be issued. They asked Ralph to get hold of the State to see what their policy is and then get back to Clerk Nolan Boyle.
-  **Ripplinger's** met with commissioners and Ralph Egbert. Ripplinger's are interested in getting the county road (loop 6/10 mile) chip sealed. Shane Kaufman was going to get them a bid, but they haven't received it yet. Does county need an easement?
  - Commissioner Robson stated that we don't need an easement. If road isn't on the state list we need to make sure it meets standards and is added on.
  - Ralph stated it was on the state list only to the Y. Ralph stated it needed to be wider.
  - Ripplinger's asked whose responsibility the road would be.
  - Commissioners said the county would be responsibility after the standards have been met--24 foot surface, 1.5 % crown, and other county specifications. This needs to be done soon, as the oil equipment will only be in the county for about three days commencing on August 1, 2000.
  - Commissioner Trupp stated to be safe as far as the deadline Ripplinger's should have their portion of the road completed by July 28, 2000.
  - Ripplinger's have a real concern with the bike and motorcycle riders in the pit. He feels like someone is going to get hurt and asked if the county could post a sign.
  - Commissioner Robson stated the county would post a sign. He asked Ralph to take care of it.

**IDAHO ASSOCIATION OF COUNTY ENGINEERS  
AND  
ROAD SUPERVIORS  
(IACERS)**

REGION 6 – SPRING 2014 MEETING AGENDA

Date/time: May 8, 2014 11:30am  
Location: Stockman's Restaurant, Idaho Falls

AGENDA TOPICS/DISCUSSION ITEMS:

- Introduction -Jay Mazalewski
  
- Order Lunch  
(Sponsored by Honen Equipment, Darryl Simmons)
  
- Road Dust Institute/Terra Conference Update -Jay Mazalewski
  - <http://www.roaddustinstitute.org/>
  - <http://www.terraroadalliance.org/>
  - <http://www.dot.state.mn.us/research/>
  - <http://www.ucprc.ucdavis.edu/dustcontrol/>
  
- NACE Conference Update – Dave Walrath
  
- County Updates – Open Discussion
  
- Other Items – Open Discussion
  - Equipment sharing
  - Irrigation culverts under County Roads
  - ??



Kathy Spitzer, Prosecuting Attorney  
Teton County Courthouse  
89 N. Street, Ste. 5, Driggs, ID 83422  
(208) 354-2990 phone  
(208) 354-2994 fax  
[kspitzer@co.teton.id.us](mailto:kspitzer@co.teton.id.us)

To: Board of County Commissioners  
From: Kathy Spitzer  
Re: Roy Moulton's May 2<sup>nd</sup> Email to Commissioners Kunz and Park  
Date: May 2014

By citing and relying upon 42-1205, Mr. Moulton confuses bridge maintenance with culvert maintenance. I.C. 42-1205 deals exclusively with *bridges*, not culverts. Even though 42-1205 is not applicable to culverts, it hinges public responsibility for maintenance of a bridge on the bridge having been constructed by the owner of the ditch "in accordance with the provisions of this section." The owners of the "ditch, canal or conduit or any other means for conveying water" have to construct a bridge that meets the following standards: the bridge must be sixteen (16) feet wide, and with boards not less than two (2) inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three (3) inches thick. If the bridge is not constructed to those standards the County can build the bridge and charge the landowner for the cost of construction. Mr. Moulton asserts that Commissioners Kunz and Park "should assume any bridge or culvert in a County road is the duty of the County to maintain." He also claims that Clay (or Jay?) "*didn't bother sending along I.C. 42-1205 or I.C. 40-2321, which both make it clear culverts and bridges in county roads are the counties duty to repair and maintain.*" 42-1205 does not support Mr. Moulton's demand that the public pay for the culvert. 42-1205 is a statute about bridges, not culverts, and it firmly places the duty upon the owner of the waterway to construct the bridge to a clear standard.

I.C. 40-2321 does apply to both bridges and culverts. It begins with "Any person intending to run water across any public highway must first, under the direction and with the approval of the directors of highways of the county or district ..." and then goes into the standards that the entity running water across a public road must follow. As in 42-1205, bridges must be 16 feet wide. The highest point of pipes or culverts "shall be at least two (2) feet beneath the surface of the highway, be built of a length not less than sixteen (16) feet, and in a substantial manner permitting uninterrupted travel. All such bridges or culverts shall be of concrete, and all pipes of concrete, steel or other mineral substance." (Wooden bridges, culverts or pipes may be built upon a resolution of the commissioners setting forth specific conditions.) **If** the bridge, pipe or culvert is constructed in accordance with these standards **and** it is accepted and approved by the County, then and only then shall the bridge, culvert or pipe "become county property and be maintained as other county bridges."

I have seen nothing indicating that the culverts in question were constructed by the owner in accordance with the standards specified in I.C. 40-2321 and nothing indicating that these culverts have been accepted and approved by the County.

The other code section cited by Mr. Moulton is 40-2322. It is relatively short and quite self-explanatory. The owner of the ditch that crosses a public highway has to build the culvert to state standards (see the preceding section 40-2321) and has to keep the culvert in good repair. If the owner does not properly build or repair the culvert the County can do so but the cost is “a lien upon the land and premises of the ditch owner, and may be sued for and collected ... in any court of competent jurisdiction.” 40-2322 appears to apply to those culverts or bridges that have not been accepted by the County but run across any public highway.

Both 40-2321 and 40-2322 were both added to Idaho law in 1985. The only case cited by Mr. Moulton is from the year 1917 (Gooding Highway District v. Idaho Irrigation Company). Neither 40-2321 nor 40-2322 were in effect when Gooding was decided. The only cases that cite Gooding also precede the 1985 legislation (they are cases from 1921, 1927 & 1929).

I researched this question when it was in our packet for last meeting, I try my best not to “shoot from the hip.” If Mr. Moulton has an issue with my legal advice, he should contact me, not directly contact my clients to give them contrary legal advice (he has done this in the past as well). Before he accuses Commissioner Kunz of coming to “*such an insupportable position*” Mr. Moulton should call the attorney who gave the “legal counsel” that so amazed him – and perhaps he should have found credible support for his own position.

Mr. Moulton calls into question my ethical duty to represent my client. I assure you that in providing advice I consider only the law and the best interest of my client, the elected officials and the residents of this County. Mr. Moulton represents private interest and obviously believes that the taxpayers of this County should pay for those special interests. It is ironic that Mr. Moulton accuses me of advocating for a special interest group.

#### **40-2321. Bridges and culverts**

Any person intending to run water across any public highway must first, under the direction and with the approval of the directors of highways of the county or district, or if the highway be the boundary of two (2) counties or districts, then, under the direction and with the approval of the director of highways of both counties or districts, construct a ditch of sufficient size to carry all the water, and must build a substantial bridge, with easy grades on and off the bridge over the ditch not less than sixteen (16) feet wide. When the quantity of water of any ditch is such that a pipe or culvert will carry the water, the water may be conducted across the highway by means of a pipe or culvert, which must be adapted to the surface of the highway, and the highest point of which shall be at least two (2) feet beneath the surface of the highway, be built of a length not less than sixteen (16) feet, and in a substantial manner permitting uninterrupted travel. All such bridges or culverts shall be of concrete, and all pipes of concrete, steel or other mineral substance.

No wooden bridges, pipes or culverts shall be constructed, unless it appears to the satisfaction of the respective commissioners that the cost of the bridge, pipe or culvert would be unreasonably increased by being made of concrete, steel or other mineral substance, and that there is not sufficient travel over the highway to make it necessary for the protection and convenience of public travel that the bridge, pipe or culvert be constructed of those materials. The respective commissioners may in their discretion and by resolution, permit the bridge, pipe or culvert to be constructed of wood or other material, but no bridge, pipe or culvert shall be constructed of wood or any materials other than those specified in this section except upon a resolution of the appropriate commissioners setting forth the reasons and particularly specifying the place of the construction. When a bridge, pipe or culvert shall have been constructed as required, and accepted and approved by the director of highways, it shall become county property and be maintained as other county bridges.

#### **40-2322**

Construction or repair of bridges and culverts by director of highways. If any person owning or having ditches across any public highway, fails or neglects to build bridges or culverts over them as required, or to keep them, or the public highway in good repair, it is the duty of the director of highways of the county or district to build or repair them at the expense of that person, and the cost of them is a lien upon the land and premises of the ditch owner, and may be sued for and collected, by and in the name of the director of highways, in any court of competent jurisdiction.

**From:** Roy Moulton <[roymoulton@tetonvalleylaw.com](mailto:roymoulton@tetonvalleylaw.com)>

**Date:** May 6, 2014, 3:11:54 PM MDT

**To:** [sidkunz@hotmail.com](mailto:sidkunz@hotmail.com)

**Subject:** Fwd: County Responsibility for Roads (culverts)

Sid, apparently you didn't get this. I sent it to your county email.

Roy Moulton

Moulton Law Office

[roymoulton@tetonvalleylaw.com](mailto:roymoulton@tetonvalleylaw.com)

[www.tetonvalleylaw.com](http://www.tetonvalleylaw.com)

cell: 208 589-9562

office: 208 354-2345

fax: 208 354-2346

Begin forwarded message:

**From:** Roy Moulton <[roymoulton@tetonvalleylaw.com](mailto:roymoulton@tetonvalleylaw.com)>

**Subject:** County Responsibility for Roads (culverts)

**Date:** May 2, 2014 at 2:17:14 PM MDT

**To:** [skunz@co.teton.id.us](mailto:skunz@co.teton.id.us), [kpark@co.teton.id.us](mailto:kpark@co.teton.id.us)

Dear Commissioners,

The law regarding the duty of a County to maintain culverts and bridges is clear. Idaho Code Sections 42-1205, 40-2321, 40-2322 together with case law interpreting these sections show that the only time an irrigation company is responsible for the cost of building a bridge or installing a culvert across a County road is if it crosses a road in a new location. If the ditch was there before the road, it is the County's duty in the first place. Even in the case of the ditch coming after the building of the road, after it is "in" it is the County's duty to maintain thereafter.

TITLE 42

IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 12

MAINTENANCE AND REPAIR OF DITCHES

42-1205. BRIDGES OVER DITCHES. All owners of any ditch, canal or conduit, or any other means for conveying water, shall build substantial bridges not less than sixteen (16) feet wide, and with boards not less than two (2) inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three (3) inches thick), at all places where any county or state road crosses the same, or any road kept open and used by any

neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required, after a notice of ten (10) days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same, and shall collect the cost thereof together with the costs of suit: **provided, that after any bridge shall have been constructed across any ditch, canal or conduit on any county or state road in accordance with the provisions of this section, it shall thereafter be maintained at the public expense.**

**History:**

[(42-1205) 1899, p. 380, sec. 25; reen. R.C., sec. 3310; compiled and reen. C.L., sec. 3310; C.S., sec. 5658; I.C.A., sec. 41-1105.]

You already have reviewed the other two statutes, so I won't include them here.

If the statutes weren't clear enough, case law reinforces the plain language of the statutes. In Gooding Highway Dist. v. Idaho Irri. Co., 164 P. 99, 30 Idaho 232., the Court ruled: "**The owner of a ditch constructed across an established highway must provide a bridge over the intersection for the use and benefit of the public. And, Where ditch or canal is constructed prior to the establishment of the road which intersects it, the expense of building a bridge must be borne by the county or highway district to which the road belongs.**"

With regard to the culvert by Dewey's, it is clearly not the case that the irrigator or Fox Creek Canal Company is asking to put in a new culvert. It is an existing culvert the County put in years ago to avoid water running right in front of the Dewey house. It was an action taken to accommodate Dewey's, not an accommodation to the downstream irrigators. It is a liability to them. Since it is a culvert "in" the County road it is the County's duty to maintain it.

Irrigation canals and ditches are well established and the waters of the State are "fully appropriated", meaning it is going to be a rare case where an irrigation company or an individual irrigator is going to put in a new crossing. You should assume any bridge or culvert in a County road is the duty of the County to maintain.

Which brings me to my final point. This is such well established law that it is rarely a topic of discussion in a county. The way it has been handled is bothersome. I asked to have the culvert fixed. Sid, you asked that we meet on site. Clay showed up with a copy of I.C. 40-2322 with the conclusion from Jay that fixing the culvert was our (the irrigators) responsibility. He didn't bother sending along I.C. 42-1205 or I.C. 40-2321, which both make it clear culverts and bridges in county roads are the counties duty to repair and maintain. (Looking back, don't you think it no little irony that while we were talking at Dewey's, the State was cleaning the culvert across the highway 200 yards west from where we were talking!) You think they maintain culverts as a charitable gesture? They do it for exactly the same reason Teton County has to.

Within 30 minutes of leaving Dewey's, I had done some research and texted Bruce Zohner (because I had his cell number and not Clay's) the controlling language in I.C. 40-2321. I thought that message getting to Clay and Jay would be the end of the question. I was told the next day I needed to get that language to Sid and so I texted it to Sid. Late Monday I found out that the Commission had discussed and decided culverts were the irrigators

responsibility. I was floored! I couldn't imagine you could have come to such an insupportable position. On talking to you Sid, I was even more amazed that you had "legal counsel" to this effect! Had you let me know this was going to happen, I could have been there to put in my two cents.

Why does the County Engineer think it his duty to provide me with his interpretation of the law? Shouldn't he discuss these kind of things with the Commissioners first and they decide these issues? Why do you let the County Attorney "shoot from the hip" with her legal opinions? I have suggested many times you request her legal opinions be in writing. Her opinion in this case is at least as ridiculous as her opinion of a year or so ago that County Zoning can control the location of churches. This, despite both federal and state statutes excluding the location of churches from zoning controls! Kathy is so obviously, and firstly, partisan, you can't trust her to be objective. From my vantage point, her legal opinions are only VARD views. How long are you going to let yourselves be embarrassed by Jay and Kathy's actions? Fire Jay, few think he is needed, and hire your civil advice (with money in leu of putting it in Kathy's budget) from an outside the Valley attorney who can be trusted to give you objective legal advise.

Time is of the essence for the delivery of "below the highway" water on Fox Creek. I would hope you can get this wrong headed and legally wrong decision reversed and replace the culvert before it effects this seasons irrigation.

Thanks for your attention to this matter,

Sincerely,

Roy Moulton  
Moulton Law Office  
[roymoulton@tetonvalleylaw.com](mailto:roymoulton@tetonvalleylaw.com)  
[www.tetonvalleylaw.com](http://www.tetonvalleylaw.com)  
cell: 208 589-9562  
office: 208 354-2345  
fax: 208 354-2346

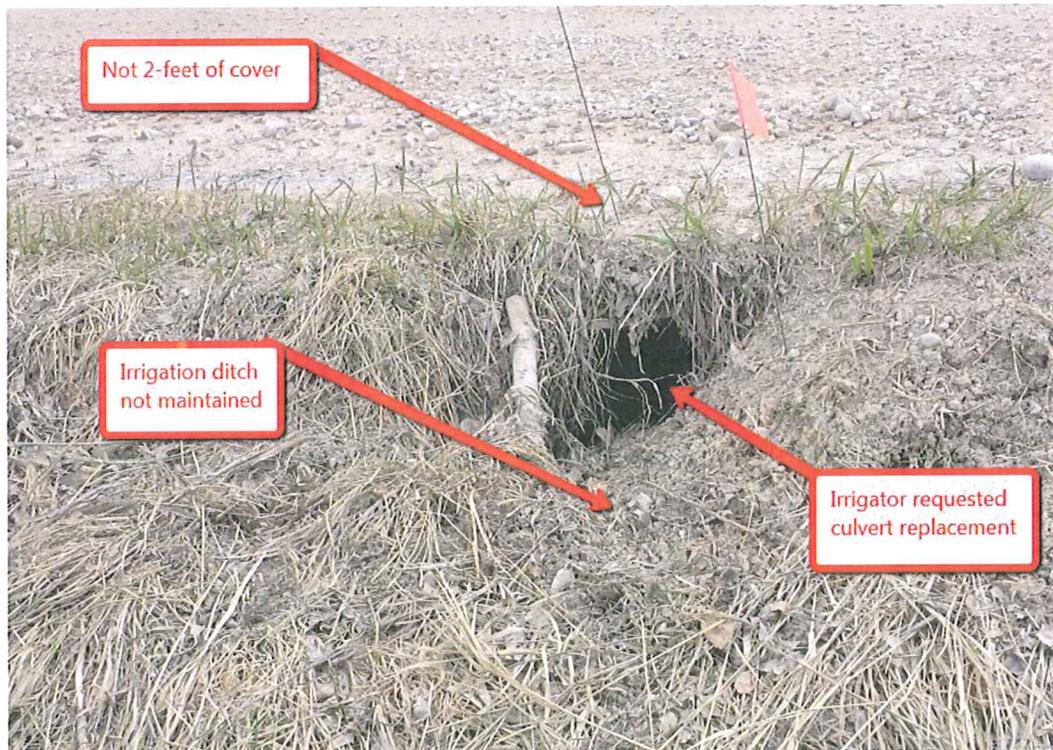
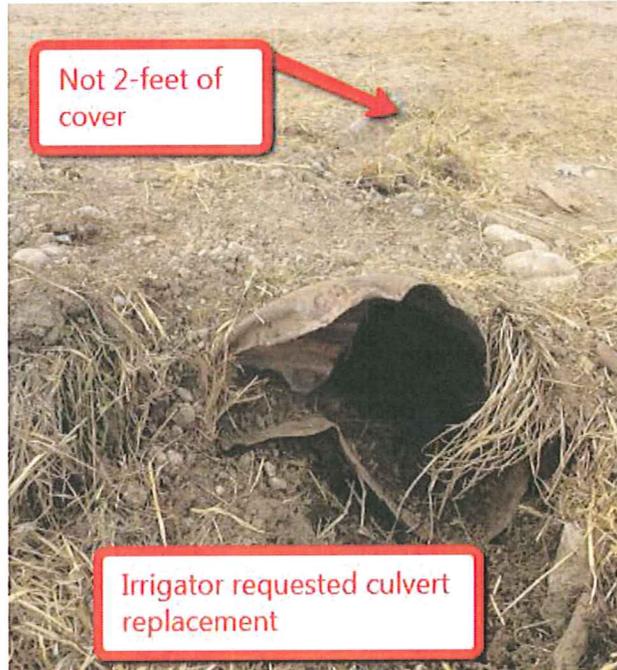
## BoCC Minutes of April 28, 2014

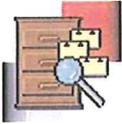
**IRRIGATION CULVERTS.** Mr. Mazalewki's report requested guidance regarding how to respond to irrigators who ask road & bridge to clean and/or replace irrigation culverts under county roads. He provided copies of several state statutes which clearly state that it is the irrigator's responsibility to maintain and repair any irrigation culverts or bridges that cross a public road.

Commissioner Kunz said this topic came up recently due to a request for county assistance with an irrigation culvert on 5500S. He has discussed the issue with Mr. Mazalewski and Road Supervisor Clay Smith and learned that the county has performed this type of maintenance in the past. However, the Board agreed that the county should no longer perform any maintenance on irrigation culverts or bridges. Prosecutor Spitzer pointed out that irrigation companies planning to perform maintenance within the county right-of-way must be sure to obtain the required permit from the road & bridge department.

4. Irrigation culverts/bridges: R&B is receiving requests from irrigators to clean and/or replace culverts under county roads that transmit irrigation water. We do not have records of installation for most of these culverts and it appears many of them were not installed according to state statute and our requirements (not sufficient cover). The decision to replace private culverts, transmitting irrigation water is a policy decision that only the BoCC can make. Attached are some of the State Statutes that apply.

Please direct myself and R&B on how to handle these requests.





# Idaho Statutes

## TITLE 18 CRIMES AND PUNISHMENTS

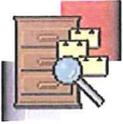
### CHAPTER 39 HIGHWAYS AND BRIDGES

18-3908. FLOODING HIGHWAYS. Any person who runs water either by flooding or sprinkler irrigation across any public highway, road or street, without first constructing a good and sufficient ditch or ditches to convey the same, or who fails to bridge such ditch or ditches, or to keep such bridge or ditches in good repair, or to ensure that the flow from the sprinkler does not flood the public highway, road or street and all persons, companies or corporations who suffer any water used by them for the purpose of irrigation, or any other purposes, to flow into or upon any public highway, road or street, in any other manner than that authorized by law, are guilty of an infraction on the first offense, and shall be guilty of a misdemeanor for each offense thereafter per calendar year, and upon conviction thereof must be fined in any sum not less than one dollar (\$1.00) nor more than fifty dollars (\$50.00), together with the costs of suit, and for a second offense, double said fine and costs; and it is hereby made the duty of all road supervisors, constables and marshals, to make complaint before the proper court, for violations of this section, whenever notified or having knowledge thereof. A person may not be charged under the provisions of this chapter if the flooding from a sprinkler or other water conveyance system is a result of mechanical failure, wind or other climatic condition, or other circumstances outside of the control of the person.

#### History:

[I.C., sec. 18-3908, as added by 1972, ch. 336, sec. 1, p. 925; am. 2001, ch. 289, sec. 1, p. 1026.]

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# Idaho Statutes

## TITLE 40 HIGHWAYS AND BRIDGES

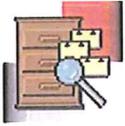
### CHAPTER 23 MISCELLANEOUS PROVISIONS

40-2322. CONSTRUCTION OR REPAIR OF BRIDGES AND CULVERTS BY DIRECTOR OF HIGHWAYS. If any person owning or having ditches across any public highway, fails or neglects to build bridges or culverts over them as required, or to keep them, or the public highway in good repair, it is the duty of the director of highways of the county or district to build or repair them at the expense of that person, and the cost of them is a lien upon the land and premises of the ditch owner, and may be sued for and collected, by and in the name of the director of highways, in any court of competent jurisdiction.

**History:**

[40-2322, added 1985, ch. 253, sec. 2, p. 699.]

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# Idaho Statutes

## TITLE 40 HIGHWAYS AND BRIDGES

### CHAPTER 23 MISCELLANEOUS PROVISIONS

40-2321. BRIDGES AND CULVERTS. Any person intending to run water across any public highway must first, under the direction and with the approval of the directors of highways of the county or district, or if the highway be the boundary of two (2) counties or districts, then, under the direction and with the approval of the director of highways of both counties or districts, construct a ditch of sufficient size to carry all the water, and must build a substantial bridge, with easy grades on and off the bridge over the ditch not less than sixteen (16) feet wide. When the quantity of water of any ditch is such that a pipe or culvert will carry the water, the water may be conducted across the highway by means of a pipe or culvert, which must be adapted to the surface of the highway, and the highest point of which shall be at least two (2) feet beneath the surface of the highway, be built of a length not less than sixteen (16) feet, and in a substantial manner permitting uninterrupted travel. All such bridges or culverts shall be of concrete, and all pipes of concrete, steel or other mineral substance. No wooden bridges, pipes or culverts shall be constructed, unless it appears to the satisfaction of the respective commissioners that the cost of the bridge, pipe or culvert would be unreasonably increased by being made of concrete, steel or other mineral substance, and that there is not sufficient travel over the highway to make it necessary for the protection and convenience of public travel that the bridge, pipe or culvert be constructed of those materials. The respective commissioners may in their discretion and by resolution, permit the bridge, pipe or culvert to be constructed of wood or other material, but no bridge, pipe or culvert shall be constructed of wood or any materials other than those specified in this section except upon a resolution of the appropriate commissioners setting forth the reasons and particularly specifying the place of the construction. When a bridge, pipe or culvert shall have been constructed as required, and accepted and approved by the director of highways, it shall become county property and be maintained as other county bridges.

#### History:

[40-2321, added 1985, ch. 253, sec. 2, p. 699.]

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# Idaho Statutes

## TITLE 42 IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

### CHAPTER 12 MAINTENANCE AND REPAIR OF DITCHES

42-1202. MAINTENANCE OF DITCH. The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water.

**History:**

[(42-1202) 1899, p. 380, sec. 16; reen. R.C. & C.L., sec. 3307; C.S., sec. 5655; I.C.A., sec. 41-1102.]

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## Dawn Felchle

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**From:** Kathy Spitzer  
**Sent:** Thursday, May 08, 2014 12:48 PM  
**To:** Dawn Felchle  
**Subject:** for packets  
**Attachments:** OP93-08.pdf

I am happy to provide, and would prefer to give, legal opinions in advance in writing. In response to Mr. Moulton's suggestion that the Board retain another attorney to advise them, please include this email along with the attached opinion from the attorney general which concludes that:

The board of county commissioners does not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before hiring outside counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and the facts made of record are reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessity" in this context.

*Kathy Spitzer*  
Teton County Prosecuting Attorney  
89 N. Main St.  
Driggs Idaho 83422  
Ph: 208-354-2990  
[kspitzer@co.teton.id.us](mailto:kspitzer@co.teton.id.us)

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## **ATTORNEY GENERAL OPINION NO. 93-8**

To: David A. Johnson  
Bonneville County Prosecuting Attorney  
605 N. Capital Avenue  
Idaho Falls, ID 83402

Bill Douglas  
Prosecuting Attorney  
Kootenai County  
P.O. Box 9000  
Coeur d'Alene, ID 83816

Per Requests for Attorney General's Opinion

### **QUESTION PRESENTED**

Do county commissioners have the ability to retain civil counsel outside the county prosecutor's office on a long-term or continuous basis?

### **CONCLUSION**

1. Pursuant to the Idaho Constitution, statutes and case law, county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity."
2. It is the county prosecutor's duty to try civil matters in which the county is a party and give the board legal advice. Before the board of county commissioners may hire private counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and this factual justification is reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessary" in this context.
3. The duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

## ANALYSIS

Your opinion request concerns the ability of the Bonneville and Kootenai County commissioners to employ, on a retained basis, a private civil attorney not affiliated with the duly elected county prosecutor. Art. 18, sec. 6, of the Idaho Constitution places a limitation on the discretion of a board of county commissioners and allows it to hire counsel only when the circumstances warrant such action.

### 1. The Plain Meaning of Art. 18, Sec. 6, of the Idaho Constitution

Since statehood, art. 18, sec. 6, of the Idaho Constitution has provided the board of county commissioners with the ability to hire counsel when special circumstances arise. Art. 18, sec. 6, reads, in pertinent part: "The county commissioners may employ counsel *when necessary*." (Emphasis added.)

The Idaho Supreme Court has held that the rules of statutory construction apply to constitutional provisions. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). A fundamental rule of statutory and constitutional construction is if a statute or constitutional provision is not ambiguous, the language will be given its plain and ordinary meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). By this notion, the plain meaning of the word "necessary" is presumed to be the meaning given to it in common parlance. The term "necessary" has been defined as follows:<sup>1</sup>

An indispensable item; essential; absolutely needed; required.  
Webster's New Collegiate Dictionary 790 (9th ed. 1991).

The term "necessity" is defined as:

The quality of being necessary; pressure of circumstance; physical or moral compulsion; impossibility of a contrary order or condition; the quality or state of being in need. Webster's New Collegiate Dictionary 790 (9th ed. 1991).

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<sup>1</sup> The definition of "necessary" in Black's Law Dictionary reads:

This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. . . ." Black's Law Dictionary 1029 (6th ed. 1990).

This is the only definition which creates an issue of ambiguity. It indicates that the meaning of the word is controlled by the context in which it is used. The constitutional context in which art. 18, sec. 6, was adopted indicates that when the framers incorporated the "necessary" standard into the constitution they had in mind exigent or special circumstances. The case law has also interpreted the necessary standard to be much more than mere convenience.

Controlling force; irresistible compulsion; a power or impulse so great that it admits no choice of conduct; a condition arising out of circumstances that compel a certain course of action. Black's Law Dictionary 1030 (6th ed. 1990).

These entries indicate that the words "when necessary" are words of limitation as used in the constitution. Given their natural significance these words bridle the discretion of county commissioners when they are considering hiring private counsel. Thus, it is the opinion of this office that mere convenience or personal preference does not rise to the level of "necessary" or "necessity" in this context.

## **2. Case Interpretation of Art. 18, Sec. 6**

There are several Idaho Supreme Court cases which have interpreted the language of art. 18, sec. 6, of the Idaho Constitution. The first was Meller v. Board of Commissioners of Logan County, 4 Idaho 44, 35 P. 712 (1894). In Meller, the board of county commissioners for Logan County entered into a contract in which it retained H.S. Hampton, a private attorney, to provide legal services to the county at \$2,000 per year for a two year period. The supreme court held that the board had gone beyond the scope of its constitutional and statutory authority by hiring private counsel. The court therefore found the contract in question to be void and a nullity, and in so holding stated:

We are unwilling to believe that it was the purpose of the framers of our constitution to "pluck the muzzle of restraint" from the boards of county commissioners throughout the state, and leave them with the sole limit of the vagaries of their own sweet wills in imposing burdens upon the taxpayers of the state.

4 Idaho at 51. It is clear from this language that the court intended to limit the discretion of county commissioners in hiring counsel to something narrower than the "vagaries of their own sweet wills." The court also found that "the Legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them on an office of its own creation. And if this cannot be done by the Legislature, will it seriously be contended that it can be done by a board of county commissioners?" *Id.* The supreme court went on to set forth the standard under which boards of county commissioners could hire counsel. It stated that "the board of county commissioners may, when the *necessity* exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts." *Id.* at 53 (emphasis added).

Two years later the supreme court decided Hampton v. Commissioners of Logan County, 4 Idaho 646, 43 P. 324 (1896). The same facts that gave rise to the decision in Meller were at issue here. After the Meller decision was handed down, H.S. Hampton, the attorney who was retained under the void contract, presented an itemized bill for his services to the Logan County commissioners. The board refused to pay the bill and Mr. Hampton appealed this decision to the district court which decided he was entitled to \$832 on a *quantum meruit* basis. In holding that Hampton was entitled to nothing, the supreme court opined that "before the authority given to the county commissioners by section 6, article 18 of the constitution can be exercised, the necessity which authorizes it must not only be apparent, but the facts creating such necessity must be made *a matter of record by the board*." Hampton, 4 Idaho at 652 (emphasis added). This holding has become the controlling standard in construing the language of art. 18, sec. 6, which relates to commissioners' ability to hire private counsel.

The next case to apply the Hampton "necessity" standard was Ravenscraft v. Board of Commissioners of Blaine County, 5 Idaho 178, 47 P. 942 (1897). In this case the board of Blaine County had hired a private firm to defend a *single* suit in which the constitutionality of the act creating Blaine County was challenged. Before hiring the private firm, the board of commissioners had first made a matter of record the circumstances which gave rise to its decision to retain private counsel. Because of the magnitude of the legal crisis facing Blaine County, the supreme court held the record contained "the facts creating the necessity for the employment of counsel by the board of commissioners of Blaine County." *Id.* at 183. Once again the Hampton "necessity" standard controlled the inquiry and was satisfied only because the Blaine County board had made an official record of the compelling facts which justified their actions to retain private counsel to defend the county in a single lawsuit.

A similar factual situation was at issue in Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926). In this case the Power County Board of Commissioners hired private counsel on a contingent fee basis to assist the prosecuting attorney in collecting deposits from several bondsmen for deposits of county money in closed banks. The supreme court followed the principle laid down in Hampton and held: "[B]y the constitution, section 6, art. 18, county commissioners are expressly empowered to employ counsel in civil cases when necessary" Barnard, 43 Idaho at 386. The court went on to conclude that the board had satisfied the necessity standard set forth in Hampton in hiring private counsel for this matter because the commissioners had identified on the record the facts which created the need for such counsel before retaining the attorney. It should be noted that the Power County board in Barnard hired counsel for a single legal issue.

In Anderson v. Shoshone County, 6 Idaho 76, 53 P. 105 (1898), the Idaho Supreme Court found that a contract for legal services between the board of

commissioners of Shoshone County and a private attorney was valid. However, in coming to its conclusion, the court stated: "It is not contended by respondent that no necessity for the employment of counsel existed, nor that the same is not made apparent by the records of the board." *Id.* at 77. It also opined that "it seems to us this objection should more properly come from the district attorney himself, but that officer does not seem to have considered himself especially aggrieved by the action of the board; at least, he has made no moan apparent in the record." *Id.* It should also be noted that the respondent cited no relevant cases to support his contention that the board had no authority to employ counsel.

The most recent published case construing the constitutionally granted power of commissioners to hire counsel when necessary was decided in 1932. Clayton v. Barnes, 52 Idaho 418, 16 P.2d 1056 (1932). In this case the court found that "section 6 article 18, in providing that the county commissioners may employ counsel when necessary, *is a limitation upon the authority of the county commissioners to employ counsel* and a denial of the authority of all other county officials to do so." *Id.* at 424 (emphasis added).<sup>2</sup>

Since the adoption of the constitution of Idaho, there have been only three instances where the Supreme Court of Idaho has upheld a board of county commissioners' decision to hire private counsel. All three are distinguishable from the situations in Kootenai and Bonneville counties. In Anderson v. Shoshone County, the respondent neither asserted that the board had failed to meet the necessity standard nor did he contend the board lacked factual justification for its action. The respondent in that case did not present a single cognizable argument to support his position. Thus, the supreme court ruled in favor of the validity of the board's action. The court did, however, state that the proper person to bring such a complaint was the district attorney. In Ravenscraft, the very existence of Blaine County was at stake and the court held that the necessity standard had been met because of the obvious importance of this crisis. Ravenscraft also only involved the ability of the Blaine County board to hire outside counsel to handle only one case. Barnard is distinguishable on the same grounds, namely that the Power County board hired outside counsel for a specific legal problem and not on a retained or continuous basis. The boards in Ravenscraft and Barnard also made a record of the factual justification for hiring private counsel.

The situations in Bonneville and Kootenai counties are most closely analogous to the facts of Meller and Hampton where the Logan County board attempted to retain private civil counsel, not for a specific case, but rather on a two year retained basis at a fixed salary. The supreme court ruled that this affiliation was impermissible.

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<sup>2</sup> The holding in Clayton makes it apparent that the conclusion reached in AG opinion 76-42, that "administrative boards [created by the board of county commissioners] have the right to hire counsel," is incorrect.

After a thorough examination of the constitution and all relevant case law, this office concludes that county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before a board of county commissioners may hire private counsel, it must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. The board must also make these factual justifications a matter of record and that record is reviewable by the courts of this state.

### **3. Proceedings at the Constitutional Convention**

Assuming that the language of art. 18, sec. 6, is subject to more than one reasonable interpretation, the intent and purpose of the framers controls the provision's meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). It is helpful to look at the context in which this provision was adopted to glean the intent and purpose of its drafters. The proceedings at the Constitutional Convention in 1889 provide insight into what the framers intended in enacting the language, "county commissioners may hire counsel when necessary."

Some historical background is necessary to provide insight into what occurred at the convention proceedings. From the organization of Idaho as a territory in 1863 to 1883, a system of district attorneys was employed. There was one district attorney for each judicial district. In 1883 the existing system was modified and provided a county attorney for each of the seventeen counties. Meller v. Board of Commissioners of Logan County, 4 Idaho 44. Upon statehood, the framers expressly rejected the county attorney format and opted for district attorneys. At statehood there were only five judicial districts, comprised of multiple counties. The framers' obvious motive in adopting the district attorney system was to save money. At the Convention, delegate Reid stated:

The district attorneys cost this territory now \$36,600. We have five district attorneys already provided for and have fixed their salaries at \$2,500. That makes \$7,500, which is a saving on that item of \$29,000 to the people.

Proceedings of the Idaho Constitutional Convention of 1889 at 1821 (Hart ed. 1912). During the same discussion, the framers decided to adopt the language which allows the commissioners to "hire counsel when necessary." There was much discussion about giving the commissioners unbridled discretion to hire counsel at any price they deemed prudent. In adopting the current language, the following discussion ensued:

Mr. Reid: If the county has an important suit or has important legal business, the commissioners ought to be allowed to go into the market and get the best legal talent; and if they do not have the business they do not have to have to have [sic] the counsel.

Mr. Beatty: Suppose an important murder case has to be prosecuted before the committing magistrate?

Mr. Reid: There is the district attorney who is already paid by the state to do that.

Mr. Beatty: But he is off in some other county.

Mr. Reid: I have seen this very system, and if it be necessary, the chairman of the board is always on hand, and upon application to him, when he sees public justice is about to fail, he can employ a man.

*Id.* at 1822. It is apparent from this debate that the framers granted the commissioners the ability to hire counsel when the district attorney was unavailable or when circumstances indicated that such counsel was absolutely needed, for example, when "public justice is about to fail."<sup>3</sup>

Thus, the proceedings at the Constitutional Convention further bolster the conclusion that the framers only intended to give county commissioners the ability to hire private counsel in emergency or special circumstances. This intention controls the meaning of the words "when necessary" if they are deemed to be ambiguous.

#### **4. Statutory Duties of County Commissioners and Prosecutors**

In addition to the constitutional provision, there are three statutes that relate to this issue. Idaho Code § 31-813 relates to the power of the county commissioners to hire counsel. It reads:

31-813. **Control of suits.**- To direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the prosecuting attorney, as they may direct.

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<sup>3</sup> The district attorney system was ultimately abandoned by returning to the county prosecutor format in 1897 by constitutional amendment. Since the framers adopted the "necessity" language of art. 18, sec. 6, expressly with a five member district attorney system in mind, it would appear that a board of county commissioners would be held to a more exacting "necessity" standard since there are now forty-four county prosecutors.

(Emphasis added.) The Idaho statute which enumerates the duties of the prosecuting attorney reads as follows:

31-2604. **Duties of prosecuting attorney.**- It is the duty of the prosecuting attorney:

1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.

2. . . . to prosecute or defend all civil actions in which the county or state is interested . . . .

3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

(Emphasis added.) In addition, Idaho Code § 31-2607 provides as follows:

31-2607. **Adviser of county commissioners.**- The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal.

(Emphasis added.)

It is not immediately clear how these statutes should be reconciled. On the one hand, Idaho Code § 31-813 authorizes the county commissioners to "employ counsel" to prosecute and defend all suits "with or without the prosecuting attorney, as they may direct." On the other hand, Idaho Code § 31-2604 twice makes it the duty of the prosecuting attorney "to prosecute and defend all civil actions" in which the county is interested. Similarly, Idaho Code § 31-2607 makes the prosecuting attorney "the legal adviser of the board of county commissioners."

Fortunately, the apparent conflict between these statutes has been resolved by the Idaho Supreme Court in Conger v. Commissioners of Latah County, 5 Idaho 347, 48 P. 1064 (1897). In holding that the board had no authority to hire counsel in any criminal

case, the court discussed § 1759 Revised Statutes of the Territory of Idaho (1887), which is identical to and the predecessor of current Idaho Code § 31-813. In construing this statute the court stated "said provision was in force prior to the adoption of our state constitution and prior to the admission of Idaho into the Union." Conger, 5 Idaho at 352. The court then discussed the predecessor statute to Idaho Code § 31-2604, § 2052 Revised Statutes of Idaho, amended in 1891. This provision has, in relevant part, remained unchanged. In reference to the apparent conflict between the two statutes, the court stated:

Some of the provisions of that section [§ 2052 Revised Statutes] are repugnant to the provisions of . . . section 1759 of the Revised Statutes, in that they make it the duty of the district attorney to prosecute or defend in all cases when a county of his district is an interested party, while the provisions of [section 1759] authorize the board to employ counsel to conduct such cases with or without the district attorney, as they may direct. If there is a conflict, as suggested, the latest expression of the legislative will must control.

Conger at 354. The court then went on to find that the board had no jurisdiction or control over criminal matters.

Thus, the discussion in Conger makes clear that where the duties of prosecutors, embodied in Idaho Code § 31-2604, and the duties and powers of county commissioners, contained in Idaho Code § 31-813, conflict, the more recently enacted expression of legislative will must control. As previously stated, the language of Idaho Code § 31-813 pre-dates the statehood of Idaho. R.S. § 1759 (1887). However, the predecessor to Idaho Code § 31-2604 was adopted four years later in the first legislative session in 1891. 1891 Sess. Laws, p. 47. Although the language which sets forth the duties of prosecutors is over one hundred years old, it is, compared to the duties and powers of county commissioners, "the latest expression of the legislative will" and, therefore, must control in the event of a conflict.

In short, a prosecutor's statutory duty "to prosecute or defend all civil actions" in which the county is a party supersedes the statutory ability of the county commissioners to hire counsel "with or without the prosecutor." The statutory duties of a prosecutor obviously do not supplant art. 18, sec. 6, of the Idaho Constitution. A board of county commissioners may still hire private counsel if they meet the constitutionally mandated necessity standard.

## CONCLUSION

Based on the plain meaning of art. 18, sec. 6, of the Idaho Constitution, the Idaho Supreme Court cases construing this constitutional provision and the history of the statutes that prescribe the duties of prosecutors and commissioners, it is our conclusion that the board of county commissioners does not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before hiring outside counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and the facts made of record are reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessity" in this context. In addition, the duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

### **AUTHORITIES CONSIDERED**

**1. Idaho Constitution:**

Art. 18, sec. 6.

**2. Idaho Statutes:**

Idaho Code § 31-813.

Idaho Code § 31-2604.

Idaho Code § 31-2607.

1887 Revised Statutes §1759.

1890-91 Sess. Laws, p. 47.

**3. Idaho Cases:**

Anderson v. Shoshone County, 6 Idaho 76, 53 P. 105 (1898).

Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Clayton v. Barnes, 52 Idaho 418, 16 P.2d 1056 (1932).

Conger v. Board of County Commissioners, 5 Idaho 347, 48 P. 1064 (1896).

Hampton v. Commissioners of Logan County, 4 Idaho 646, 43 P. 324 (1896).

Meller v. Board of County Commissioners, 4 Idaho 44, 35 P. 712 (1894).

Ravenscraft v. Board of Commissioners, 5 Idaho 178, 47 P. 942 (1897).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

**4. Other Authorities:**

Proceedings of the Idaho Constitutional Convention of 1889 (Hart ed. 1912).

Black's Law Dictionary (6th ed. 1990).

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DATED this 20th day of July, 1993.

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