

March 31, 1999

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Election of Fish and Game Commissioners

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on March 19, 1999. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative purports to amend Idaho Code §§ 36-102(b) through (e) to change the way fish and game commissioners are selected. Currently, there are seven fish and game commissioners. Idaho Code § 36-102(b). Each of these commissioners represents an individual district. Idaho Code § 36-102(c). Idaho Code § 36-102(c) establishes the term that each commissioner serves. If the proposed initiative were enacted into law, there would be four fish and game commissioners, two elected at large from each congressional district. The only people eligible to vote in fish and game commissioner elections would be those electors who also possess a valid hunting or fishing license.

As an initial matter, the initiative should be formatted to clearly indicate how it is supposed to amend the current language of Idaho Code § 36-102. Instead of stating that

the language of Idaho Code § 36-102 should be “modified,” the initiative should specifically repeal Idaho Code §§ 36-102(b) through (d) and replace the repealed language with the language in the initiative. Also, the initiative should not state that the current language contained in Idaho Code § 36-102(e) is “modified” by the initiative when the version of Idaho Code § 36-102(e) found in the initiative is identical to the existing language in section 36-102(e).

Next, the proposed initiative reduces the number of fish and game commissioners from seven (7) to four (4). While this change does not raise any legal issue, the petitioner may wish to consider retaining an odd number of commissioners to eliminate the possibility of tie votes.

Third, the initiative’s limitation on those who may vote for fish and game commission positions poses a serious constitutional concern. The Twenty-Fourth Amendment to the United States Constitution states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

(Emphasis added.) In essence, the proposed initiative would require otherwise qualified electors to pay the fee for a hunting or fishing license in order to vote for fish and game commissioners. While the licensure requirement for voting is not explicitly a poll tax, the initiative does have the effect of conditioning the right to vote upon the payment of a fee. Even if the licensure requirement is not deemed a poll tax, a reviewing court may rely on the line of case authority prohibiting the placement of restrictions, such as property ownership, on the right to vote. In Johnson v. Lewiston Orchard Irr. Dist., 99 Idaho 501, 584 P.2d 646 (1978), the Idaho Supreme Court ruled that restrictions on the right to vote must be “carefully and meticulously scrutinized.” Johnson, 99 Idaho at 503, *quoting Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969). Such a restriction must be “necessary to promote a compelling state interest in order to survive constitutional attack.” *Id.* Since the proposed initiative contains no findings that would explain the “compelling state interest” to a reviewing court, the proposed initiative will be very vulnerable to challenge under this standard. Indeed, this office concludes that a reviewing court is likely to rule that conditioning the ability to vote for a public official on the payment of a fee is unconstitutional.

Fourth, the proposed initiative does not include any procedure to be used in conducting the election of fish and game commissioners. Title 34 contains comprehensive rules and restrictions governing elections. Taking just one example, the proposed initiative states that the “Idaho Department of Fish and Game shall designate

the time and place for the election of commissioners,” while Idaho Code § 34-106 establishes strict limits on the times during the year when elections can be held. If it is the intent of the proposed initiative to deviate from the general election guidelines contained in title 34, that intention should be specifically stated in the text of the initiative. Furthermore, if the elections for commissioners will follow a different process than the process established for other elections, the text of the initiative should specifically set out the desired process.

Finally, a statewide election carries a significant cost. The proposed initiative does not address the question of how the fish and game commissioner elections are to be funded. The proposed initiative should either contain a funding mechanism or designate a particular account within the Department of Fish and Game that will bear the cost of commissioner elections.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Jim Pratt by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

MATTHEW J. MCKEOWN
Deputy Attorney General