

February 28, 2003

The Honorable Ben Ysursa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review  
Initiative To Amend Idaho Code §§ 36-102(c); 36-102(d); and 36-107(b).

Dear Mr. Ysursa:

An initiative petition was filed with your office on February 3, 2003. 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 time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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**

Entitled "Initiative To Amend Title 36 That Governs The Idaho Fish And Game Commission" (the "initiative"), petitioners apparently seek to amend Idaho Code §§ 36-102(b); 36-102(d); and 36-107(d). The proposed amendments are outlined and reviewed below:

#### **A. Proposed Amendments to Idaho Code § 36-102(b):**

1. Creation of a Citizens Wildlife Advisory Council (CWAC) for each of the seven regions;
2. Eliminate the service of Commissioners to be at the pleasure of the Governor, Commissioners may only be removed for cause;
3. Eliminate the restriction on party (political) affiliation;

4. Create a Citizen Wildlife Advisory Council (CWAC), from which Commission members would be nominated.

**B. Proposed Amendments to Idaho Code § 36-102(d):**

1. Numbering the regions instead of geographical region descriptions;
2. Amend the geographical boundaries of two regions by realigning the counties in each region;
3. Increase the length of the term from four (4) to six (6) years;
4. Provide for staggered terms.

The Idaho Fish and Game Commission is created pursuant to statute. Idaho Code § 36-101. Offices of legislative creation can be modified, controlled, or abolished by the legislature. See Smylie v. Williams, 81 Idaho 335, 341 P.2d 451 (1959). The initiative is recognized by the Idaho Constitution as a legislative power; therefore, these changes may be made through an initiative. *Id.*; Idaho Const. art. III, § 1. As a result, the proposed amendments to Idaho Code §§ 36-102(b) and 36-102(d) do not appear to violate any provisions of the state or federal constitutions.

**C. The Proposed Amendment to Idaho Code § 36-107(b) Appears to Violate the Idaho Constitution**

The proposed initiative seeks to amend Idaho Code § 36-107(b) as follows:

The commission shall govern the financial policies of the department and shall fix the budget for the operation and maintenance of its work for each fiscal year and this budget can not [*sic*] be amended by the Idaho state legislature without the approval of five (5) commissioners. Said budget shall not be exceeded by the director.

Initiative, p. 2.

The prohibition of budgetary amendments by the legislature without a supermajority of commissioners' approval, within this provision, violates several provisions of the Idaho Constitution. This provision appears to violate art. II, § 1, related to the separation of powers based upon its application to the legislature and the executive branches. But more importantly, a specific process is outlined within the Idaho Constitution for the passage of bills; the proposed amendment seeks to alter this process by statute. It is axiomatic that the Idaho Constitution cannot be amended by statute without specific constitutional authorization. Absent such authorization, this alteration is unconstitutional.

Specifically, passage of bills is governed by art. III of the Idaho Constitution. Article III, § 15, outlines the manner of passing bills. As provided for within the proposed initiative, the legislature must seek the approval of the Idaho Fish and Game Commission prior to amending fish and game's budget recommendation. The proposed initiative seeks to insert the fish and game commission into the process by requiring their approval on certain legislative activities. A limitation such as this must be expressly provided for within the Idaho Constitution. This is not contemplated anywhere within the Idaho Constitution.

Coordinately, the proposed initiative could be interpreted to create a fish and game "veto" of legislative action related to fish and game's budgets. This is also unconstitutional. The veto power is expressly limited to the governor in the Idaho Constitution by art. IV, §§ 10 and 11. There is no provision granting any other entity within the State of Idaho the power to veto a bill passed by the legislature.

Finally, art. VII of the Idaho Constitution outlines the system of finance and revenue for the State of Idaho. The legislature is granted plenary authority over this system by the Idaho Constitution. Specifically, art. VII, § 11, mandates that the appropriations of the legislature cannot exceed the revenue (balanced-budget requirement). The proposed initiative contains no mechanism to ensure that this provision of the Idaho Constitution would not be violated, and clearly infringes upon the legislature's power to balance the budget under art. VII, § 11.

Article VII, § 13 of the Idaho Constitution requires that money expended from the treasury must be done by appropriations made according to law. As previously outlined within this review, the Idaho Constitution outlines a specific process for the passage of bills. Case law has defined an appropriation as the authority, from the legislature, given in legal form to the proper officers, to pay from the public moneys, a specific sum. McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931); Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); Herrick v. Gallet, 35 Idaho 13, 204 P. 477 (1922). The proposed initiative's improper infringement into the legislative authority to set appropriations violates this provision of the Idaho Constitution.

## CONCLUSION

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 Jerry Conley by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN P. KANE  
Deputy Attorney General