



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G WASDEN

March 3, 2006

VIA HAND DELIVERY

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE

Re: Certificate of Review
Proposed Initiative Relating to the Removal of Wolves from Idaho

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on February 9, 2006. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and 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 following recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

I. **ESA Background.** Before discussing the text of the proposed initiative and the substantive issues attendant to its provisions, a brief summary of the status of the gray wolf (*Canus lupus*) under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, within Idaho helps place the proposal in legal context. The gray wolf is listed currently as endangered under the ESA in the contiguous 48 States except Minnesota, where it is listed as threatened. 43 Fed. Reg. 9607 (1978); see also Defenders of Wildlife v. Secretary, 354 F. Supp. 2d 1156 (D. Or. 2005) (invalidating rule, 68 Fed. Reg. 15,804 (2003), reclassifying entire species to threatened status). In 1994, however, the Secretary of the Department of the Interior, through the United States Fish and Wildlife Service (FWS), exercised his authority under ESA Section 10(j), 16 U.S.C. § 1539(j), to establish a "nonessential experimental population" (NEP) in portions of three States—Idaho, Montana and Wyoming—by the reintroduction of gray wolves imported from Canada. 59 Fed. Reg. 60,252 (1994).^{*} The principal NEP locus in Idaho is referred to commonly as the central Idaho area and is bounded on the north by Interstate Highway 90, on the east by Interstate Highway 15, and on the west and south by the state line. Another portion of the State east of Interstate Highway 15 is located in the "Greater Yellowstone" NEP area that also encompasses portions of Montana and Wyoming.

The FWS introduced 35 wolves from Canada into the central Idaho area during 1995 and 1996. 70 Fed. Reg. 1286, 1287 (2006). Over the intervening period, the wolf population has increased significantly in the region and is estimated now by IDFG at 500-600 animals in 61 packs with 36 verified breeding pairs. IDFG, Idaho Wolf Management, available at <http://fishandgame.idaho.gov/cms/wildlife/wolves> (last visited February 14, 2006); see also 71 Fed. Reg. 6634, 6636 (2005) (FWS estimate of 422 animals and 27 breeding pairs as of 2004). The Idaho population and those populations in the two other NEP areas have exceeded since 2002 the recovery goal set by FWS of at least 30 breeding pairs distributed among the areas—*i.e.*, at least ten pairs per State—over a consecutive three-year period. 70 Fed. Reg. at 1288.

Aside from satisfying this recovery metric, the 1994 experimental population rule also included as a condition for delisting the existence of adequate state "protective legal mechanisms" to maintain the wolf populations in the three States after loss of ESA protection. In response to that requirement, the 2002 Idaho Legislature approved by

^{*} Section 10(j) was added to the ESA in 1982. It authorizes the Secretary to establish NEPs that expand the range of listed species, thereby promoting recovery objectives, but to do so pursuant to rules designed to "mitigate industry's fears [that] experimental populations would halt development projects, and, with the clarification of the legal responsibilities incumbent with experimental populations, actually encourage private parties to host such populations on their lands." Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1232 (10th Cir. 2000) (quoting H.R. Rep. No. 97-567, at 8 (1982)); see also McKittrick v. United States, 142 F.3d 1170, 1174 (9th Cir. 1998) ("[E]ach experimental population has its own set of special rules so that the Secretary has more managerial discretion. . . . This flexibility allows the Secretary to better conserve and recover endangered species")

concurrent resolution the Idaho Wolf Conservation and Management Plan (Wolf Plan). Although the Wolf Plan reiterated the State's formal position that all wolves should be removed from Idaho by the Federal Government, it also recognized the need "to use every available option to mitigate the severe impacts on the residents of the State of Idaho" from the wolves' presence and thus provided that "the state will seek delisting and manage wolves at recovery levels that will ensure viable, self-sustaining populations." Idaho Wolf Management and Conservation Plan 4 (2002). The FWS approved the Idaho Wolf Plan in 2004. Montana also has an approved plan, but Wyoming does not. 71 Fed. Reg. at 6652-55; see also Wyoming v. USDOJ, 360 F. Supp. 2d 1214 (D. Wyo. 2005) (rejecting challenge to FWS refusal to approve Wyoming wolf management plan).

In January 2005, the Department of the Interior issued a revised Section 10(j) rule for the NEP populations that, in part, loosened "take" restrictions and authorized transfer of regulatory responsibility to Idaho, Montana and Wyoming conditioned upon federal approval of the particular State's wolf management plan and entry into a memorandum of agreement (MOA). 70 Fed. Reg. 1286, 1299-80 (2005). The requisite MOA between Idaho and the Department was executed in January 2006. The revised Section 10(j) rule therefore applies to the central Idaho NEP region.

Finally, FWS published an advanced notice of proposed rulemaking in February 2006, announcing its intention to delist wolves in the Northern Rocky Mountain area, which includes the entirety of the three States and portions of Oregon, Washington and Utah. 71 Fed. Reg. at 6639 (Fig. 2). Delisting is conditioned upon Wyoming's adoption of a wolf management plan consistent with FWS requirements. Id. at 6658 ("on the basis of the best scientific and commercial information available, we believe that the gray wolf in the NRM DPS would no longer qualify for protection under the ESA, if Wyoming modified its State wolf law and State wolf management plan in a manner that the Service would approve as an adequate regulatory mechanism").

II. The Proposed Initiative. The proposal is captioned "An Initiative Relating to the Removal of Wolves From Idaho" and, in addition to prefatory "Whereas" clauses, contains nine sections. Sections 1 through 3 amend, respectively, Idaho Code §§ 36-103, 36-201 and 36-712(a). Sections 4 and 5 repeal, respectively, Idaho Code §§ 36-714(2) and 36-715. Section 6 substantially revises through amendment Chapter 24 of Title 36. Sections 7 and 8 repeal, respectively, Idaho Code §§ 67-818 and 67-819, while Section 9 rescinds the concurrent resolution approving the Wolf Plan. Our review indicates that (1) the proposal's caption is potentially misleading and (2) there are significant constitutional questions raised by the initiative under Article III, Sections 16 and 18. This office also recommends the inclusion of underscoring and strikeouts to indicate new and repealed language that are not required as a matter of law but may be helpful to the public in determining whether to support the initiative.

A. The Petition's Caption. The caption suggests that the initiative, if adopted, will "remove" wolves from Idaho. As discussed above, however, rescission of the Wolf Plan will place Idaho in the same position as Wyoming now occupies and not only will preclude delisting but also will reinstate the 1994 Section 10(j) rule with its more stringent "take" limitations. Neither of those outcomes will effect removal of reintroduced or any other wolves from this State. Rescission of the Wolf Plan instead will result in greater federal control over the species in Idaho. In this regard, it must be emphasized that, by virtue of actions taken pursuant to Section 10(j), wolves exist here and that, insofar as they are listed as threatened or endangered under the ESA, are not subject to a "take"—a term which includes any form of harassment or capture. See 16 U.S.C. § 1532(19) ("[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). Wolves, in short, cannot be "removed" from Idaho by actions taken pursuant to state law. Absent a change in federal statute or implementing regulations, the wolf populations will remain, with the only questions being which governmental entity is responsible for their management and what regulatory measures will be employed to ensure their continued recovery. See, e.g., 70 Fed. Reg. at 1289 ("[b]ecause the [wolf] population inhabits parts of Montana, Idaho, and Wyoming, all three States must have adequate regulatory mechanisms to reasonably ensure their share of the population will remain recovered before the Service can propose it be delisted").

The caption is additionally confusing to the extent that it suggests the petition is limited to wolf removal. As discussed below, the initiative also would abolish the Office of Species Conservation (OSC).

This office offers no view on how those questions should be answered as a policy matter. The initiative sponsors nonetheless may wish to consider rephrasing the caption.

B. Unity of Subject. It is settled that the "power of legislation, reclaimed by the people through the medium of [Article III, Section 1], did not give any more force or effect to initiative legislation than to legislative acts but placed them on an equal footing." Luker v. Curtis, 64 Idaho 703, 706, 36 P.2d 978, 979 (1943); accord State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). Consequently, the constitutionality of voter-approved initiatives is determined "by the same standards as . . . if the legislature had enacted it." Simpson v. Cenarrusa, 130 Idaho 609, 611, 944 P.2d 1372, 1374 (1997).

Article III, Section 16 of the Idaho Constitution contains one of those "standards" and provides in part that "[e]very act shall embrace but one subject and matters properly connected therewith." The Supreme Court has held that "if the provisions of an act all relate directly or indirectly to the same subject, having a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united in one act." Boise City v. Baxter, 41 Idaho 368, 376, 238 P. 1029, 1032 (1925); accord Cole v.

Fruitland Canning Ass'n, 64 Idaho 505, 511, 134 P.2d 603, 605 (1945). Inherent in this requirement is the need for the statute to "disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim." AFL v. Langley, 66 Idaho 763, 768, 168 P.2d 831, 833 (1946).

Here, the proposed initiative's subject matter is wolf removal. This purpose is disclosed perhaps most plainly in the initiative's caption and its "Whereas" clauses that focus exclusively on the reintroduction of wolves by the FWS, the negative effect of such action, and need for wolf recovery efforts to be terminated. Sections 1 through 5 of the initiative respond specifically to the removal issue insofar as they (1) direct the Idaho Department of Fish and Game (IDFG) to remove reintroduced wolves "at such time and to the extent allowed by law" from Idaho and treat all other wolves as "unprotected predatory wildlife[;]" (2) add wolves generally to the list of unprotected wildlife; (3) make a technical change to a provision that requires reporting wolves born or held in captivity; (4) repeal exceptions from the obligation to compensate for damage done by wolves escaping from captivity; and (5) repeal a provision related to the duties of OSC and IDFG with respect to the transition of wolf management from federal to state control. Section 9 rescinds legislative approval of the Wolf Plan. Sections 6 through 8, however, address issues related generally to species conservation by substantially amending Chapter 24 of Title 36 and repealing statutes creating OSC and specifying its authority.

A quite substantial issue exists over whether the proposed initiative violates the unity of subject mandate in Article III, Section 16. The OSC's responsibilities extend to all matters of species conservation, and not simply conservation activities related to wolves. Twenty-three species of mammals, birds, fish, invertebrates and plants listed under the ESA exist in Idaho, and during fiscal year 2005 OSC received \$17.67 million in funds for its conservation-related activities, with only \$2.4 million—or 13.6 percent—for wolf matters. During 2005, for example, the agency petitioned FWS to delist the Idaho springsnail; provided data to FWS to support delisting bull trout in Idaho; developed candidate conservation plans for slickspot peppergrass and sage grouse; assisted in completion of the Clearwater-Salmon forestry agreement; and administered Pacific Coastal Salmon Recovery Funds through project solicitation, review and funding; and prepared to take a lead role in administering the Northwest Power and Conservation Council's 2006-09 Fish and Wildlife Mitigation Program in this State. The provisions related to OSC's elimination could well be determined in a judicial challenge to be unrelated to whether wolves should be removed from Idaho. Moreover, a voter's support of wolf removal entails consideration of factors quite arguably distinct from those that inform a decision concerning whether an agency generally responsible for species conservation matters should be abolished. Cf. Keenan v. Price, 68 Idaho 423, 451, 195 P.2d 662, 679(1948) ("if the thing or things proposed can be divided into questions distinct and independent so that any one of them can be adopted without in any way being controlled, modified, or qualified by the other, then there are as many

[constitutional] amendments [requiring separate ballot measures] as there are distinct and independent questions or subjects") (emphasis and some parenthetical marks deleted). This office recommends that the proposed initiative's sponsors consider either deleting Sections 6 through 8 or pursuing the wolf-removal and OSC-elimination issues through separate petitions.

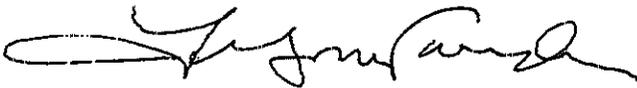
C. Full Text of Sections Amended. Article III, Section 18 prohibits any act for being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." See Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We therefore recommend that the full text of Idaho Code §§ 36-103, 36-201, 36-712 and Title 36, Chapter 24 be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition.

D. Miscellaneous. The sponsor's attorney has suggested a change to the proposed initiative as filed: The word "and" should replace the second "to" in the sixth "Whereas" clause. This review has been conducted with that modification considered. He suggested two other modifications, but they had been made in the proposed petition as filed and thus were considered.

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 Ron Gillett by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

Clay R. Smith
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