



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 19, 2021

TRANSMITTED VIA EMAIL

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
irubel@house.idaho.gov

Re: Request for legislation review of House Bill 135 – Our File No. 21-72762

Dear Representative Rubel:

This letter is in response to your recent inquiry regarding House Bill 135 (H135). Specifically, you ask:

- (1) What is the impact of the language in H135 that provides that the emergency declaration "must not restrict the right of Idahoans to work" when there is an incidental impact on people's livelihoods (e.g. shutting down access to an area affected by forest fire where people work)?
- (2) What other Governor emergency powers would be curtailed if the emergency declaration were only permitted to persist to the extent necessary for federal resources to be received?
- (3) What other constitutional or legal issues may be at play with H135?

Each question is addressed in turn below.

- I. **What is the impact of the language in H135 that provides that the emergency declaration "must not restrict the right of Idahoans to work" when there is an incidental impact on people's livelihoods (e.g. shutting down access to an area affected by forest fire where people work)?**

The proposed language in H135 could have unintended and confusing consequences. As presently drafted, the language in H135 states that “declared emergencies must not restrict the right of Idahoans to work, provide for their families, and otherwise contribute to the economy of Idaho.” It is assumed this language was drafted in response to the Stay at Home Orders issued in the early stages of the COVID-19 pandemic that directed non-essential business and government functions to cease operations at physical locations. It appears that this provision is intended to prevent the closure of any business or governmental operation in order to address an emergency situation. As explained below, this restriction may make it impossible to effectively address emergencies. As you noted within your inquiry, often during a wild or forest fire an area must be evacuated to protect the health and safety of the people living there as well as to enable emergency responders to address the emergency.¹ This new language would have far-reaching effects that extend well beyond pandemic-based scenarios.

H135 prohibits emergency declaration restrictions on the right of Idahoans to 1) work, 2) provide for their families, or 3) otherwise contribute to the economy of Idaho during a declared disaster. There are countless ways to work, provide for one’s family, and contribute to the economy of Idaho. There are likewise countless ways to potentially halt a disaster declaration for restricting these activities.² For instance, the Governor could be withheld from issuing evacuation orders or otherwise controlling the ingress and egress to disaster areas because doing so would affect the rights of the citizens to work, provide for their families or otherwise contribute to the Idaho economy in those disaster areas. Under the broad prohibitory language of H135, the Governor could even be prohibited from closing fee campsites threatened by fires because doing so would affect the right of Idahoans to contribute to the economy of the state (i.e. pay for a campsite). H135 potentially withholds the Governor from declaring any kind of disaster emergency and imposing measures to address the emergency that affects anyone’s ability to spend or make money in the state.

It is essential to note that the Governor’s authority to address emergencies flows from article IV, sections 4 & 5. Emergency declaration and response are core executive functions. A fire cannot be legislated out of existence and if it is to be addressed it requires the mobilization of people, resources, and execution. This presents the possibility that those provisions of H135 interfering with the Governor’s ability to address an emergency could be of limited legal effect, found to be inapplicable, or struck down as unconstitutional. It is important to note that the scope of executive authority to address emergencies in Idaho is an unresolved question of Idaho constitutional law. The type of emergency may also have differing constitutional implications. For example, it is likely more difficult for the Legislature to limit the Governor’s authority to mobilize the National Guard under article IV, section 4 to address an emergency than it is to limit his authority to declare of an emergency under article IV, section 5.

¹ Consider for example a pizza delivery driver that refuses to yield to emergency responders because doing so would make his or her delivery late and potentially place his or her job in jeopardy.

² One uncertainty raised by this legislation is whether it would authorize an individual to ignore an order of isolation or quarantine if such order arose from an emergency declaration. Potentially, this legislation creates a conflict with the provisions on quarantine and isolation, which adds further legal uncertainty.

II. What other Governor emergency powers would be curtailed if the emergency declaration were only permitted to persist to the extent necessary for federal resources to be received?

Assuming it is lawful for the state to continue an emergency declaration solely for the purpose of receiving federal resources,³ the proposed language of H135 would curtail all of the Governor's emergency powers granted through Idaho Code section 46-1008 under such circumstances.

III. What other constitutional or legal issues may be at play with H135?

The proposed language of H135 allows the Legislature to terminate or extend a disaster emergency by concurrent resolution, which is likely unconstitutional.

As explained in greater detail below, the Legislature only possesses the authority granted to it through Idaho's Constitution. Legislative authority under article III of the Idaho Constitution is exercised through the constitutional requirements for lawmaking, and a concurrent resolution does not meet the constitutional requirements for lawmaking.

a. Article III Sets Forth the Requirements for Legislative Branch Authority.

Idaho Code section 46-1008(2), provides that the Legislature has the authority to terminate a state of disaster emergency by concurrent resolution. This authority is echoed and expanded upon in H135. But this office can identify no portion of the Idaho Constitution that allows this legislative claim of authority.

Article III, § 1 of the Idaho Constitution vests the legislative power of the state within a senate and a house of representatives. In order to legislate, both chambers must vote upon and pass legislation. Article III, § 15. All bills passed by the legislature must be presented to the Governor for his signature or disapproval. Idaho Const. art. IV, § 10. If the Governor disapproves and returns the bill, the Legislature may override the Governor through a 2/3 vote of the members in

³ The Stafford Act—the federal law governing presidentially declared disasters—requires a state to have a declared disaster in place to qualify for federal aid. 42 U.S.C.A. § 5170(a). The Act specifically states that “[a]s part of [a presidential disaster declaration], and as a prerequisite to major disaster assistance under this chapter, the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan” (emphasis added). The appropriate state response action and the execution of Idaho's state emergency plan is triggered by the Governor's proclamation of a state of disaster emergency.

An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the state, local and intergovernmental disaster emergency plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to this act or any other provision of law relating to disaster emergencies.

Idaho Code § 48-1008(3) (emphasis added). If the declared state of disaster emergency is terminated by concurrent resolution, the state would no longer be eligible for federal disaster aid.

each house. Idaho Const. art. IV, § 10. Any legislation that does not meet these requirements is not law, unless a specific exception is provided for within the Constitution. Idaho Power Co. v. State, By and Through Dept. of Water Resources, 104 Idaho 570, 574. Legislative action by resolution is not a “law” in that context. *Id. citing*, Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917) (Requirements of legislative action to bind state); Balderston v. Brady, 17 Idaho 567, 107 P. 493 (1910) (Joint resolution is not a law of the State because it is not enacted in the manner provided for enactment of a law).

b. Resolutions of the Legislature Have No Legal Effect Unless Authorized By the Constitution.

In Mead v. Arnell, 117 Idaho 660, 668 (1990), the Court held that the Legislature was authorized to reject administrative rules because the rules were created by way of a delegation of its lawmaking authority set forth in the Idaho Constitution. This authority has since been placed in the Idaho Constitution in article III, section 29, wherein legislative approval or rejection of a rule is not subject to gubernatorial veto. Similarly, legislative action regarding constitutional amendments may occur through resolutions because article XX, section 1 directs that upon a 2/3 vote of each house, voting separately, the Legislature has the duty to submit the proposed amendment to the electorate. When the Legislature is authorized to act by concurrent resolution without presentment to the Governor, such authority is provided for within the Idaho Constitution. This conclusion is reinforced by the case law cited above, as well as the bounds the Idaho Supreme Court set on its holding in Mead v. Arnell:

This holding should not be deemed to apply to any situations, set of facts or possible application other than the rejection of an administrative rule or regulation that has been promulgated pursuant to legislatively delegated authority.

Id. at 668. The Governor’s authority to issue executive orders or proclamations is not a delegated power of the Legislature.

The Governor’s authority to issue executive orders and declarations arises from article IV, section 5:

SUPREME EXECUTIVE POWER VESTED IN GOVERNOR. The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.⁴

⁴ The Governor’s authority is reinforced by article IV, section 4:

GOVERNOR IS COMMANDER OF MILITIA. The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call the militia to execute the laws, to suppress insurrection, or to repel invasion.

Although there is no Idaho case law on the Governor's authority to issue executive orders, reference to the law surrounding Article 2, section 1 of the United States Constitution demonstrates that the Governor's authority under article IV, section 4 is highly analogous to a president's authority under Article 2, sec. 1. A president's executive order can be overridden through Congress's passage of a law subject to the president's veto. A similar process is likely required by Idaho's Constitution. Any legislative override of an executive order or emergency declaration must comply with the law making requirements of Idaho's Constitution.⁵

c. Article IV, § 9 Provides The Governor With Exclusive Authority to Establish the Subjects for An Extraordinary Session of the Idaho Legislature.

Article IV, section 9 of Idaho's constitution places the sole authority to convene the Legislature in an extra session with the Governor. That provision also specifically limits the subjects to be addressed to those determined by the Governor within the proclamation convening the extraordinary session. H135 purports to permit the Legislature if convened in an extraordinary session to address the disaster emergency, any legislation to respond to the disaster emergency, including appropriating necessary funding, and possible termination of the declaration. H135, p. 2, ll. 28-35. This provision of H135 would likely only be constitutionally permissible if the Legislature has been called into extraordinary session to address the disaster emergency. The precise scope of legislative authority to address these issues would be a fact dependent inquiry reliant on the language of the Governor's proclamation assigning the subjects of an extraordinary session.

Conclusion:

The language of H135 that prohibits the Governor from declaring a disaster which might affect the right of Idahoans to work, provide for their families, or otherwise contribute to the economy of Idaho is overly broad and could introduce legal uncertainty into the Governor and the State's authority to respond to disasters and emergencies. This language could lead to unintended consequences. Furthermore, H135's continued use of concurrent resolution's to set aside emergency declaration's raises a significant constitutional question.

See also McConnel v. Gallet, recognizing that when the Governor orders the National Guard to respond, the state must pay the necessary expenses incident to the response. 51 Idaho 386, 6 P.2d 143, 144 (1931).

⁵ It is important to note that the scope of the Governor's authority to declare and respond to emergencies while arising from article IV is largely undefined. The Legislature likely has authority to establish reasonable boundaries, but care must be taken that such boundaries do not render the Governor's ability to identify, declare, and respond to emergencies unworkable. The Legislature may not prevent a constitutional officer from performing his constitutional duties. Wright v. Callahan, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940).

Representative Ilana Rubel
February 19, 2021
Page 6

I hope you find this analysis helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'BK', with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BK:kw