



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

February 23, 2021

TRANSMITTED VIA EMAIL

The Honorable Ilana Rubel  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street  
Boise, Idaho 83702  
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Re: Request for legislation review of House Bill 118;<sup>1</sup> Senate Bill 1090;<sup>2</sup> and House Bill 101<sup>3</sup>  
Our File No. 21-72764

Dear Representative Rubel:

You have asked our office for a legal analysis of the above referenced legislation to advise of “any Constitutional or other legal concerns.” All three bills raise serious constitutional concerns because they interfere with the Attorney General’s core function of protecting the State’s legal interests.

House Bill 101 would change existing law by removing the Attorney General as the primary legal officer of the State of Idaho. This bill does this by allowing (1) state entities and officers to obtain legal advice from an attorney other than the Attorney General and to hire an attorney other than the Attorney General to represent them in court and administrative proceedings; and (2) state entities and officers to retain legal representation without approval by the Attorney General.

House Bill 118 and Senate Bill 1090 take proscriptions against the Attorney General a step further by expressly prohibiting the Idaho State Board of Land Commissioners (Land Board) and the

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<sup>1</sup> <https://legislature.idaho.gov/sessioninfo/2021/legislation/H0118/>

<sup>2</sup> <https://legislature.idaho.gov/sessioninfo/2021/legislation/S1090/>

<sup>3</sup> <https://legislature.idaho.gov/sessioninfo/2021/legislation/H0101/>

Idaho Department of Lands (IDL) from retaining the Attorney General for his legal services and prohibiting the Attorney General from providing legal services to the Land Board or IDL.

### **SUMMARY CONCLUSIONS**

1. A court will likely hold that House Bill 101 violates the separation of powers established in the Idaho Constitution by prohibiting the Attorney General from performing his core constitutional duty of protecting the State's legal interests.
2. A court will likely hold that House Bill 118 and Senate Bill 1090 violate the Idaho Constitution by stripping the Land Board of its constitutionally-vested discretion to manage the endowments for the sole and exclusive benefit of the endowment beneficiaries, as well as by eliminating the discretion the Board has to hire experts of its own choosing.
3. A court will likely hold that House Bill 118 and Senate Bill 1090 violate the separation of powers established in the Idaho Constitution by prohibiting the Attorney General from providing legal advice to the Land Board and the IDL, which is contrary to his constitutionally-established roles on the Land Board.

### **THE ATTORNEY GENERAL'S CONSTITUTIONAL AUTHORITY**

Article II, section 1 of the Idaho Constitution provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of power properly belonging to one of these departments shall exercise any powers properly belonging to either of the other, except as in this constitution expressly directed or permitted.

The Office of the Attorney General is created in article IV, section 1 of the Idaho Constitution. The Constitution grants the Attorney General several specific duties, including designation as a state land commissioner. Idaho Const. art. IX, § 7. The Constitution also provides that the executive officers of the State "shall perform such duties as are prescribed by this Constitution and as may be prescribed by law . . ." Idaho Const. art. IV, § 1. Although the Constitution does not specifically delineate the duties of the executive officers within this section, Idaho courts and courts across the country have recognized that constitutionally-created executive officers are imbued by their constitutions with certain implied powers and duties.

When interpreting the provision "as may be prescribed by law" in article IV, section 1, the Idaho Supreme Court in a 1940 decision declared that "the legislature may prescribe duties in addition to those prescribed by the constitution, provided, those prescribed by the legislature do not conflict with the duties either expressly or impliedly prescribed by the Constitution." Wright v. Callahan, 61 Idaho 167, 99 P.2d 961, 965 (1940). Thus, any laws passed by the Legislature that conflict with the Attorney General's express or implied constitutional duties violate article IV, section 1 of the Constitution.

The Idaho Supreme Court reaffirmed this principle 80 years later in Ybarra v. Legislature by Bedke, 166 Idaho 902, 466 P.3d 421 (2020), when it stated: “As explained in both Wright and Williams, the characteristic duties belonging to a constitutional officer—those never repealed or expounded on by the Constitution—cannot be taken away by the Legislature.” *Id.* at 430.

Courts have looked to several sources when determining the inherent powers of a constitutional officer or department, including the territorial laws pre-dating the Constitution, the framers’ intent at the time the Constitution was adopted, and the common law. *See, e.g., Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940) (discussing territorial laws and the framers’ intent); State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971) (discussing common law).

**A. Inherent Powers of the Attorney General Under Territorial Law And As Understood By The Framers At The Time of Adoption**

The first source for determining the extent of the Attorney General’s constitutional powers are the territorial laws predating the adoption of the Constitution. The territorial laws demonstrate how the framers of the constitution envisioned the Attorney General’s role. Section 250 of the Idaho Revised Statutes (1887) provided:

It is the duty of the Attorney General: . . . 1. [t]o attend the Supreme Court and prosecute or defend all causes to which the Territory or any officer thereof is, in his official capacity, a party. . . . [and] 6. [to] give his opinion in writing, without fee, to the Legislature or either House thereof, and to the Governor, the Territorial Secretary, Controller, Treasurer, the Trustees or commissioners of Territorial Institutions, when required, upon any question of law relating to their respective offices . . . [and] 11. [t]o discharge the other duties prescribed by law.

*Id.* Rev. Stat. 1887 § 250 (emphasis added). The plain language of this provision makes it the duty of the Attorney General to provide legal counsel to the State and its various departments, agencies and officials.

In terms of the framers’ intent, the proceedings of the Idaho Constitutional Convention confirm that the drafters of the Constitution understood that in creating the Office of the Attorney General, they were vesting the office with authority similar to that of the territorial attorney general, namely to represent and advise the State and state officers in all legal matters. In response to a comment that the offices of state auditor and attorney general could be eliminated, delegate George Ainslie remarked:

And as to getting along without an attorney general, I think that is impossible; nor can you devolve the business of the attorney general upon a district officer. That would be a fine thing to see, that the district attorney from some district should act as attorney general in some case coming here on appeal, or assume his duties in some matter requiring a construction of the constitution. Let us make this a proper

organization, in carrying out the ends of state government. I don't see how you could get along without it, and I object to any amendment to it.

1 Proceedings and Debates of the Constitutional Convention 413 (I.W. Hart, ed., 1912). Likewise, delegate John S. Gray remarked:

The attorney general I must say—you must agree with me, I think, who will attend to the legal duties of the state, if necessary. Upon whom will these devolve? Upon the district attorney, or must there be a man got for the occasion? If so, who? If one should be taken for the occasion, it would certainly cost more, should there be litigation to any extent, than it would to have a regular salaried officer upon whom we could depend . . . a good officer of that kind is certainly one of the most important officers devised among the state officers, to attend to all the state business, to attend to all the prosecutions before the supreme court; and we certainly will have to increase our expense accounts for the prosecution of criminals arising from the counties, if the district attorney must follow them here and prosecute them in the event of appeal . . . .

*Id.* at 414 (emphasis added). The breadth of the Attorney General's constitutional duties was also recognized by delegate Alex E. Mayhew:

The attorney general of the territory has to be the adviser of all the state officers; he will be required to examine not only records and authorities but give written opinions for the different departments. It will be his duty to defend all cases in behalf of the state; to prosecute all criminal cases appealed from the different district courts to the Supreme Court. He will be required, as it is provided in the Judiciary bill, that there shall be four terms a year of the Supreme Court, to attend all those terms, which will require almost the entire attention of the attorney general.

2 Proceedings and Debates of the Constitutional Convention at 1422 (emphasis added).

These authorities demonstrate that the framers of the Idaho Constitution intended the Attorney General to be the chief legal officer of the State. The Attorney General's most important constitutional duty is to protect the State's legal interests, which includes a wide range of responsibilities as expressed in Idaho's Territorial law and by the founders of the Constitution.

#### **B. Inherent Powers of the Attorney General Under Common Law**

The Idaho Supreme Court has also recognized that the Attorney General is imbued with certain common law powers. In Howard v. Cook, 59 Idaho 391, 83 P.2d 208 (1938), the Court addressed a case involving the title to water rights that had been foreclosed upon by the State Department of Lands. In that case, a landowner claiming title to a portion of the water had sued the State to quiet

title to the water. The Attorney General, acting pursuant to Idaho Code section 56-120 (the predecessor to Idaho Code section 58-120) filed a Cross Complaint to quiet title in the State. The Court ruled that the private landowner could not bring an action against the State because the State had not waived its sovereign immunity. But the Court also ruled that the Court had jurisdiction to render judgment on the State's cross claim because the Attorney General had both statutory and common law rights to bring the action. In so doing, the Court recognized the existence of the common law power of the Attorney General:

It is virtually conceded that the attorney general is empowered to institute civil actions for and on behalf of the state for the protection of the state's rights and interest, as was apparently the universal rule at common law; that is, at common law, the attorney general had the right to institute civil suits on his own initiative and at his own discretion for such purpose.

*Id.* at 397, 83 P.2d at 211. That holding is consistent with the majority rule of law in the United States. See NATIONAL ASSOC. OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (Jan. 1975), <https://www.ojp.gov/pdffiles1/Digitization/16297NCJRS.pdf>. The decision in Howard reaffirms the Attorney General's common law right to act on behalf of the State. As noted above, that right also exists as one of the Attorney General's characteristic duties under the Idaho Constitution.

### **THE ATTORNEY GENERAL'S CHARACTERISTIC DUTIES MAY NOT BE DIMINISHED BY THE LEGISLATURE**

Whether by reference to the territorial statutes, the Constitutional Convention or common law, the Attorney General has the constitutional authority and duty to represent the State, its agencies, officers, boards and other state entities. The question posed is whether the Legislature can limit the Attorney General's ability to represent the State, its officers and entities. As explained above, the Idaho Supreme Court has repeatedly held that "the characteristic duties belonging to a constitutional officer—those never repealed or expounded upon by the Constitution—cannot be taken away by the Legislature." Ybarra v. Legislature by Bedke, 166 Idaho 902, 466 P.3d 421, 430 (2020). Under this Idaho Supreme Court doctrine, any law which diminishes the characteristic duties of the Attorney General, as a constitutional officer, is unconstitutional.

As discussed above, the characteristic duties of the Attorney General imbued by the Constitution are wide ranging and include representing and defending the State, its officers, agencies and other state entities before administrative tribunals and in court, and providing legal guidance to the State, its officers, agencies and other state entities.

In order to fulfill these characteristic duties of his office, the Attorney General must be able to coordinate, manage and direct the legal affairs of the State and protect the State's legal

interests, whether by providing legal direction in the State's day-to-day activities or representing the State, its officers and entities before a court or administrative tribunal.

In light of the foregoing legal authority, a court is likely to conclude that House Bill 101 is unconstitutional because it allows attorneys other than the Attorney General do what the Attorney General is constitutionally charged to do and entirely removes the Attorney General from equation. The bill makes it impossible for the Attorney General to fulfill his constitutional duty to protect the State's legal interests. As explained below, House Bill 118 and Senate Bill 1090 suffer from the same constitutional defect, where these bills actually prohibit the Attorney General from performing his constitutional duties.

With the exception of one outlier decision, the Idaho Supreme Court has routinely adhered to the doctrine that the Legislature does not have the authority to take the characteristic duties of a constitutional officer away. The following is a discussion of those instances in which the Idaho Supreme Court has considered the interplay between the Legislature and the duties of constitutional officers or the powers of another branch of government.

**1. State v Malcom, 39 Idaho 185, 226 P. 1083, 1084 (1924)**

In State v Malcom, the statute in question authorized county assessors to collect taxes on personal property. The Court found that the statute conflicted with the then-constitutional authority of county treasurers to collect taxes, even though the statute only "impos[ed] part of the duties of the treasurer upon respondent." *Id.* at 1086. The Court held that, by virtue of such partial divestiture of the treasurer's duties, the act was "clearly repugnant to the Constitution," reasoning that:

The Legislature cannot enlarge or decrease the scope of a constitutional office, where it is clearly fixed by the Constitution. When the Constitution devolves a duty upon one officer, the Legislature cannot substitute another.

Malcom, 226 P. at 1084 (citations omitted).

**2. Wright v. Callahan, 61 Idaho 167, 99 P.2d 961 (1940)**

In Wright v. Callahan, the Court extended the reasoning in Malcolm to the inherent duties of constitutional officers. The Court addressed legislation that transferred certain duties of the State Auditor to a statutorily created "office of comptroller." Consistent with the holding in Howard v. Cook, discussed above, the Court began its analysis by noting:

From the earliest period of our history as a nation, almost every State in the Union had a Secretary of State, Controller, Treasurer, and Attorney-General; and the general nature of the duties pertaining to each were perfectly well known to the framers of our Constitution.

Wright, 99 P.2d at 965 (quoting Love v. Baehr, 47 Cal. 364 (1874)). The Court concluded that the drafters of the Idaho Constitution were aware of the principle established in Baehr and other cases that the Legislature cannot transfer to other officers “important powers and functions which from time immemorial have belonged” to the office. *Id.* (quoting State ex rel. Kennedy v. Brunst, 26 Wis. 412, 7 Am. Rep. 84 (1870)). It ultimately held:

Having concluded the powers and duties conferred upon the territorial controller as an auditor and “superintendent of the fiscal concerns” and affairs of the territory were, by the adoption of Section 1 of Article IV, *supra*, impliedly vested in the State Auditor, the legislature could not, therefore, divest him thereof by creating the office of comptroller and vesting in the comptroller the powers and duties which the Constitution already affixed to the auditor's office.

Wright, 99 P.2d at 966.

**3. Taylor v. State, 62 Idaho 212, 109 P.2d 879 (1941)**

In Taylor v. State, however, the Idaho Supreme affirmed the Legislature’s power to authorize the state liquor board to hire counsel of its choosing rather than using the Attorney General. Without deciding whether the Attorney General had the constitutional authority to serve as, or to designate, counsel for the state liquor board, the Court, in a strongly split decision, found that a 1934 amendment to the Idaho Constitution granting the Legislature “full power and authority” over the manufacture, sale, and transportation of “intoxicating liquors” allowed the use of non-attorney general lawyers. 109 P.2d at 880. The Court concluded that the “constitutional amendment placed upon the legislature the exclusive responsibility and duty of exercising full power and authority to control and regulate intoxicating liquors for beverage purposes,—wisely or unwisely.” *Id.* at 881. Because the Legislature’s power was exclusive in this context, the Court concluded that, in this particular instance, recognizing a constitutional power in the Attorney General to “designate legal counsel” for the liquor board “and to direct and control the duties of such counsel” would be “to say that the legislature to this extent, does not have ‘full power and authority to ... control and regulate ... intoxicating liquors for beverage purposes.’” *Id.*

**4. Padgett v. Williams, 82 Idaho 28, 348 P.2d 944, supplemented, 82 Idaho 114, 350 P.2d 353 (1960)**

Without any reference or discussion of the analysis or result reached in Taylor, the Court in Padgett v. Williams addressed whether the Legislature could appropriate funds to a state agency to pay for legal counsel who was not an assistant attorney general. The State Auditor had denied a claim to pay the salary of the counsel arguing in part that claim was not valid because the agency could not employ counsel other than the Attorney General. Finding the appropriation valid, the Court stated:

Assuming, arguendo, that the decision in Wright v. Callahan, supra, is correct, even in light of Idaho Const. art. 21, § 2, which provides:

‘All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature[.]’

it by no means follows that the office of attorney general became impliedly vested with common law powers upon the adoption of our constitution, which were not thereafter subject to legislative change. Indeed, even those states which hold that the attorney general is clothed with common law power, with but one exception (Illinois), conclude that such powers are subject to the legislative will. *Darling Apartment Co. v. Springer*, 25 Del. 420, 22 A.2d 397, 137 A.L.R. 803, 817. We conclude, therefore, that the office of attorney general is not constitutionally vested with any common law powers and duties that are immune to legislative change. Cf. *State ex rel. Clancy v. Hall*, 23 N.M. 422, 168 P. 715; *State v. Davidson*, 33 N.M. 664, 275 P. 373; *Shute v. Frohmler*, 53 Ariz. 483, 90 P.2d 998; *State v. Industrial Commission*, 172 Wis. 415, 179 N.W. 579; *State ex rel. McKittrick v. Missouri Public Service Commission*, 352 Mo. 29, 175 S.W.2d 857.

82 Idaho at 35-36, 348 P.2d at 948 (emphasis added). The Court went on to conclude that the substantive statute creating the agency authorized it to hire counsel, and that the appropriation bill providing the money necessary to pay the salary made the claim valid. *Id.* at 36-38, 348 P.2d at 948-50.

It should be noted at this juncture, however, that the discussion of Wright in Padgett, which is quoted above, directly contradicts the very holding of Wright; yet, the Court in Padgett did not overrule Wright. Wright remains valid and controlling precedent in Idaho and has been cited numerous times to invalidate legislation, while Padgett has never been cited as controlling authority for the proposition at hand, which is that the Legislature may prescribe duties in addition to those prescribed by the Constitution, but those duties may not conflict with or diminish the duties expressly or impliedly prescribed by the Constitution. *See infra*.

##### 5. State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971)

The next case addressing the authority of the Legislature to abrogate or limit the inherent or common law powers of a co-equal branch of government is State v. McCoy.<sup>4</sup> In that case, the Legislature had provided for mandatory minimum sentences for certain offenses. Notwithstanding the statute, a sentencing court suspended the sentence of a defendant. The State appealed, arguing that in passing the mandatory minimum sentence provisions, the Legislature abrogated the common law authority of the judiciary to suspend sentences. The State further argued that the Legislature is free to modify the common law by statute. The Supreme Court rejected this contention:

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<sup>4</sup> The holding in McCoy was expressly changed by an amendment to the Idaho Constitution providing that the Legislature may set mandatory minimum sentences. The legal rationale of McCoy, however, remains intact.



We conclude from these authorities that the judiciary possessed the power at common law to suspend sentences. However, this does not, standing alone, nullify the statute under consideration for it is clear that the common law can almost always be overturned or modified by the legislature. I.C. s 73-116. If the common law was recognized as the law of this state at the time the constitution was adopted, *State ex rel. Rich v. Idaho Power Co.*, *supra*, we must also conclude that the powers reserved to the several departments, but not enumerated, must be defined in the context of the common law.

Were we deliberating upon a matter of substantive law, there would be no doubt that the legislature has effected a valid change in the common law. However, this is a consideration of much greater dimension. The constitution provides that the judiciary is a department separate from the others and that the ‘... legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government ...’ But, this document does not explicitly delineate what those powers shall be.

For this reason we must go beyond the constitution itself to discover what were the powers held peculiarly by the judiciary. In this light, we perceive that the authority possessed by the courts to sentence necessarily includes the power to suspend the whole or any part of that sentence in proper cases and this is more than a bare rule of substantive law subject to change by the legislature. Rather, it is in the nature of an inherent right of the judicial department and one which the separation of powers concept in our system of government places above and beyond the rule of mandatory action imposed by legislative fiat.

94 Idaho at 240, 486 P.2d at 251 (emphasis added).

**6. Williams v. State Legislature of Idaho, 111 Idaho 156, 722 P.2d 465 (1986)**

The Court next addressed a constitutional officer’s duties in Williams v. State Legislature of Idaho, which involved the Legislature’s denial of funding to the State Auditor to perform certain audit functions. Reiterating the holding in Wright that the Legislature may not prevent a constitutional officer from performing his constitutional duties, the Court went on to find that the territorial laws creating the State Auditor were the source of authority for the State Auditor’s audit functions. The Court concluded that those functions had carried through the adoption of the Constitution and included the audit functions that had been stripped away by the Legislature. The Court rejected an argument that a long history of legislative encroachment on the auditor’s function was a basis to find that these functions did not survive:

The Legislature may not usurp the power of a constitutionally created executive agency, whether or not the power has been exercised. *Wright*, 61 Idaho at 179–80, 99 P.2d at 966. The Maryland Court of Appeals has stated:

The rule which can be distilled from the cases is essentially this. If an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced in impotence by the transfer of duties characteristic of the office to another office created by the legislature . . . .

*Murphy v. Yates*, 276 Md. 475, 348 A.2d 837, 846, (1975) (citations omitted).

Williams, 111 Idaho at 160, 722 P.2d at 469. The Court thus found that the Legislature’s actions violated the Idaho Constitution.

**7. Ybarra v. Legislature by Bedke, 166 Idaho 902, 466 P.3d 421 (2020)**

Finally, and most recently, the Court addressed this issue in Ybarra v. Legislature by Bedke, 166 Idaho 902, 466 P.3d 421 (2020). The Legislature had reassigned certain employees and functions from the State Superintendent of Public Instruction to the State Board of Education. The Superintendent contended that this infringed upon her inherent constitutional duties in violation of the holdings in Wright and Williams. Reaffirming the principles of both Wright and Williams, the Court stated: “As explained in both *Wright* and *Williams*, the characteristic duties belonging to a constitutional officer—those never repealed or expounded on by the Constitution—cannot be taken away by the Legislature.” Ybarra, 166 Idaho at \_\_\_, 466 P.3d at 430.

The Court went on, however, to explain that unlike the office of the State Auditor in Wright and Williams, which had retained the authorities of its territorial or common law counterpart, the Idaho Constitution had specifically modified the duties of the Superintendent of Public Instruction, and had vested in the State Board of Education the very duties that the superintendent claimed were inherent in her office:

Undoubtedly, as in *Wright*, the Superintendent has inherent characteristic duties and powers to her constitutional office that carry over from Idaho's territorial days. As explained in both *Wright* and *Williams*, the characteristic duties belonging to a constitutional officer—those never repealed or expounded on by the Constitution—cannot be taken away by the Legislature. Yet, discerning and defining these duties is difficult given the unfortunately amorphous characteristic of the office, as defined in the Constitution and the territorial laws of long ago. Indeed, what the Superintendent now describes as “residual powers” can be lost and become merely

vestigial powers if they are later delegated by the Constitution to another constitutional office.

While the Idaho Constitution is silent as to the duties and powers of the Superintendent, it specifically assigned any general supervisory powers the Superintendent once had before statehood to the Board. Additionally, the Idaho Constitution expressly provides that the Superintendent's role will be further defined by the Legislature. Thus, any powers the Superintendent possessed during the territorial period of Idaho that were assigned to the Board by the delegates to the Constitutional Convention are now merely vestigial because they did not survive to grant the Superintendent the broad powers she now seeks for "leading, directing and supervising the public and secondary schools of Idaho."

Ybarra, 166 Idaho at \_\_\_, 466 P.3d at 430. Accordingly, the Court found no violation in the Legislature's actions.

### **ANALYSIS/CONCLUSION**

A synthesis of these cases leads to the conclusion that the Idaho Supreme Court is likely to look to the territorial statutes and the duties the framers of the Constitution understood were inherently associated with the Office of the Attorney General when creating that Office in the Constitution to ascertain what inherent authorities are held by this Office that cannot be abridged by the Legislature. As discussed above, the Attorney General's express and implied constitutional duties include serving as the State's primary legal officer charged with conducting the legal affairs of the State, its officers, its boards, agencies, and other state entities. The constitutional debates demonstrate the framers' intent that this role be preserved in the Constitution, and the framers' intent that the Attorney General serve on boards such as the Land Board specifically so that he could bring his legal expertise to the Board at little expense.

The majority of cases in Idaho hold that when the Constitution has assigned constitutional duties to a constitutional officer, the Legislature may not devolve upon some other office the inherent duties of that constitutional officer. *See Taylor & Ybarra*. Thus, a court likely would conclude that both House Bill 118 and Senate Bill 1090 violate article V, section 1 of the Idaho Constitution and the separation of powers doctrine by attempting to strip the Attorney General of his inherent authorities as legal counsel for the State, and his specific role as a member of the Land Board.

Further, by allowing state entities to retain their own legal counsel, who are not within the Office of the Attorney General and are hired without the approval of the Attorney General, a court is likely to conclude that House Bill 101 usurps the role that the framers of the Constitution contemplated would be reserved to the Attorney General. The Territorial law in effect when Idaho's Constitution was adopted and the comments of the framers demonstrate

that the Attorney General was to be the State's chief legal officer representing the State, its entities and officers in court and before administrative tribunals, and advising the State, its departments, officers, and the Legislature in legal matters. House Bill 101 prevents the Attorney General from acting in his capacity as the State's chief legal officer and from performing his core function of protecting the State's legal interests. The bill impairs the characteristic duties of the Attorney General and, therefore, is likely unconstitutional.

While the decision in Padgett v. Williams provides support for the argument that the Legislature may limit the role of the Attorney General, Padgett is an outlier decision. Its discussion of Wright ignored the fundamental holding and analysis in that case. Padgett further failed to discuss other Idaho cases having precedential value, instead looking to the law of other states, and reaching a conclusion inconsistent with the long history of cases interpreting Idaho's Constitution. No case subsequent to Padgett has followed its reasoning and indeed all subsequent cases seem to reject its rationale.

House Bill 101 strips the Attorney General of his inherent role as chief legal advisor to the State, its entities and officers. House Bill 118 and Senate Bill 1090 strip the Attorney General of his inherent role as the chief legal advisor to the Land Board and the Department of Lands. All three bills prevent the Attorney General from performing his core function of protecting the State's legal interests. Therefore, a court would likely determine that the bills violate the Idaho Constitution.

Below is a discussion of how House Bill 118 and Senate Bill 1090 raise other constitutional concerns.

## **HOUSE BILL 118, SENATE BILL 1090 AND THE LAND BOARD**

### **A. The Board's Fiduciary Duty**

These bills prohibit the Idaho Department of Lands (IDL) from receiving legal services from the Attorney General and the Attorney General from providing such services to IDL. As such, they implicate the constitutional authorities of both the Land Board and the Attorney General because the IDL is merely the instrumentality of the Board, and the Attorney General is a member of that very Board.

The governor, secretary of state, attorney general, state controller and superintendent of public instruction being constituted a state board of land commissioners by section 7 of article 9, of the Constitution of the state, as such board, have the direction, control and disposition of the public lands of the state. The board shall exercise the said constitutional functions through the instrumentality of a department of lands which is hereby created.

Idaho Code § 58-101 (emphasis added).

The Land Board is created by the Idaho Constitution at article IX, section 7:

The governor, superintendent of public instruction, secretary of state, attorney general and state controller shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.

Idaho Const. art. IX, § 7. The Land Board is the “epitomic trustee” of Idaho’s endowment lands, Wasden v. State Bd. of Land Comm’rs, 153 Idaho 190, 280 P.3d 693 (2012), and exercises broad and exclusive judgment and discretion in the management of the endowments. Pike v. State Bd. of Land Comm’rs, 19 Idaho 268, 113 P. 447 (1912); Blaine County Livestock Assn v. State Bd. of Land Comm’rs, 34 Idaho 807, 198 P. 760 (1921). While the Legislature has some authority regarding the management of endowment lands by virtue of the phrase “under such regulations as may be prescribed by law” in article IX, section 7, the Legislature may not pass laws that interfere with the Board’s fiduciary duty to the endowment beneficiaries. *See* Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 64, 982 P.2d 367 (1999).

The question presented by Senate Bill 1090 and House Bill 118 is whether, by directing from whom the IDL and by extension the Land Board is to receive legal services, they impinge upon the discretion of the Board in a way that may be constitutionally untenable.

In exercising its authority, the Land Board is governed by the Uniform Prudent Investor Act and legal standards applicable to any type of trustee. Typically, trustees have broad discretion to employ advisers and experts to assist them in the management of the trust assets. *See generally* Restatement Third Trust § 88(c):

The trustee can properly incur reasonable expenses in employing lawyers, brokers, or other agents or advisors so far as such employment is appropriate to the sound administration of the trust. The trustee cannot properly incur expenses, however, in employing agents or others to do acts if the employment would involve a violation of the trustee's duties as defined either by law or by the terms of the trust.

This fundamental premise is wisely reflected in the Board’s enumerated duties which provide that the Board has the duty:

To appoint and consult with expert advisors for each critical function for which the state board of land commissioners has responsibility. In this context the term “expert advisor” shall mean a person engaged in the business for which he holds himself out to be an expert and who is experienced in that field.

Idaho Code § 58-104(12). In exercising these duties a trustee is required to be conscious of costs due to the fundamental duty of prudence which governs all actions taken. Restatement Third Trusts at § 88(a) & § 77 (duty of prudence).

The proposed legislation removes the Board's discretion to consult with experts of its choosing, and may cause the Board to expend endowment funds greater than would be necessary in violation of its fiduciary duty. The Board should have the discretion to make a determination as to the expertise of the persons it retains and should not be prevented from retaining attorneys it deems capable of providing the most qualified and cost effective legal advice, including the Attorney General's office, if it deems it appropriate. In this regard, a court would likely conclude that House Bill 118 and Senate Bill 1090 remove the Board's discretion and violate the Idaho Constitution.

**B. Conflict of Interest Concerns With The Attorney General Serving As A Member of the Land Board**

One of the stated reasons for House Bill 118 and Senate Bill 1090 is that there is a purported "conflict of interest" created by the representation of IDL by the Attorney General's staff while the Attorney General sits upon the Board. There is, however, no "conflict of interest" as defined in the law. Idaho Rule of Professional Conduct 1.7 defines a "conflict of interest" to exist where "the representation of one client will be directly adverse to another client," or, when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . ." Here there is no conflict because there is only one "client." IDL is merely the instrumentality of the Board, and thus the Deputies assigned to IDL are effectively retained by the Board to assist IDL in carrying out the directives of the Board, consistent with the Board's constitutional and statutory duties.

The Attorney General is but one member of the Board, and when serving in that capacity there is no conflict. Moreover, the Idaho Rules of Professional Conduct recognize the unique role of the Attorney General in representing the State, and provide greater flexibility to the Attorney General's office even when there are real conflicts. *See* Idaho Rules of Professional Conduct Preamble Comment 18.<sup>5</sup>

Comments from the sponsors of this legislation appear to conflate the question of "conflict of interest" with a question of the "influence" the Attorney General may exercise upon the Board.

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<sup>5</sup> Comment 18 states: "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority."

The persuasiveness of a particular member of the Board with respect to issues is not a “conflict of interest.” Nor will this legislation resolve any questions regarding the influence of the Attorney General upon members of the Board by removing Deputy Attorneys General from representing IDL and the Board. Indeed, removing the deputies may actually create a conflict by purporting to make a distinction between representing IDL and the Board. If the IDL receives legal advice from attorneys representing it that conflicts with the legal counsel of the Attorney General to the Board, a real conflict may arise.

### **C. The Attorney General’s Constitutional Role As A Member of the Land Board**

It is apparent from both the text of the original Idaho Constitution, as well as the discussions and debates surrounding the Constitution, that one role of the Attorney General on the Land Board, and the many other boards established by the Constitution,<sup>6</sup> was to serve as counsel to these boards. This was driven at least in part by a spirit of thrift held by the framers of our state constitution:

[W]e have provided otherwise that they shall be commissioners of lands, commissioners of penitentiaries, and board of examiners. There are three other offices prescribed that they shall hold, and there may be other commissions the legislature would like to create, and by appointing these gentlemen members of the commissions, it will save the expense . . . .

2 Proceedings and Debates of the Constitutional Convention 1416 (I.W. Hart, ed., 1912).

House Bill 118 and Senate Bill 1090 would strip the Attorney General of this role of providing legal counsel to the instrumentality of the Land Board–IDL and, thus, is contrary to the Idaho Constitution and the intent of its framers.

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<sup>6</sup> Originally the Attorney General was a member of the Board of Canvassers (art. XXI, § 2); the Board of Examiners (art. IV, § 18); the State Board of Land Commissioners (art. IX, § 7); the Board of Education (art. IX, § 2, amended in 1912); the Board of Equalization (art. VII, § 12, amended in 1944); State prison commissioners (art. X, § 5, amended in 1942 to become an independent State Board of Correction); and the Board of Pardons (art. IV, § 7, amended in 1946). With the exception of the Board of Regents of the University of Idaho, and the Board of Arbitration under the Bureau of Immigration and Labor, the Attorney General was on every board or commission created by the original Idaho Constitution.

Representative Ilana Rubel  
February 23, 2021  
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I hope you find this analysis helpful.

Sincerely,

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

BRIAN KANE  
Assistant Chief Deputy

BK:kw