STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN


February 22, 2012

The Honorable Elliot Werk
Idaho State Senate
Idaho Statehouse

**Hand Delivered**

Re: SJR 106

Dear Senator Werk:

You asked the Attorney General's Office to address the following questions regarding SJR 106:

Whether the amendment would preclude the state from charging fees for this newly constitutionally protected right to hunt, fish, and trap.

Whether the amendment would preclude the management of fish and game, including the imposition of restrictions or quotas on hunting, fishing, and trapping.

Whether the language concerning water rights and minimum water amounts will impede, inhibit, or otherwise cause issues with the management of water resources for species conservation and restoration.

Whether the language concerning water rights and minimum water amounts will potentially place Idaho into conflict with the federal government over water issues and species restoration efforts.

Whether the language concerning water rights and minimum water amounts place Idaho into conflict with any federal constitutional imperatives or Congressional acts or laws, and, in the event of outcomes, the likely outcome for the state of Idaho, Fish and Game Commission, associated laws, and the ongoing management of hunting, fishing, and trapping in our state.


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MAIL 115413

The first sentence of SJR 106 provides:

> The rights to hunt, fish and trap are a valued part of the heritage of the State of Idaho and shall forever be preserved for the people and managed through the laws, rules, and proclamations of the state.

The insertion of the conjunctive term "and managed" will likely be interpreted to create a break or separation between the duty to preserve hunting, fishing, and trapping rights and the authority to manage those rights through laws, rules, and proclamations. With such a separation in place, the courts will likely conclude that the amendment is not intended to infringe upon the traditional authorities of the Legislature and the Idaho Fish and Game Commission to take into account factors other than preservation of hunting, fishing, and trapping rights when establishing fish and game laws, rules, and proclamations. In short, by providing that hunting, fishing, and trapping rights may be "managed" without any qualifications on such management, the most likely interpretation of the amendment is that the right to fish and hunt is not a fundamental right that can be restricted only to further a compelling governmental purpose. *See California Gillnetters Ass'n v. Dept. of Fish and Game*, 46 Cal. Rptr. 2d 338 (Ct. App. 1996) (constitutional provision guaranteeing "right to fish" created "only a qualified right," not a fundamental right, since same provision "expressly authorized regulation of fishing"). While SJR 106 would establish a general duty to preserve hunting, fishing, and trapping rights, such duty would not infringe upon traditional state police powers to regulate the taking of fish and game through licensing, quotas, and time, place, and manner restrictions. Indeed, as has been recognized by courts with similar provisions, continued implementation of hunting, fishing, and trapping restrictions is essential to preservation of the fish and game that is the subject of the hunting, fishing, and trapping rights. *State v. Colosimo*, 669 N.W.2d 1, 6 (Minn. 2003). In *Colosimo*, the court held that fishing regulations "work in tandem" with the constitutional fishing right provision to achieve "preservation of Minnesota's game and fish resources." *Id.* Similar reasoning should apply in the event SJR 106 is adopted and ratified.

In short, the amendment, if enacted and ratified, is unlikely to preclude the state from charging fees for this newly constitutionally protected right to hunt, fish, and trap, and is unlikely to preclude the management of fish and game, including the imposition of restrictions or quotas on hunting, fishing, and trapping.

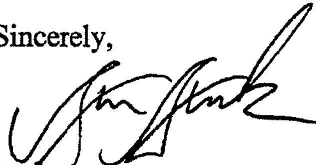
The second sentence of SJR 106 provides:

> The rights set forth herein do not create a right to trespass on private property, shall not affect rights to divert, appropriate, and use water, or establish any minimum amount of water in any water body, and shall not lead to a diminution of other private rights.

As written, the second sentence of SJR 106 does not prohibit the Legislature from establishing minimum stream flows or lake levels for the benefit of fish and game species. It simply prohibits courts from implying the existence of such minimum stream flows or from implying any restrictions on the diversion, appropriation, and use of water as a result of the establishment of the hunting, fishing, and trapping rights. The provision should not impede, inhibit, or otherwise cause issues with the management of water resources for species conservation and restoration, since the provision does not restrict existing authorities to affirmatively manage the state's water resources for the benefit of species consistent with the provisions of article XV of the Idaho Constitution. Nor does the provision appear likely to create conflicts with federal statutes or constitutional provisions. Federal laws traditionally defer to state water laws "to resolve water resource issues in concert with the conservation of endangered species." 16 U.S.C. § 1531(c)(2).

This letter is provided to assist you with the legal questions presented in your letter and is not intended as a formal legal opinion or to represent the views of this office on any policy issues presented by the draft resolution.

Sincerely,



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Natural Resources Division

SWS/pb