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

February 9, 2021

TRANSMITTED VIA EMAIL

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

Re: Request for Analysis of H.B. 90

Dear Representative Rubel:

You requested analysis of H.B. 90, legislation that would amend title 73, Idaho Code, by the addition of a new section titled, "Protection of Certain Monuments and Memorials."

As analyzed below, this bill's procedure for approving and denying the mandated requests, legislative concurrent resolutions, likely has no legal effect and is therefore unenforceable. H.B. 90 may also violate constitutional prohibitions on local or special laws. Further, given the lack of definition of certain terms, H.B. 90 may implicate First Amendment concerns.

I. OVERVIEW OF H.B. 90

H.B. 90 would require approval from the Legislature prior to relocation, removal, or alteration of certain historical monuments and memorials on public property of the state or any of its political subdivisions in place prior to July 1, 2021. Additionally, this proposed legislation would require legislative approval prior to renaming or rededicating any school, street, bridge, structure, park, preserve, reserve, or other public area of the state or its political subdivisions in place prior to July 1, 2021 and dedicated in memory of or named for any historic figure or historic event. Legislative approval under this bill would require a concurrent resolution by the Legislature.

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II. ANALYSIS

A. Concurrent resolutions adopted under H.B. 90 lack the force of law.

Concurrent resolutions do not have the force of law except within specific constitutionally identified circumstances. Unless provided for by Idaho's Consitution, a concurrent resolution cannot take the place of law to regulate otherwise lawful activities of political subdivisions. Thus, any concurrent resolutions adopted under H.B. 90 are most likely only guidance on legislative preference and cannot be enforced against any political subdivision who seeks approval of a proposed change as required under H.B. 90. As detailed below, this legislation's procedure for approval and denial of change requests–a concurrent resolution from the state legislature–may render this legislation ineffective.

Article III, § 1 of the Idaho Constitution vests the legislative power of the state within a senate and house of representatives. In order to legislate, both chambers must vote upon and pass legislation. Idaho Const. art. III, section 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 two-thirds vote of the members in each house. Idaho Const. art. IV, § 10. Any legislation that does not meet these requirements is not law, unless a specified exception is provided for within the Constitution. Idaho Power Co. v. State, By and Through Dept. of Water Resources, 104 Idaho 570, 574 P.2d 736 (1983). "Legislative action by resolution is not a 'law' in that context." *Id.* (first citing Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917) (requirements of legislative action to bind state); and then citing 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)).

In Idaho Power Co. v. State, By and Through Dept. of Water Resources, 104 Idaho 570, 574 P.2d 736 (1983), the Court held that a statute requiring legislative approval of a political subdivision's—the Idaho Water Resource Board—water plan by concurrent resolution was unconstitutional because it purported to authorize the Legislature to perform functions constitutionally assigned to the Board. The statute at issue required the Board to submit a water plan which would not become effective until the Legislature approved the plan by concurrent resolution. The Court concluded the Board had constitutional authority to formulate and implement a state water plan and for that reason held the statute unconstitutional. The Court also concluded that even if the statute had not trespassed into the Board's exclusive authority, it had no legal effect because it provided for legislative action on the state water plan by means of a concurrent resolution. Subsequently, in Mead v. Arnell, 117 Idaho 660 791 P.2d 410 (1990), the Idaho Supreme Court further affirmed the limited legal effect of concurrent resolutions.

Here, H.B. 90 likely runs afoul of the issues discussed by the Idaho Supreme Court in Idaho Power Co. and in Mead because it likely overstates the legal authority of concurrent resolutions. Concurrent resolutions do not have the effect of law because they do not comply with article III, section 15 and article IV, section 10, of the Idaho Constitution. They therefor cannot be considered to have legal effect other than stating a policy preference of the Legislature, or of the chamber that has adopted it. [1]

B. Article III, section 19 could prevent the Legislature from enacting local or special laws changing the names of places.

Under article III, section 19, H.B. 90 could be subject to challenge as prohibited special or local legislation. The Legislature's authority to enact legislation is plenary and subject only to the limitations contained within the Constitution. Article III, section 19 restricts the Legislature from passing local or special laws in a series of enumerated cases. The Constitution prohibits the Legislature from passing "local or special laws" concerning: "changing the names of persons or places ... [and] regulating county and township business." Idaho Const. art. III, § 19. No Idaho case law interpreting this specific prohibition on naming places exists; however, the Idaho Supreme Court has applied the following criteria when deciding whether a statute is a local or special law. Our research indicates a court could conclude that H.B. 90's efforts to require approval by the Legislature of any change in the name to historic monuments, memorials and other public places is unconstitutional.

A law may be found special if (1) it disproportionately affects an individual or number of individuals out of a single class similarly situated and affected or a special locality; (2) there is no legitimate purpose; and (3) the classification is arbitrary, capricious or unreasonable. Citizens Against Range Expansion v. Idaho Fish And Game Dept., 153 Idaho 630, 636, 289 P.3d 32, 38 (2012). In Citizens against Range Expansion the Court stated "a 'special law' applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality; a law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable." *Id.* at 636, 289 P.3d at 38. In Moon v. North Idaho Farmers Ass'n, the Court clearly defined local laws: "A law is not a "local law" when it applies equally to all areas of the state." Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 546, 96 P.3d 637, 647 (2004), *cert. denied*, 125 S.Ct. 1299, 543 U.S. 1146, 161 L.Ed.2d 106.

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[1] In addition to the constitutional concerns addressed in this letter, I will also note the practical concerns associated with whether the Idaho Legislature has the ability to expeditiously manage reviewing and voting on the volume of potential name changes that could be implicated by this bill across the State.

While H.B. 90 as drafted has a uniform application across the State of Idaho, it is potentially subject to challenge upon application as special or local legislation.[2] Under H.B. 90, municipalities make an individual request to undertake an individual change to a specific piece of property. The ultimate result, whether approving or denying, is a legislative determination on that specific request for that specific property in that specific municipality. In contrast to the findings of the Court in Citizens Against Range Expansion, each concurrent resolution stemming from H.B. 90 will inherently apply to a single locality or single class of similarly situated individuals; these resolutions by design cannot apply to the state as a whole because no other similarly situated locality exists. Under existing precedent, a court could conclude that each concurrent resolution issued under H.B. 90 is an unconstitutional, prohibited local law.

Further, there may be reasonable argument that the draft legislation is a substitution of the Legislature for local authority, thus making it a special or local law, because it implicates the ability of local government to administer it. As mentioned above, no Idaho Supreme Court case addresses article III, section 19's provision prohibiting the Legislature from passing local or special laws concerning naming places. Looking outside of Idaho, Louisiana has prohibitions on special laws in its constitution, analogous to Idaho, and a law regulating city parks was later held as unconstitutional. In City of New Orleans v. Treen, a Louisiana statute replaced a New Orleans city park commission with a state agency. 431 So. 2d 390 (La. 1983). The Louisiana Supreme Court determined that because the city was still required to fund the park without retaining any oversight, the law was impermissible special legislation. *Id.* Similarly here, H.B. 90 arguably creates a new authority, the Legislature, to oversee municipal governance while the municipality continues to fund the property.

C. H.B. 90 may implicate the First Amendment.

Lines 17-20 of H.B. 90 would prohibit any person from preventing the public body responsible for the monument or memorial from taking "proper measures" and "exercising proper means" for the maintenance of the monument or memorial. The terms "proper measures" and "proper means" are undefined. The vagueness of these terms might leave the bill open to a challenge under the First Amendment of the United States Constitution as chilling constitutionally protected activities and/or to arbitrary or discriminatory application. *See* Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222 (1972). I recommend that the terms in question be substituted or defined to increase clarity.

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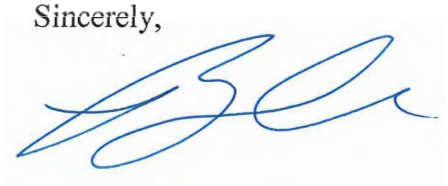
[2] This is assuming that the concurrent resolution that would apply H.B. 90's effect would have legal effect. As discussed above, it would likely not have legal effect.

I hope you find this analysis helpful.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

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