



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 27, 2021

TRANSMITTED VIA EMAIL

The Honorable Fred Martin
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
fmartin@senate.idaho.gov

RE: Request for AG analysis – Our File No. 21-72486

Dear Senator Martin:

This letter is in response to your inquiry regarding HCR 2. Specifically, you have asked whether the Legislature has the authority to alter an emergency declaration of the Governor through a concurrent resolution. 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.

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. But this office can identify no portion of the Idaho Constitution that allows this legislative claim of authority.

Article III, section 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. Idaho Const. art. 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 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 specific exception is provided for within the Constitution.

Idaho Power Co. v. State, By and Through Dep't of Water Res., 104 Idaho 570, 574, 661 P.2d 736, 740 (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)).

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

In Mead v. Arnell, 117 Idaho 660, 668, 791 P.2d 410, 418 (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 two-thirds vote of each house, voting separately, the Legislature has the duty to submit the proposed amendment to the electorate. In short, 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:

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, 791 P.2d at 418. 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 of the Idaho Constitution:

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.¹

¹ The Governor's authority is reinforced by article IV, section 4 of the Idaho Constitution:

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 II, Section 1 of the United States Constitution demonstrates that the Governor's authority under article IV, section 4 of the Idaho Constitution is highly analogous to a president's authority under Article II, Section 1 of the United States Constitution. 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 lawmaking requirements of Idaho's Constitution.²

Concurrent Resolutions Are Of Limited Effect.

As explained above, unless the Idaho Constitution provides for the use of a concurrent resolution not presented to the Governor, legislative vehicles that do not comply fully with article III, section 15 and article IV, section 10, of the Idaho Constitution cannot be considered to have legal effect other than stating a policy preference of the Legislature, or of the chamber that has adopted it.

I hope that you find this analysis helpful.

Sincerely,

A handwritten signature in dark ink, appearing to read 'B. Kane', with a stylized, flowing script.

BRIAN KANE
Assistant Chief Deputy

BK:kw

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

² It is important to note that the scope of the Governor's authority to declare and respond to emergencies while arising from article IV of the Idaho Constitution 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).