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ATTORNEY GENERAL OPINION NO. 87-6

The Honorable Stan Hawkins
Representative, District 33
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Per Request for Attorney General's Opinion

RE: Legislative Review of Minimum Stream Flow Applications

QUESTIONS PRESENTED:

1. Does the provision in Idaho Code § 42-1503 (Supp. 1987) that purports to allow the legislature to reject, by concurrent resolution, a minimum stream flow application approved by the Director of the Idaho Department of Water Resources contravene any provision of the Idaho Constitution?

2. What legislative action must occur to prevent a minimum stream flow from being approved pursuant to the last clause of Idaho Code § 42-1503 (Supp. 1987)?

CONCLUSIONS:

1. Despite the presumption in favor of a statute's constitutionality, our opinion is the provision in Idaho Code § 42-1503 that purports to authorize the legislature to reject, by concurrent resolution, a minimum stream flow approved by the Director of the Idaho Department of Water Resources would be found by the Idaho Supreme Court to contravene article 2, section 1; article 3, sections 1 and 15; and article 4, section 10 of the Idaho Constitution.

2. Because of the foregoing conclusion, this opinion does not address the second question presented.

ANALYSIS:

You requested our opinion regarding the constitutionality of the role of the legislature in approving minimum stream flow

applications, pursuant to Idaho Code § 42-1503. That statute, enacted by the Idaho legislature in 1978, sets forth the procedure by which the Idaho Water Resource Board will make application to the Director of the Idaho Department of Water Resources to appropriate waters to maintain minimum flows in Idaho streams. The statute then requires the Director to solicit input from affected stated agencies and to conduct public hearings. If the Director determines that the public interest will be served, he is directed to approve the minimum stream flow application. The final step of the approval process is in the hands of the legislature. Idaho Code § 42-1503 provides as follows:

> Approved [minimum stream flow] applications shall be submitted to each Legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

Under this provision, the legislature retains final veto power over the Director's decision to approve a minimum stream flow application.

In recent years, courts have taken a negative view of the constitutionality of "legislative veto" statutes, under which an executive agency must submit the decisions it makes or the rules it adopts to the legislature for ultimate approval, disapproval or amendment. Court analysis of "legislative veto" provisions proceeds along two paths. First, assuming that such a veto is legislative in character, courts hold that veto by concurrent resolution is constitutionally defective because it fails to conform to requirements regarding the exercise of the legislative power. Second, assuming the veto is executive in nature, courts hold that such action is constitutionally defective because it violates the separation of powers doctrine. Our opinion will analyze each of these two approaches.

Enactment and Presentment Clauses

The initial question raised by Idaho Code § 42-1503 is whether the act of the legislature in rejecting a minimum stream flow application constitutes a legislative act. If the rejection of a minimum stream flow is a legislative act, it must be accomplished by a bill, duly passed, in accordance with the enactment and presentment provisions of the Idaho Constitution. A concurrent resolution is insufficient. Idaho Power Company v. State, 104 Idaho 570, 661 P.2d 736 (1983); Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917).

Legislative power is the authority to determine policy for government. Rich v. Williams, 81 Idaho 311, 325, 341 P.2d 432, 440 (1959). The legislature is exercising its legislative power when its action has the purpose and effect of altering legal rights, duties, and relationships of persons, including the executive branch. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

Idaho Code § 42-1503 delegates the duty to file applications for minimum stream flows to the Idaho Water Resource Board and vests the Director of the Idaho Department of Water Resources with the authority to approve minimum stream flows. Additionally, Idaho Code § 42-1504 (Supp. 1987) gives the public a right to request the Idaho Water Resource Board to file an application for a minimum stream flow. The legislative veto contained in section 42-1503 alters these rights and duties; therefore, the rejection of a minimum stream flow likely would be found to be a legislative act that must comply with the constitutional requirements regarding the exercise of the legislative power.

Article 3, section 1 of the Idaho Constitution vests the legislative power of the state in the senate and house of representatives. The framers of Idaho's Constitution, guided by the United States Constitution, however, recognized the need for constraints on the exercise of the legislative power. Therefore, the framers provided that the exercise of the legislative power be by a bill, which must contain the phrase "Be it enacted by the Legislature of the State of Idaho." Idaho Const. art. 3, § 1. In addition, each bill must then comply with the printing, reading, and voting provisions set forth in Idaho Const. art. 3, § 15. Finally, after passage by both houses of the legislature, every bill must be presented to and acted upon by the Governor, in conformity with the provisions of Idaho Const. art 4, § 10.

The Idaho Supreme Court has determined that a concurrent resolution does not meet the minimal constitutional requirements of a "law":

> But even if I.C. § 42-1736 had authorized legislative action which was not in conflict with Art. 15, § 7 of the constitution, it could still have no legal effect because it provides for legislative action on the state water plan by means of a concurrent resolution. The state legislature can enact no law except it be by the constitutionally prescribed process, which requires that every bill, before it becomes law, be presented to the governor. Idaho Const. Art. 3 § 15; Art. 4, § 10. To the extent that Art. 15, § 7 authorizes the legislature to influence the operation of the Water Resources Board, it does so only as to "such laws as may be prescribed by the legislature" (emphasis

added). Legislative action by resolution is not a "law" in that context. See, Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917); Balderston v. Brady, 17 Idaho 567, 107 P. 493 (1910).

Idaho Power Co. v. State, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983).

The United States Supreme Court reached a similar conclusion in an analogous situation. In Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), the United States Supreme Court held unconstitutional the provision in 8 U.S.C. § 1254(c)(2)(1983) permitting one house of the Congress, by resolution, to invalidate the decision of the Attorney General with respect to deportation of an alien. The Court concluded that the procedure violated, among other provisions, the presentment clause of the United States Constitution. U.S. Const. art. I, § 7.

The presentment clause of the United States Constitution provides that every bill passed by Congress must first be presented to the President before becoming law. U.S. Const. art. I, § 7. The United States Supreme Court identified the purposes of the clause as follows:

> It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence the majority of that body.
>
> The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.

Id. at 948 citing The Federalist, No. 73, at 458 (A. Hamilton). The Supreme Court held that the congressional veto of an alien deportation decision under 8 U.S.C. § 1254(C)(2) was, in fact, an exercise of legislative power requiring compliance with the presentment clause of the United States Constitution. The Court reasoned that because the Attorney General's duties were created by statute, they could only be modified by an act of equal dignity. Immigration and Naturalization Service v. Chadha, 462 U.S. at 954, 955.

Proponents of the legislative veto have argued that because the statute creating the veto is enacted in accordance with the constitutional limitations on the exercise of the legislative power, there is no constitutional infirmity. This argument is

without merit, however, because the legislature cannot pass an act that allows it to violate the constitution. Constitutional requirements cannot be eliminated by virtue of one enactment approved by the governor. As the Alaska Supreme Court noted in its opinion striking down a legislative veto: "Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto." State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 779 (Alaska 1980).

Although the Idaho Supreme Court has not yet ruled on the constitutionality of a legislative veto, in Holly Care Center v. State, 110 Idaho 76, 714 P.2d 45 (1986), the court, in dicta, stated "The legal efficacy of the legislative veto raises potentially serious constitutional issues, involving, among others, that pertaining to the presentment of bills and the fundamental principle of separation of powers." Id. at 82, 714 P.2d at 51. In an accompanying footnote, the court briefly surveyed recent rulings by other state courts on the "legislative veto" issue:

> We note that many courts, both state and federal, are now struggling with such issues. See, e.g., I.N.S. v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (legislative veto unconstitutional); General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982) (legislative veto unconstitutional); State ex rel. Stephan v. Kansas House of Rep., 236 Kan. 45, 687 P.2d 622 (1984) (legislative veto unconstitutional); Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981) (legislative veto unconstitutional); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981) (legislative veto unconstitutional); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) (legislative veto unconstitutional).

Id. The citation to five different state courts that have followed the U.S. Supreme Court in striking down legislative vetoes, and the fact that our research has not found any court decisions in the last decade upholding a legislative veto, suggests that the Idaho Supreme Court is likely to follow the rationale of Chadha if presented with that question.

Separation of Powers Clause

As indicated by the Idaho Supreme Court in the Idaho Power case, the legislative veto is also constitutionally invalid if it amounts to an exercise by the legislature of power that properly belongs to the executive branch of government. 104 Idaho at 574, 661 P.2d at 740. The separation of powers

doctrine prohibits the legislature from exercising power delegated to the executive branch.

Article 2, § 1, of the Idaho Constitution expressly adopts the separation of powers doctrine that underlies the structure of the federal government. The provision reads as follows:

> 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 powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Idaho Const., art. 2, § 1. The purpose of the separation of powers doctrine is to "check the extent of power exercisable by any one branch of Government in order to protect the people from oppression." Consumer Energy Counsel of America v. F.E.R.C., 673 F.2d 425, 471 (D.C. Cir. 1982). As Justice Brandeis said, "The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J. dissenting.)

Though the concept of separation of powers is easy to articulate, the delineation between what is a legislative, executive, or judicial function is not always clear. By necessity there is a blending of powers, which blending is most apparent in the area of administrative law. Often problems are so complex that development of a detailed statute covering all situations is impracticable. Thus, the federal government and state legislatures have opted to delegate legislative power to administrative agencies to fill in the details of a statute establishing broad policy guidance.

The fact that the legislature has the power to delegate its legislative powers does not mean that the legislature is powerless to direct the agencies it has created. The legislature may retain direct control over administrative action by providing detailed rules of conduct to be administered without discretion; or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 476 (D.C. Cir. 1982). Once the legislature has delegated power to an agency, however, its responsibility is to oversee the implementation of duly enacted laws and to revise the laws if the desired objectives are not being achieved. Any legislative involvement in the administrative process beyond such oversight and revision by

statute violates the separation of powers doctrine because it ultimately leads to shared administration. Id. at 474.

The legislative veto in effect allows the legislature to block execution of a statutory program until the agency agrees to act in compliance with the current views of the legislature that may well be different from the legislature that enacted the substantive law. Id.; General Education Provisions Act, 43 Op. Att'y Gen. No. 25, 8 (June 5, 1980). By its nature, this type of oversight is beyond judicial review because the exercise of such powers can be held to no enforceable standard. Id. Thus, the legislative veto removes any checks on legislative action and opens the door to autocracy, which conflicts with the purpose of the separation of powers doctrine.

Applying the principles set forth above to Idaho Code § 42-1503, it is the opinion of this office that the Idaho Supreme Court would find the legislature's role in approving minimum stream flows under that section violates article 2, section 1 of the Idaho Constitution. Even though State of Idaho, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), recognizes the legislature's ability to establish a minimum stream flow by enactment of a statute, section 42-1503 delegates this power to the director of the Idaho Department of Water Resources. Because of this delegation, the power to create a minimum stream flow is committed to the executive branch and cannot be controlled by the legislature except by enactment of a bill. As former United States Attorney General Benjamin R. Civiletti stated in his opinion on the legislative veto provision contained in the General Education Provisions Act:

> The test is not whether an activity is inherently legislative or executive, but whether the activity has been committed to the Executive by the Constitution and applicable statutes. In other words, the Constitution provides for a broad sweep of possible Congressional action; but once a function has been delegated to the Executive Branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.

General Education Provisions Act, 43 Op. Att'y Gen. No. 25, 9 (June 5, 1980). A contrary conclusion would reduce the separation of powers doctrine to a mere shadow.

Severability

Although the Idaho Supreme Court is likely to find the legislative veto provision contained in Idaho Code § 42-1503

unconstitutional, it does not follow that a court would conclude all of the section is invalid. When a portion of a statute is found unconstitutional, a court must determine whether the balance of the statute is severable.

The act creating the minimum stream flow statute has a severability clause. Act of March 29, 1978, § 13, 1978 Idaho Sess. Laws 897. Idaho Code § 42-1503 was subsequently amended by the act of March 28, 1980, § 25, 1980 Idaho Sess. Laws 553, which also contains a severability clause. These clauses create a presumption in favor of severability. Lynn v. Kootenai County Fire Protective District #1, 97 Idaho 623, 627, 550 P.2d 126, 130 (1976). Thus, if the legislative veto is not indispensable to the act, a court will attempt to construe Idaho Code § 42-1503 to give effect to the legislative intent as expressed in the severability clause. Id. at 626, 550 P.2d at 130.

The deletion of the legislative veto from Idaho Code § 42-1503 does not emasculate the statute. As the United States Supreme Court noted in finding the legislative veto in the Airline Regulation Act of 1987 severable from the balance of the Act, "a legislative veto . . . by its very nature is separate from the operation of the substantive provisions of the statute. Alaska Airlines, Inc. v. Brock, 480 U.S. ____, ____, 94 L.Ed 2d 661, 670 (1987). Indeed, the legislature contemplated that minimum stream flow decisions would be effective absent legislative action. Thus, the legislative veto is not an integral part of the statute. See Voyles v. City of Nampa, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976). Since the severability clause creates a presumption that the statute will operate in a manner consistent with the legislative intent, the Idaho Supreme Court probably would determine that legislative veto can be excised from Idaho Code § 42-1503, absent strong evidence that the legislative intent is to the contrary.

While this opinion is advisory only and a final determination can be provided only by the Idaho Supreme Court, we conclude that should the court be asked to rule on the legislative veto contained in Idaho Code § 42-1503, it would find the provision unconstitutional. Further, it is our opinion that the court would sever the legislative veto from the minimum stream flow statute.

AUTHORITIES CONSIDERED:

1. United States Constitution:

U.S. Const. art I, § 7.

2. United States Supreme Court Cases:

Alaska Airlines, Inc. v. Brock, 480 U.S. ____, 94 L.Ed.2d 661(1987).
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
Myers v. United States, 272 U.S. 52 (1926).

3. Federal Appellate Court Cases:

Consumer Energy Counsel of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd sub nom., Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S 1216 (1983).

4. Idaho Constitution:

art. 2, § 1.
art. 3, § 1.
art. 3, § 15.
art. 4, § 10.
art. 5, § 13.

5. Idaho Statutes:

Idaho Code § 42-1503 (Supp. 1987); Idaho Code § 42-1504 (Supp. 1987); Act of March 29, 1978, ch. 345, § 13, 1978 Idaho Sess. Laws 884, 897.
Act of March 28, 1980, ch. 238, § 25, 1980 Idaho Sess. Laws, 526, 553.

6. Idaho Cases:

Griffiths v. Van Deusen, Idaho 136, 169 P. 929 (1917).
Holly Care Center v. State, 110 Idaho 76, 714 P.2d 45 (1986).
State of Idaho, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).
Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736 (1983).
Lynn v. Kootenai County Fire Protective District # 1, 97 Idaho 623, 550 P.2d 126 (1976).
Rich v. Williams, 81 Idaho 311, 341 P.2d 432 (1959).
Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976).

7. Cases From Other States:

General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982).
Opinion of the Justices, 121 N.H. 552, 431 A.2d 783. (1981).
State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).
State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981).
State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622 (1984).

8. Other Authorities:

General Education Provisions Act--Congress' Disapproval of Department of Education Regulations by Resolution Not Presented to the President Is Unconstitutional, 43 Op. Att'y Gen. 25 (1980).
1982 Op. Tenn. Att'y Gen. 82-115.
1 Sutherland Statutory Construction, § 1.02 (4th ed. 1985).
Shapiro, APA: Past, Present, Future, 72 Va. L.Rev. 447 (1986).
Shirley, Resolving Challenges to Statutes Containing Uncontrolled Legislative Veto Provision, 85 Colum. L.Rev. 1808 (1985).
Smythe, Judicial Review of Rule Rescissions, 84 Colum. L.Rev. 1928 (1984).
Strauss, Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789.
Note, Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, 94 Yale L.J. 1493 (1985).

DATED this 31st day of July, 1987.

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