

Idaho's Constitutional Defense Fund goes toward losing cases

By REBECCA BOONE, Associated Press

BOISE, Idaho (AP) — A special state fund created to help Idaho navigate state sovereignty conflicts with the federal government has paid out more than \$2.1 million over the last two decades, nearly all of it spent on losing legal battles.

The Constitutional Defense Fund hasn't paid for a winning case since 1996, when Idaho reached a settlement with the federal government over nuclear waste storage and cleanup. The law allows the fund to be spent proactively — such as filing lawsuits or hiring public relations specialists to fight for state sovereignty — or retroactively, defending Idaho from lawsuits. A review of historical documents shows that it's almost entirely gone to the latter.

The next nine cases have all been losers for the state, including three cases defending abortion laws, two lawsuits involving gay rights and two lawsuits over the steps required to get initiatives on the ballot.

"It's a significant amount of money," said Randy Stapilus, an author and publisher who has extensively covered Idaho politics. "The question is not necessarily having a fund that could be used in extreme cases, but maybe how frequently it's been used and the wisdom of using it in cases where there's been lots of legal warning that the case may not be successful."

There's currently about \$322,000 remaining in the account. Earlier this year, a judge struck down an Idaho law banning undercover investigations of farming operations, and the fund could be drawn down further if the state uses it to pay the plaintiff's attorney fees for that case.

Gov. C.L. "Butch" Otter has said he intends to ask lawmakers in January to shore up the fund with another \$1 million. The fund has remained true to its purpose and concept, "defending the sovereignty of our state and our citizens," Otter said in a statement.

Otter's spokesman, Jon Hanian, also noted that it's hard to predict how a case will turn out until it's argued and a judge has made a ruling.

The fund was created in 1995 to finance Idaho's legal confrontations with the federal government, though critics said they feared it would become a slush fund for political allies and Republican lawyers. It was seeded with \$1 million.

The first payments went to Boise legal firm Elam & Burke for then-Gov. Phil Batt's battle with the feds over nuclear waste stored at the Idaho National Engineering Laboratory (now called simply Idaho National Laboratory, or INL).

Ten months of courthouse wrangling and backroom negotiations resulted in a win, of sorts, for the state — a deal that traded resumption of limited nuclear dumping at the lab for promises that most

radioactive waste would eventually be removed. By April of 1996, more than \$190,000 had been paid to Elam & Burke for the legal work.

A few years later, the council approved launching another legal battle with the feds over the proposed reintroduction of grizzly bears into Idaho's Bitterroot Mountains. The council members approved spending money on filing the lawsuit and on hiring a public relations firm to help sway others to the cause, according to the meeting minutes. But they ultimately ceded over that effort to the Idaho Attorney General's office, so no money was spent on the matter according to the state's records. The feds later backed off the reintroduction plan.

The next case, Idaho Coalition United for Bears v. Cenarrusa, arose out of a 1996 bear beating initiative sponsored by a large national association that had pushed similar initiatives elsewhere. Some feared that Idaho would get overrun with initiatives, but lawmakers changed the law to raise the hurdles, requiring at least 6 percent of registered voters in 22 counties.

That law was challenged in court in 2001, and a federal judge struck down the 22 county provision.

The fund has also been used for cases where lawmakers were warned that new laws would likely not meet Constitutional standards. Such was the case for Idaho's abortion law cases — most recently, state Attorney General Lawrence Wasden's office warned lawmakers that a proposed fetal pain law would likely be found unconstitutional by the courts.

Still, lawmakers passed the fetal pain law, and later, the state lost a lawsuit over the issue. That case led to a \$137,000 payout of legal fees to the winning side.

A look at how Idaho's Constitutional Defense Fund has been used since it was created in 1995:

1995-1996: Idaho paid about \$190,000 to Boise law firm Elam & Burke for legal fees associated with negotiating a settlement over nuclear waste storage and cleanup in eastern Idaho.

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2004: About \$47,000 in legal fees paid to attorneys for Idaho Coalition United for Bears. The coalition sued the state over a new law designed to make it tougher to get initiatives on the ballot by requiring at least 6 percent of registered voters in 22 counties to sign the initiative petition. Idaho lost the case.

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2006: About \$380,000 in legal fees paid to Planned Parenthood attorneys after the organization successfully sued Idaho over parental consent law. Idaho lost the case.

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2008: About \$66,000 paid in legal fees to Planned Parenthood attorneys after a newly revised version of the parental consent law was also found to be unconstitutional. Idaho lost the case.

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2009: Idaho paid about \$75,000 in legal fees to the winning side in a lawsuit brought by Pocatello Education Association. The lawsuit argued that the Voluntary Contributions Act passed by lawmakers in 2003 violated free speech rights. The Act required unions to separate contributions for political purposes out from contributions used for other purposes, and prohibited state employees from paying union dues toward political activities with automatic paycheck deductions. A judge found the law was almost entirely unconstitutional but said the ban on payroll deducted political contributions for state employees could stand. The case was mostly a loss for Idaho.

2011: Paid about \$54,000 in legal fees to the plaintiffs in Donald Daien v. Ben Ysursa (who was then Idaho's Secretary of State). Daien challenged Idaho's residency requirements for people circulating petitions and the state's ballot requirements for independent political candidates. Idaho lost the case.

2015: More than \$628,000 paid to attorneys for four lesbian couples who sued Idaho over the state's ban on same-sex marriage, plus another \$53,000 paid to a private law firm hired to represent Idaho in the case. Idaho lost the federal lawsuit and the subsequent appeals.

2015: About \$137,000 paid to the American Civil Liberties Union of Idaho after the organization sued the state on behalf of Occupy Boise protesters. Idaho had passed several laws restricting camping, and the protesters successfully argued that some of the laws unconstitutionally restricted their right to camp on the Capitol grounds as a method of free speech. Idaho lost the case.

2015: About \$474,000 paid to attorneys representing a woman who was charged with having an illegal abortion. The woman successfully argued that Idaho's so-called fetal pain law and other laws restricting abortion access were unconstitutional. Idaho lost the case.

2015: About \$70,000 in legal fees paid to attorneys for a woman who sued over laws prohibiting her from being buried in the Idaho State Veterans Cemetery with her late wife. Idaho lost the case.