



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

February 20, 2018

Representative Mathew Erpelding
Idaho House of Representatives
Idaho State Capitol
Boise ID 83720

Via email: MErpelding@house.idaho.gov

Re: Inquiry regarding HB536

Dear Representative Erpelding,

This letter responds to your request for an analysis concerning HB 536, which proposes amendments to various trespass statutes in the Idaho Code.

QUESTIONS PRESENTED

- I. What are the ramifications of the unusual legal standards in the legislation such as a treble penalty for civil trespass?
- II. How do the penalties for damage to property differ from other sections of code, and is it necessary to redefine penalties for a different occurrence, but the same action (i.e. damage to property)?
- III. Are there any constitutional concerns at all with this bill?

BRIEF ANSWERS

- I. The proposed remedy provision allowing for treble damages in a civil suit is not unusual. However, the proposed provision allowing for treble damages in a criminal prosecution conflicts with the criminal restitution statute.

- II. Idaho's criminal code often provides enhanced penalties upon successive convictions for similar law violations. Such enhanced penalties must be set out specifically in the statute.
- III. HB 536 presents significant Constitutional concerns, including potential overbreadth and first amendment challenges and the use of a presumption in a criminal matter.

ANALYSIS

- I. **The treble damages provision set forth in HB 536 implicates policy decisions to be made by the legislature concerning civil causes of action, but treble damages are not an appropriate component of a criminal sentencing scheme.**

At common law, actions for trespass allow for recovery of actual damages. The Idaho Supreme Court has long upheld that the statutory right to recover treble damages in trespass cases involving willful and intentional damage. Menasha Woodenware Co. v. Spokane International Ry. Co., 19 Idaho 586 (1911) (statutory damages allowing for treble recovery applies to willful trespass not mistaken action). Many civil statutory causes of action permit treble damage recovery. See, e.g., I.C. §§ 47-717 (removal of ores, minerals or deposits from state land in commercial quantities without a lease permits treble damages); 45-615 (unpaid wage claims permit treble damages or wages plus statutory penalties – employee must plead remedy sought); 42-902 (injuring ditch or head gate, diverting water or opening a head gate with intent to divert water permits treble damages); 6-317 (malice, wantonness or oppression in causing damage in the context of unlawful detainer actions permits treble damages). HB 536's remedy provision permitting treble damages, see I.C. § 6-202(5)(a) as proposed, comports with other similar causes of action.

The proposed legislation does create a minor inconsistency. Proposed Idaho Code § 6-202(2) includes a willful and intentional intent requirement for entering or remaining upon the real property of another. However, Idaho Code § 6-202(3) as proposed, which defines specific types of trespass by various means of damage or injury to property, does not include the same intent requirement. Generally, when a statute permits an award beyond actual damages, Idaho courts must decide whether the award is intended as a penalty or compensation. If the damage provision is intended as a penalty, the statute will be strictly construed and the Court will require evidence of bad faith (malicious, wanton or oppressive behavior). Barth v. Canyon County, 128 Idaho 707, 712, 918 P.2d 576, 581 (1996). Based on prior case law in the context of civil trespass, it is likely the appellate

courts will require willful and intentional conduct, but not necessarily bad faith. The statute as proposed does not include this language, and it is recommended that the legislature make the intent explicit rather than rely upon judicial interpretation. Including the requirement that any injury or damage be willful and intentional would also eliminate any confusion between subsections 2 and 3.

With respect to the proposed language in § 18-7008(3)(d), the penalty provisions of the criminal trespass portion of the statute contemplate a “civil penalty in an amount up to treble the damage caused.” The following subsection, § 18-7008(3)(e), provides for restitution in accordance with Idaho Code § 19-5304. The treble damages provision clearly conflicts with Idaho’s criminal restitution statutes. By its very language, this provision is not intended as restitution. “Civil” penalties have no place in criminal statutes. Idaho Code § 19-5307 provides for a fine in favor of the victim of certain enumerated violent crimes. In the event the legislature intends to provide for additional sanctions to be imposed against offenders who commit property crimes, the language of the sanction should mirror the civil fine language contained in § 19-5307. Additionally, the legislature might want to consider what factors raised by the crime of trespass warrant a civil fine where other crimes against property do not. It is recommended the criminal violation not contain a civil fine provision. Victims are entitled to recover restitution for out of pocket expenses. Restitution is restorative in nature, State v. Cottrell, 152 Idaho 387, 396, 271 P.3d 1243, 1252 (Ct. App. 2012), serving the sentencing factors of offender rehabilitation and community safety while not imposing undue penalties on the offender. Additionally, victims of criminal offenses will not receive a “windfall” if remuneration to the victim is limited to restitution. A fine, even directed to the victim, would be subject to analysis under the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. In determining whether such a provision is valid, the court measures the extent of the fine against the gravity of the offense. United States v. Bajakajian, 524 U.S. 321, 334 (1998). Arguably, treble damages in the context of a criminal trespass offense would be considered grossly disproportionate to the damage inflicted.

Based on the above concepts, this office recommends the legislation address the intent necessary for all actions that constitute trespass and limit the applicability of treble damages to a civil cause of action.

II. HB 536’s proposed hierarchy of criminal penalties is consistent with Idaho law.

HB 536 provides for a hierarchy of criminal penalties for subsequent convictions for criminal trespass. Your inquiry asks how this hierarchy differs from other sections of the

Idaho Code and whether it is necessary to redefine penalties for a different occurrence of the same criminal conduct.

With respect to your first question, other Idaho criminal violations include a hierarchy of penalties for subsequent violations. See, e.g., § 18-8005 (penalties for subsequent DUI convictions); § 18-918 (penalties for subsequent domestic violence convictions); § 18-4116 (penalty for subsequent indecent exposure conviction). While such enhancements are not common, they are not inconceivable.

As for the second part of your question, the answer is two-fold. First, the legislature must determine whether subsequent violations require enhanced penalties. That is a policy determination to be made. Second, in the event the legislature determines that a criminal violation requires more than the standard penalty or an enhanced penalty, then the legislature must expressly provide for such penalty or enhancements. Otherwise, Idaho Code § 18-113 sets the standard penalty for a misdemeanor as six months in jail and/or a fine not exceeding \$1000.

III. HB 536 raises Constitutional questions regarding overbreadth and/or the First and Fourteenth Amendments to the United States Constitution.

“The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms.” State v. Richards, 127 Idaho 31, 35, 896 P.2d 357, 361 (Ct. App. 1995). HB 536’s criminal trespass provisions appear to include constitutionally protected conduct. Part of this is likely due to the lack of an intent element as discussed previously. Many of the alleged violations do not even require willful and intentional conduct. However, even if such intent were included throughout the subsection identifying criminal conduct, willful and intentional simply means purposeful, State v. Draper, 151 Idaho 576, 589, 261 P.3d 853, 866 (2011) (willful means intent to commit a particular act), and will therefore criminalize many innocent and/or mistaken acts.

In reviewing the proposed language, it becomes clear that many innocent acts would be considered criminal. Three quick examples come to mind: a neighbor who sees a runaway pet and opens a fence gate to approach the residence of the pet’s owner, runs afoul of proposed § 18-7008(2)(b)(v) (“...opening any gate ... of another ... without the permission of the owner”); a child at a city park who picks up a handful of rocks, places them in his pocket and takes them home violates § 18-7008(2)(b)(iv) (“... carrying away any earth, soil, or stone from any land in any of the cities of the state ... without the license of the proper[] authorities”); and a tired driver who pulls off a two-lane highway to take a nap alongside a cultivated field, remaining entirely on the two-groove track located inside

the field but adjacent to the crops flouts the prohibition contained in § 18-7008(2)(b)(ix) (“Driving a motor vehicle ... into, upon, over or through any private land that is actively devoted to cultivated crops without permission”).

These examples illustrate merely some of the constitutional conduct proscribed by the proposed statute. While the proponents may not intend to criminalize a neighbor’s good deed, or a girl scout’s attempt to sell cookies, these acts violate the plain language of the proposed statute, which contains no limitations on many of the criminal trespass acts. *But see, e.g., State v. Nastoff*, 124 Idaho 667, 669-670, 862 P.2d 1089, 1091-1092 (Ct. App. 1993) (plain meaning of malicious injury to property statute, Idaho Code § 18-7001, requires intent to damage or injure property and does not include conduct committed with intent to commit other wrongful act that in effect causes injury). HB 536 imposes criminal liability on innocent conduct and is likely over broad.

In addition, HB 536 appears to conflict with other provisions of the Idaho Code. For example, Idaho Code § 18-7038 specifically deals with destroying livestock, yet proposed § 18-7008(2)(b)(x) creates a trespass for killing livestock. Additionally, title 25, chapter 35 provides various rules regarding the treatment of animals. Finally, various other state code sections address civil and criminal liability for damage to public and private land. The specific violations enumerated in proposed § 18-7008(2) might require a more in depth review of Idaho statutes to identify all possible conflicts.

Finally, HB 536 implicated First Amendment protections. In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), the Ninth Circuit recently discussed Idaho’s “Ag-Gag” law, Idaho Code § 7042, and invalidated various provisions of the statute as violative of the First Amendment. The Court discussed Idaho’s criminal trespass statute, Idaho Code § 18-7008, and appeared to approve the statute’s use to criminalize entry upon the real property of another without authority where the person entering the property is on notice of the violation. *Id.* at 1195-1196. The Court further expressly endorsed Idaho’s goal of protecting private property rights as being constitutionally appropriate. *Id.* at 1199.

HB 536 as proposed, amends Idaho’s notice requirements for trespass and arguably eliminates them under certain circumstances. The proposed legislation redefines the parameters of posting – reducing the requirement to “signs prohibiting trespass or a clear display of bright orange or fluorescent paint at all property corners, fishing streams crossing property lines, roads, gates and rights-of-way entering the land or in a manner that would reasonably be expected to be seen by a person in the area....” However, given the fact that much of Idaho’s public lands abut privately held land, where the border between the two may be indecipherable as one stands at the corner of a property, a single sign or display of paint in that corner, without repeated representations of the same at

repeating intervals as now required by the statute, would not allow a recreational user to know which side of the fence is the private land and which is the permissible public land. Notice under these circumstances is all but negligible.

In addition, HB 536 prohibits a person from entering or remaining upon another's property without authority but eliminates the requirement that the owner communicate his desire that the visitor leave the premises. Consider again the friendly neighbor, this time delivering home-made holiday goodies, who enters through a side gate and approaches a residence door. Without express authority from the home owner, this neighbor has committed trespass under HB 536 – without having been asked to leave by the owner. Again, this may be an unintended consequence, but it is clearly a violation under the statute's plain language.

Given the fact HB 536 does not limit liability to the State's legitimate interest in protecting against *interference* with the ownership or possession of land, the proposed statute appears to violate First Amendment protections. See Animal Legal Defense Fund, 878 F.3d at 1196 (*citing* Desnick v. American Broadcasting Companies, Inc., 194 F.3d 505 (4th Cir. 1999) (trespass may validly protect against entrances to property that infringe on valid private property interests)). Under the Ninth Circuit's recent iteration of the First Amendment's parameters, HB 536 is not sufficiently limited in its application.

Further, there are serious concerns about the use of a mandatory presumption in a criminal matter, in section 5 of the bill, that appears to shift the burden of proof from the state to the defendant. In section 5, the proposed Idaho Code 18-7008(1)(e) creates such a presumption, i.e., that a person who enters or remains on the property of another does so "willfully and intentionally" in circumstances that are themselves expansive and undefined. To enter "willfully and intentionally" appears to be an intended element of this newly-created offense. Thus, the state would not have the burden of proving this element beyond a reasonable doubt. Rather, the defendant would have to prove that he did not enter the land of another "willfully and intentionally." Such a shifting of the burden of proof would be unconstitutional as violative of a defendant's due process rights under the Fourteenth Amendment to the U.S. Constitution. State v. Hebner, 108 Idaho 196, 199, 697 P.2d 1210, 1213 (1985) (*citing* Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)).

CONCLUSION

In response to the specific questions posed, the treble damages remedy provision in HB 536 is likely appropriate in the context of civil liability. The same provision set forth in the criminal penalty provision is not consistent with other Idaho statutes and likely violates the federal Constitution. The criminal penalty hierarchy is a matter within the legislature's

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sound discretion and would be lawful if set forth in the statute. Finally, HB 536, as written, appears to be overly broad as it proscribes a great amount of lawful conduct and runs afoul of First Amendment and Fourteenth Amendment protections.

I hope this analysis is helpful. This analysis does not address additional issues concerning the amendments to the Fish and Game Code. Please feel free to contact our office if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be "P. Panther", with a long horizontal flourish extending to the right.

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division