STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 14, 2016

Representative Ilana Rubel
Idaho Statehouse
Hand Delivered

Re: House Bill 582, Idaho Multiple Use Sustained Yield Act

Dear Representative Rubel:

You asked this office the following questions regarding House Bill 582, which would provide management guidelines for any lands received by the State from the United States on or after July 1, 2016.

1) HB 582 asserts that promises were made in the U.S. constitution, Idaho constitution, the Idaho admission act and congressional acts giving rise to a federal obligation under the "equal footing" doctrine to transfer certain lands to the state of Idaho. What is your view as to the legal soundness of this theory?

2) How does Idaho compare with other states with respect to power over federally-administered lands within their respective borders? Has any court ever found that a state can force the federal government to transfer land to state control on the "equal footing" theory?

3) Section 58-1504 provides that all lands ceded to the state "be administered and managed...for multiple use and sustained yield...shall not interfere with or impair any bona fide and existing rights of a person in existence." How would this potentially change the current use and degree of public access with respect to such lands?

4) How would the details of "multiple use" management be worked out? Through agency rule making? What means would Idaho citizens have to challenge / direct management of the land?

Our analysis is as follows:

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1) House Bill 582 asserts that among the rights each state possesses as a result of its admission to the Union on an "equal footing" is the right to "the grant of all lands held in trust by the federal government for the states once they are granted statehood." This premise has no support in the law. Prior to adoption of the Constitution, the original 13 states granted their western lands to the United States "as a common fund for the use and benefit of such of the United American States . . . . 25 J. Continental Cong. 561 (1783) (resolution of Virginia Legislature). Representative Clement Clay of Alabama, speaking on the House floor in 1833, stated: "These lands were to be a common fund, for the use of the whole Union—not of each, or any of the states separately considered, but of the Government itself." Gales and Seaton, *Register of Debates in Congress* 1906 (1833). Thus, as new states were admitted, the United States retained title to federal lands within the newly admitted state for the benefit of the United States as a whole, not for the benefit of the individual states in which the lands resided. This principle has been recognized in a number of Supreme Court decisions. For example in *Light v. United States*, a rancher, accused of letting his cattle trespass on a forest reservation, argued that the public lands were held in trust for the people of the state, and any reservation of lands without the consent of the state was in violation of the trust and void. *Light v. United States*, 220 U.S. 523, 535-36 (1911). The Court rejected the premise that federal lands within a state are held in trust for such state, holding instead that:

> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.

220 U.S. at 537. While the Supreme Court has held that courts may not compel Congress to dispose or transfer public lands, nothing in the Constitution prohibits Congress from voluntarily making such transfers to the States. Varying amounts of lands have been granted to states for support of public schools, for parks, and for other purposes, and Congress's power to dispose of public lands through such transfers is unfettered. *Boundary Backpackers v. Boundary Cty.*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996) ("[t]he power over federal land granted to Congress in the Property Clause is plenary and without limitations"). At least one state, Hawaii, has been granted ownership of all federal lands within its borders. Hawaii Admission Act, 73 Stat. 5 (1959).

2) Undeniably, the States are not equal with regard to the amount of federal lands within their borders. Almost sixty-two percent of Idaho is federal land, second only to Nevada, which has 84.9 percent. Congressional Research Service, *Federal Land Ownership: Overview and Data* (Dec. 29, 2014). This disparity is the result of federal policies that shifted from sale of lands to reservation of lands starting with the Forest Reserve Act of 1891 (26 Stat. 1095), and the fact that many of the lands in Idaho were not suitable for homesteading.

Courts have concluded, however, that such disparity does not violate the equal footing doctrine. In *United States v. Gardner*, the court concluded that the differing amounts of federal lands "may cause economic differences between the states [but] the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997). The court thus concluded the equal footing doctrine does not apply "to economic or physical characteristics of the states." *Id.*; *see also United States v. Medenbach*, No. 96–30168, 1997 WL 306437, at *3 (9th Cir. June 6, 1997) ("the equal footing doctrine is not implicated by the fact that the State of Washington may have within its boundaries more land subject to federal control than do the original thirteen states"); *United States v. Risner*, No. 00-10081, 2000 WL 1545491, at 1 (9th Cir. Oct. 17, 2000) ("Neither the Supreme Court nor this court has ever held that the equal footing doctrine insures equality between the States with respect to property beyond those lands under navigable waters."); *Nevada ex rel. Nev. State Bd. of Agriculture v. United States*, 512 F. Supp. 166, 171 (D. Nev. 1981) (stating that while passage of Federal Land Management and Planning Act (FLPMA) had disproportionate impact on Nevada due to its large federal land holdings, "Federal regulation which is otherwise valid is not a violation of the "equal footing" doctrine merely because its impact may differ between various states because of geographic or economic reasons").

3) Facially, House Bill 582's requirement that lands be administered and managed for multiple use and sustained yield, and to respect existing rights, would not require any restrictions on public use and access beyond those applicable to lands in federal ownership. Aside from areas set apart for specific uses, such as wilderness areas, federal laws currently require multiple use and sustained yield management of public lands. *See* Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. §§ 528-531), and the Federal Land Policy and Management Act (43 U.S.C. § 1732). Multiple use management may result in temporary restrictions for public safety or for resource protection, but otherwise allow public access and use of public lands. While on its face House Bill 582 does not require a substantial departure from current land management practices on federal lands, it does not provide enough guidance to predict how it would be applied in practice.

4) The general directive in House Bill 582 to employ multiple use and sustained yield management would likely require rule-making, a land classification scheme, and extensive land use planning. Current directives to engage the public in negotiated rule-making where feasible would apply. *See, e.g.*, Idaho Code § 67-5220. House Bill 582 is silent, however, as to which state agency or agencies would be authorized to manage lands or engage in such rule-making.

Sincerely,

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Natural Resources Division

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