



**STATE OF IDAHO**  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

March 6, 2018

Representative Ilana Rubel  
Idaho House of Representatives  
Idaho State Capitol  
Boise ID 83720  
Via email: [IRubel@house.idaho.gov](mailto:IRubel@house.idaho.gov)

Re: Inquiry regarding HB658

Dear Representative Rubel,

This letter responds to your email with questions concerning HB 658, which proposes amendments to various trespass statutes in the Idaho Code.

**QUESTION PRESENTED**

Are there Constitutional or other legal problems with HB 658?

**BRIEF ANSWER**

HB 658 appears to have addressed overbreadth concerns. HB 658 still overlaps and/or conflicts with other existing Idaho laws.

**ANALYSIS**

The Office of the Attorney General has addressed various questions concerning HB 538 and 658. This response attempts to address your question concerning possible Constitutional concerns posed by HB 658 as well as other "problems" posed by the bill. This is not an exhaustive analysis, but attempts to address your question appropriately.

- 1) HB 658's proposed alternative statutory damage remedy of \$500.00 is consistent with Idaho law.

HB 658 provides, “(3)(a) Civil trespass. Any person found liable for a civil trespass ... shall be liable for the following damages and penalties: (i) the greater of: 1. A civil fine or penalty of five hundred dollars (\$500).... (b) Civil trespass with damage. Any person found liable for a civil trespass with damage ... shall be liable for the following damages and penalties: (i) treble the amount of actual damages caused by the trespass....”

The reference to a “civil fine or penalty” is likely an inartful or inaccurate term in the context of civil liability. However, Idaho law permits the legislature to proscribe alternative statutory damages to a plaintiff rather than limiting an award to actual or nominal damages. To the extent that the proposed statutory provision calls for a “civil fine or penalty”, this Office recommends the specific reference to such be struck. Rather, in the event the legislature deems it appropriate to create a minimum damage provision for a civil trespass, the statute should simply provide for such. For example, the statute could say, “Any person found liable for a civil trespass ... shall be liable for the following damages and penalties: (i) the greater of: 1. Five hundred dollars (\$500) or 2. Actual Damages”. Legislatively defined statutory damages are permissible.

Additionally, as to the provision permitting treble damages when civil trespass results in damages, it is likely the appellate courts will require willful and intentional conduct, but not necessarily bad faith, before permitting treble damages. So long as the statute requires willful and intentional conduct before awarding treble damages, which it appears to do, this provision does not appear to present any legal issues.

Proposed HB 658 does raise another possible issue to the extent that a plaintiff in a civil trespass matter may recover “[a]ny costs associated with investigating any trespass, which shall be taxed as costs....” HB 658, referencing proposed Idaho Code 60-202(3)(a)(iii) and (b)(iii). Generally, costs to be assessed in a civil case are governed by Idaho Rule of Civil Procedure 54. Rule 54 identifies certain costs to be awarded as a matter of right. Investigatory costs are not such costs. Rule 54 also provides that discretionary costs may be awarded by the Court where they are “necessary, exceptional, [and] reasonably incurred....” Hoagland v. Ada County, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) (citations omitted). It appears the proposed statutory amendment conflicts with Idaho Rule of Civil Procedure 54. If you would like further analysis of this issue, please advise.<sup>1</sup>

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<sup>1</sup> In Hoagland, the Idaho Supreme Court reiterates the *American Rule*, a concept that presumes that each party is responsible for his own attorney fees and costs. The Court stated, “As to the disputed discretionary costs in the present matter, we begin with the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise.” Hoagland, 154 Idaho at

2) HB 658 increases the risk of potential injury to trespassers.

HB 658 provides that an owner, lessee or other lawful occupant of real property owes no duty of care to a trespasser except to refrain from intentional, willful and wanton acts that cause injury to such trespasser. See HB 658 (adding Idaho Code title 6, chapter 31 to limit liability of land possessor to trespassers). The legislature has pending before it HB 444 and SB 1313.<sup>2</sup> These bills contain what are commonly known as “stand your ground” or “castle” doctrines. SB 1313 contains presumptions governing the use of force in defense of a habitation, place of business or employment or occupied vehicle. Given the fact that HB 658 criminalizes various acts of individuals who are in fact trespassing, even if such people enter or remain on property in the absence of malicious or threatening intent, such trespassers are at greater risk of potential injury from land owners, lessees or possessors.

In concert, HB 658 and the pending legislation that would incorporate stand your ground/castle doctrine concepts into Idaho law make it likely trespassers will be deemed to have nefarious intent upon entry into real property. Such presumed intent would permit unreasonable uses of force against such trespassers by landowners while limiting the landowners’ civil and criminal liability.

3) HB 658 appears to overlap with and/or conflicts with other existing Idaho laws.

Given time constraints, this Office has not fully reviewed Idaho statutes to identify all possible conflicts between existing statutes and HB 658. HB 658 does appear to conflict or overlap with other existing provisions of Idaho Code. None of these overlaps or conflicts appear to be fatal to HB 658 and likely will not raise constitutional concerns; however the inconsistencies may create some practical issues. For example, several provisions of title 18, chapter 70, Idaho Code, specifically address cutting timber, especially on state land, as well as recovery for damages related to improper taking of timber. Specific provisions of Idaho Code address some of the conduct defined by HB 658 as a trespass. For example, Idaho Code § 18-7014 addresses injury to crops and an owner’s recovery for that injury, while Idaho Code § 18-7012 creates a separate criminal offense for opening gates and injuring fences belonging to another.

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916, 303 P.3d at 603. We have not researched whether Rule 54 would take precedence over a specific statutory award of costs.

<sup>2</sup> HB 444 has been referred to the House State Affairs Committee. SB 1313 has been passed in the Senate, filed with the House and referred to the House State Affairs Committee.

A more concerning conflict is Idaho Code § 18-7038, which specifically deals with destroying livestock and makes it a felony to destroy livestock, whereas the proposed language of § 18-7008(c)(vi)/(ix) would define such killing as a misdemeanor trespass. Idaho Code § 18-2407 also defines the killing of livestock of a certain value as a Grand Theft, which is also a felony. A conflict would also be created between the language of HB 658 and Idaho Code § 18-7031. The latter makes it an infraction to deposit waste substances, including trash, on public or private property, whereas HB 658 would define this conduct as a misdemeanor trespass. None of these conflicts are fatal to the bill. Prosecutors have wide discretion in charging and prosecuting criminal offenses. However, inconsistencies or overlap between these statutes may create some practical challenges. A prosecutor faced with two or more statutes applicable to the same conduct may face significant pressures from the courts and defense bar in determining how to charge and prosecute an offense.

Most of the inconsistencies addressed here are also present in the current trespass statutes, as existing Idaho Code § 18-7008 defines the conduct constituting trespass very similarly to HB 658. HB 658 continues the existing conflicts and overlap, which may result in practical concerns for prosecutors and create further lack of simplicity and clarity in Idaho's criminal code.

4) HB 658 appears to have addressed the Constitutional concerns raised in prior opinions.

In our prior opinions, this Office focused on two primary Constitutional concerns – overbreadth and First Amendment concerns. With respect to these two Constitutional protections, it appears HB 658 has addressed the issues.

With respect to the overbreadth concerns, HB 658 has specifically limited application of the criminal law to certain types of conduct. The bill has also identified several types of innocent conduct that specifically do not fall within the criminal prohibitions, such as persons engaged in lawful duties, neighbors and social invitees as well as girl scout and related organizations who enter property, so long as it is not posted. While the limitation on application of the criminal statute by exempting certain types of conduct is not as common as more precisely identifying criminal conduct in the statute, this Office is not aware of any case where such a statutory scheme in and of itself violates Constitutional protections against governmental overbreadth.

We recognize that the notice requirements, while addressing overbreadth issues, may still implicate vagueness concerns. However, vagueness is difficult to gauge. The language appears to be suitable to narrow the statute's application of criminal liability, but

a trial and/or appellate court may disagree when faced with a specific challenge. It is inherently difficult to demonstrate a facial vagueness challenge. See State v. Cobb, 132 Idaho 195, 969 P.2d 244 (1998) (facial vagueness challenge must demonstrate impermissible vagueness in all applications). An “as applied” analysis will be rejected so long as the charged conduct is clearly proscribed by the ordinance. Id. at 198, 969 P.2d at 247.

In prior analysis, this Office also identified a potential issue related to the First Amendment. The primary reason HB 536 implicated First Amendment protections arose out of the prior draft’s failure to provide guidance which would place the public on notice of proscribed conduct. In the present draft, it appears HB 658 has defined circumstances under which the public is on notice that they could be found guilty for entering and/or remaining on private property. While the notice provisions utilize a “reasonable person” standard in some respects, this standard is commonly used in legal proceedings, including various criminal jury instructions. See, e.g. Idaho Criminal Jury Instruction 1243 (Injury to Child jury instruction defines willfully as circumstances under which a reasonable person would know the act or failure to act would likely result in injury or harm to a child); 1274A (Stalking jury instruction includes conduct that would cause reasonable person to suffer substantial emotional distress and/or fear death or physical injury). In addition, the reasonable person standard is used in other criminal law contexts, including but not limited to whether a frisk is lawful, State v. Smith, 159 Idaho 15, 21-22, 355 P.3d 644, 650-651 (Ct. App. 2015), whether law enforcement seized a person, State v. Fry, 122 Idaho 103-104, 831 P.2d 942, 945-946 (Ct. App. 1991), and whether the State presented sufficient evidence to meet the probable cause standard, Martinez v. State, 90 Idaho 229, 232, 409 P.2d 426, 427 (1965). Based on the foregoing, it appears HB 658 sufficiently addressed the notice issues raised in our prior opinions. Therefore, it is likely the current version of the bill does not implicate First Amendment protections as it narrows the application of criminal liability to situations that appear to interfere with lawful private ownership or possession of land.

### CONCLUSION

In response to the specific question you have posed, the legislature’s creation of minimum statutory damages and/or treble damages is acceptable in the context of civil liability. HB 658 appears to have addressed the Constitutional issues raised in this Office’s prior analysis of HB 536. The overlap between the proposed amendments to various trespass statutes and pending self-defense bills adopting stand your ground/castle doctrine language would likely increase the risk of serious injury or death to otherwise innocent trespassers.

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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 read 'K. Schindele', with a long horizontal flourish extending to the right.

Kristina M. Schindele  
Deputy Attorney General  
Criminal Law Division  
Chief, Prosecutions Section