Attachment 4
1/23/17

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Sent: Friday, January 20, 2017 9:28 AM
To: Shannon Frasure; siddoway@dcdi.net; Senator Jeff Siddoway
Cc: James Ruchti
Subject: Contest of Election of Senator Nye / Response to Incumbent's Memo of Costs
Attachments: Contestant's Response to Nye Memo of Costs.pdf

Attached for filing in this matter is Contestant's Response to Incumbent's Memorandum of Costs.

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IN THE SENATE OF THE STATE OF IDAHO

IN THE MATTER OF: THE CONTEST OF THE ELECTION OF W. MARCUS W. NYE (a/k/a: "MARK" NYE) TO THE OFFICE OF STATE SENATOR IN AND FOR LEGISLATIVE DISTRICT NO. TWENTY-NINE	**CONTESTANT'S RESPONSE TO INCUMBENT'S MEMORANDUM OF COSTS**

Pursuant to the request of the Chair of the Senate State Affairs Committee, at the hearing on January 16, 2017, CONTESTANT, TOM KATSILOMETES, by and through his attorney, J. Kahle Becker hereby responds to Incumbent Nye's Memorandum of Costs and Fees as follows:

1. **The Plain Language of Idaho Code 34-2120 only Allows for the Senate to Make an Award of Costs, not Attorney's Fees.**

Idaho Code § 34-2120 Security for costs – Assessment of Costs specifically allows the prevailing party in an election contest to recover its costs, up to $500, out of the bond posted with the Secretary of State by the Contestant. § 34-2120. Security for costs--Assessment of costs provides in relevant part:

> (a) The contestant shall file with the secretary of state a bond in the amount of five hundred dollars ($500) conditioned to pay the contestee's costs in case the election be confirmed by the legislature.
>
> (b) The contestants are liable for witness fees and the costs of discovery made by

them respectively. If the election is upheld by the legislature, the legislature may assess costs against the contestant. If the election is annulled by the legislature, the legislature may assess costs against the contestee.

There is no mention of any award of attorney's fees against the unsuccessful party in an election contest. The Supreme Court has specifically commented on the distinction between attorney's fees and costs in an Election Contest:

> The general rule is that costs do not include attorney fees unless attorney fees are expressly included in the definition of the term costs. *See* 20 AM.JUR.2D *Costs* § 1 (1995); 20 C.J.S. *Costs* § 125 (1990). The legislature's awareness of this rule is demonstrated by its authorization of awards of costs and attorney fees. *See, e.g.*, I.C. §§ 5-321, 6-101(3)(*o*), 7-610, 9-342, 12-120(5), 16-1620A (all referring to costs and attorney fees). When the legislature has intended that the term costs cover attorney fees, it has so provided. *See, e.g.*, I.C. §§ 18-3302(6), 18-6713(9), 18-7805(a), 25-3405(7), 26-3106(1)(c), 30-3-48(3), 30-3-54(4), 37-1014, 59-1320(4), 67-6626. Therefore, we hold that attorney fees are not appropriately awarded under I.C. § 34-2130.
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> *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000).

The decision in *Noble* comports with the statutory construction guidance statute enacted by this legislature.

> § 73-113. Construction of words and phrases
> (1) The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.
>
> (2) If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered, and the statute must be construed as a whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored.
>
> (3) Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

Though Incumbent did not seek fees pursuant to Idaho Code §§ 12-121 or 12-117 and his counsel expressly disavowed their application to this Election Contest at the January 16, 2017

hearing, a brief analysis may help guide the Senate's decision. Idaho Code 12-121 and Idaho Code 12-117 are inapplicable at this stage of the proceedings. By its plain language I.C. 12-121 refers to a civil action and a judge's authority to award attorney's fees. Both statutory prongs fail in this election contest in this legislative venue. I.C. 12-117 is similarly inapplicable because it only allows fees when a state agency is an adverse party. Here, the Senate is acting in a judicial capacity under Article III Section IX and, at this time, it is not adverse to either Contestant or Incumbent.

Additionally, Contestant had a good faith basis in fact and law to pursue this Election Contest. Contestant proved that Incumbent violated the Sunshine Law and thus, Contestant is arguably a prevailing party. This legislative body, or a committee thereof, simply exercised its discretion under Article III Section IX and declined to make a finding that one of its members committed a violation of laws the legislature had written. The stated reasons of the Committee, or at least some members thereof, seemed to be a concern that many other members of the legislature may have committed similar Sunshine Law violations as well as the concern that having done so could expose them to a similar election contest. Contestant should not be penalized for the Senate's unwillingness to recognize a violation of the Sunshine Laws against its own members.[1]

2. Incumbent Seeks Impermissible Costs and Costs in Excess of the Statutory Cap

Turning to the specific costs Incumbent requested in his Memorandum of Costs, it appears those costs exceed the $500 statutory cap found in I.C. § 34-2120 and thus any costs in excess of that cap are statutorily unrecoverable. Incumbent's costs also include items which were statutorily to have been born by him. I.C. 34-2120(b) specifically states that the contestants are liable for their own costs of discovery. Incumbent specifically seeks his costs (and attorney fees) for taking his own discovery. For example, Incumbent seeks the costs of his own deposition transcript, the

[1] It is important to distinguish proving a violation of the Sunshine Laws from the severity of the punishment imposed by this Senate.

deposition of his own treasurer, as well as his treasurer's assistant. He also seeks his costs for taking the deposition of Idaho Lorax, a deposition which was exponentially lengthened by Incumbent counsel's own irrelevant questioning of Mr. Lorax to assassinate his character. In addition to being statutorily prohibited, Incumbent could simply have utilized the free copy of those deposition transcripts provided by Contestant since those transcripts were included in the legislative record in this matter. Other costs appear to be rather arbitrary, for example a "scan charge" as well as posters which the Chairman of State Affairs indicated were too small to read. In any event, it appears Incumbent has incurred costs unrelated to his own discovery which may be allowable (lodging, mileage, copies, postage) up to the statutory $500 cap. Contestant has no objection to this Senate providing Incumbent the $500 Contestant posted with the Secretary of State as a bond at the outset of this Election Contest.

3. **The Senate has no Authority to Impose a Monetary Penalty or Award in Excess of the $500 Bond**

Incumbent cites Article III Section 9 as an all-encompassing grant of power to the Senate when it sits as the judge of the election of its members. Based on his perception of the broad powers vested in the Senate by Article III Section 9, Contestant asks this Senate to disregard the plain language of I.C. § 34-2120 and engage in what amounts to a Constitutionally prohibited concentration of power. Such a request ask this Senate to unilaterally invoke power which belongs to its two co-equal branches of government. The following arguments are made herein to preserve those arguments in the event a record is being created that could limit the issues which may be argued should there be judicial review of the actions of the Senate. Thus, before heading down this dangerous path, it is necessary to review the relevant constitutional provisions. Article III Section 25 states:

The members of the legislature shall, before they enter upon the duties of their

> respective offices, take or subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of Idaho, and that I will faithfully discharge the duties of senator (or representative, as the case may be) according to the best of my ability." And such oath may be administered by the governor, secretary of state, or judge of the Supreme Court, or presiding officer of either house.

The separation of powers is enshrined in Article II Section 1:

> 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's Supreme Court has interpreted Article II Section 1 as a prohibition on judicial review of discretionary acts of the legislature. *In re SRBA Case No. 39576*, 128 Idaho 246 (1995). The only language in Article III Section 9 which warrants consideration in this regard is the legislative discretionary authority to "determine its own rules of proceeding." Unfortunately for Incumbent, making an award of attorney's fees would be substantive law making and not a mere discretionary procedural rule.

> The Idaho Constitution vests the power to enact substantive laws in the Legislature. Idaho Const. art. III, § 1; *see also Mead v. Arnell,* 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) ("[O]f Idaho's three branches of government, only the legislature has the power to make 'law.' "). This power is not restricted by the Court's authority to enact rules of procedure to be followed in the district courts. *State v. Beam,* 121 Idaho 862, 863, 828 P.2d 891, 892 (1992) ("[T]his Court's rule making power goes to *procedural,* as opposed to *substantive,* rules."). This Court has adopted the standard for delineating substantive laws from procedural rules promulgated by the Washington Supreme Court in *State v. Smith,* 84 Wash.2d 498, 527 P.2d 674 (1974). In *Smith,* the Washington Supreme Court observed that substantive law "creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Id.* at 501, 527 P.2d at 677, *quoted in Beam,* 121 Idaho at 863–64, 828 P.2d at 892–93.
>
> *In re SRBA Case No. 39576*, 128 Idaho 246, 255 (1995).

The legislative branch is vested with the constitutional authority to enact laws. Providing for the awards of attorney's fees are substantive laws, not procedural rules.

> I.C. § 42–1423, (1994) which expressly prohibits an award of costs or attorney fees against the state in a general water adjudication, is a legitimate exercise of the Legislature's substantive authority. This Court has consistently held that the power to award attorney fees is governed by statute. *E.g., Hellar v. Cenarrusa,* 106 Idaho 571, 578, 682 P.2d 524, 531 (1984) ("We continue to adhere to the so-called 'American rule' to the effect that attorney fees are to be awarded only where they are authorized by statute or contract.").
>
> *In re SRBA Case No. 39576*, 128 Idaho 246, 256 (1995).

There is no provision for a single house, in this case the Senate, to make an award of attorney's fees against a party to an election contest.

The legislative branch is also Constitutionally prohibited from engaging in the execution of the laws it enacts. Those powers are held by the Executive Branch under Article IV Section 5.

> The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

Thus, in addition to being statutorily prohibited under I.C. § 34-2120, should the Senate consider making an award in excess of $500, the question then becomes what form would such an award take. A judgment? To do so would invade the province of the Courts in violation of Article V Sections 13 and 20. A writ? To do so would require the action of the Judicial and Executive Branch. It would likewise be impermissible for the Senate consider rewriting I.C. § 34-2120 to permit the retroactive award of attorney's fees to Mr. Nye in this case. Article XI Section 12 provides:

> RETROACTIVE LAWS FAVORING CORPORATIONS PROHIBITED. The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

Furthermore, enacting case specific legislation by exercising legislative powers under Article III Section 15, and in so doing specifically making an award of attorney's fees against Contestant would also run afoul of the separation of powers. Moreover, such legislative actions would most likely violate other provisions of Idaho's Constitution directly applicable to the Legislative Branch. See Article I Section 16 "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed" and Article III Section 19 "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say..." Thus, the Senate's powers are limited to an award of the forfeiture of Contestant's $500 bond.

CONCLUSION

Contestant initiated this statutorily permitted Election Contest by posting his statutorily required $500 bond. Thereafter, the Legislature exercised its discretionary authority in sitting as the judge of this election and in evaluating the qualifications of its members as permitted under Article III Section 9. Contestant having succeeded in proving a violation of the Sunshine law, but having failed to convince this Senate to rule that one of its members violated the laws the legislature wrote, now concedes to forfeit his $500 bond. Granting relief beyond the $500 bond would lead the Senate into dangerous uncharted waters.

J. Kahle Becker
Attorney for CONTESTANT KATSILOMETES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2017, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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