



Terri Kondeff  
Director

SEN. OKUNIEWICZ  
S.B. 1300

# Legislative Services Office Idaho State Legislature

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*Serving Idaho's Citizen Legislature*

March 11, 2026

The Hon. Doug Okuniewicz  
Senator, District 3  
Idaho Legislature

The Hon. Kelly Anthon  
Senator, District 27  
President Pro Tempore of the Senate  
Idaho Legislature

The Hon. Mike Moyle  
Representative, District 10  
Speaker of the House of Representatives  
Idaho Legislature

RE: S.B. 1300

Dear Senator Okuniewicz, Mr. Pro Tem, and Mr. Speaker:

You requested my opinion on whether there is a conflict between Senate Bill 1300 and the instruments that conveyed Harriman State Park to the State of Idaho. If enacted, S.B. 1300 would change how the Director of the Department of Parks and Recreation is appointed. Under current law, the director is appointed by the Park and Recreation Board,<sup>1</sup> but under S.B. 1300, the appointment would be made by the Governor, subject to Senate confirmation.<sup>2</sup>

Per the conveyance instruments, the Legislature is required to “establish pursuant to law a professionally staffed career Park Service whose personnel shall be chosen on the basis of merit alone.”<sup>3</sup> Your question, essentially, is whether this provision would be violated if the director must be appointed by the Governor and confirmed by the Senate.

### SHORT ANSWER

There is no inherent conflict between S.B. 1300 and the conveyance instruments. While the conveyance

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<sup>1</sup> I.C. § 67-4222(2)(b).

<sup>2</sup> S.B. 1300, §§ 1 and 4 (Idaho 2026).

<sup>3</sup> Agreement between E. Roland Harriman, W. Averell Harriman, and Robert E. Smylie (Dec. 4, 1961), 1963 Idaho Sess. Laws ch. 315, pp. 860-861, ¶ 4(b) [*hereinafter* “1961 Agreement”].

instruments require the merit-based selection of department personnel, the selection process itself is left to the discretion of the Legislature. As long as the director is appointed on the basis of merit, the State is in compliance with the conveyance instruments.

## BACKGROUND

On December 4, 1961, Governor Robert Smylie signed an agreement with E. Roland Harriman and W. Averell Harriman in which the Harrimans expressed an intent to make a gift of certain property “for the purpose of creating in perpetuity a State Park under the terms and conditions hereinafter set forth” in the agreement.<sup>4</sup> The agreement was ratified by act of the Legislature in 1963.<sup>5</sup>

The 1961 Agreement did not, by itself, make any conveyances. The original intent was for the Harrimans to bequeath the property in their wills.<sup>6</sup> Over time, that intent changed, and on November 13, 1976, Governor Cecil Andrus signed a Supplemental Gift Agreement with the Harrimans that provided for an *inter vivos* transfer<sup>7</sup> of the property instead.<sup>8</sup> Specifically, the Harrimans agreed to transfer the property “on or before March 31, 1977.”<sup>9</sup> The property conveyance would be “absolute and complete and not subject to any life estate or any other interest for the benefit of W. Averell Harriman, E. Roland Harriman, Gladys F. Harriman or any other person.”<sup>10</sup>

However, the Supplemental Gift Agreement provided a condition on the conveyance:

This Agreement is subject to the condition that if (1) the State of Idaho at any time shall cease to use the real property subject to this Agreement as a State Park for the purposes contemplated by the aforesaid Agreement dated December 4, 1961, made by E. Roland Harriman, W. Averell Harriman and Robert E. Smylie, as Governor of the State of Idaho, or (2) any of the requirements set forth in paragraph 4 of said Agreement shall not be complied with, then in either such event...all of the interest of the State of Idaho in and to all property subject to this Agreement shall cease, determine and come to an end, and such property shall immediately vest in and possession thereof shall immediately be delivered to such organization or organizations described in Section 170(b)(1)(A) of the Internal Revenue Code, or any similar successor provision, as shall be designated by an instrument in writing in proper form for recording executed by [certain designated individuals].<sup>11</sup>

For purposes of the analysis below, I am assuming that this condition, which includes the possibility of a transfer of the property to a third party, remains legally valid, even though that question in and of itself

<sup>4</sup> 1961 Agreement at 858.

<sup>5</sup> H.B. 203, 1963 Idaho Sess. Laws ch. 315.

<sup>6</sup> 1961 Agreement at 859, ¶¶ 1 and 2.

<sup>7</sup> An *inter vivos* transfer is a “transfer of property made during the transferor’s lifetime.” See definition of “transfer,” Black’s Law Dictionary (12th ed. 2024).

<sup>8</sup> Agreement between E. Roland Harriman, W. Averell Harriman, and Cecil D. Andrus ¶¶ B (Nov. 13, 1976) [*hereinafter* Supplemental Gift Agreement].

<sup>9</sup> *Id.* pp. 4-5.

<sup>10</sup> *Id.* at p. 5.

<sup>11</sup> *Id.* at pp. 5-6.

might warrant further research and analysis.<sup>12</sup> Regardless, between 1976 and 1979, the conveyance was completed through various other actions and instruments, including a warranty deed. In 1982, Harriman State Park opened to the public.<sup>13</sup>

## ANALYSIS

Pursuant to the Statute of Frauds, a gift of real property must be made in writing.<sup>14</sup> “When construing an instrument that conveys an interest in land, courts seek to give effect to the intent of the parties to the transaction.”<sup>15</sup> “The first rule of construction to be applied to a written instrument in order to determine what is intended by it is that resort shall be had to the language of the instrument itself, and if the expressed meaning is plain on the face of the instrument it will control.”<sup>16</sup> In the “absence of fraud or mistake, the intention of the parties must be ascertained from the instrument itself.”<sup>17</sup> Unless an instrument is ambiguous, it “must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.”<sup>18</sup> Where instruments are ambiguous, “courts have generally construed [them] against the grantor and in favor of the grantee.”<sup>19</sup> “In deciding whether a document is ambiguous, the Court seeks to determine whether it is reasonably subject to conflicting interpretation.”<sup>20</sup>

When the Harrimans conveyed property to the State for the purpose of establishing a state park, they

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<sup>12</sup> Without getting too “into the weeds,” and fully acknowledging that the issue would require significantly more research and is beyond the scope of your question, I believe there are inconsistencies in the various conveyance instruments and question whether an “*absolute and complete*” conveyance may truly be conditional in the sense that it is subject to a reversion and a transfer if the condition is breached. I also question the practical mechanics of the reversion and transfer language. The language seems to have been drafted without careful consideration of what a state is and how it differs from an individual or even an organization. The transfer is presumed to happen upon breach of the condition by the “State of Idaho,” yet the State is a sovereign with three branches of government and numerous constituent officers and parts. If, for example, the Director of the Department of Parks and Recreation made a non-merit hire, but the Attorney General promptly sues to block the hire, and the Idaho Supreme Court enjoins the hire, and the Park and Recreation Board removes the offending director, meaning that the non-merit hire was “chosen” by the director but never in fact *worked* for the department, has the “State of Idaho” truly breached the condition? And should the entire State, most notably its people, be penalized for the attempted wrongdoing of one individual, when the very clear intent of the Harrimans was to give a park to the people “in perpetuity?” I point this out, not because the State shouldn’t keep its promises (it should), but because I am skeptical that the State, even in the event of a true breach, would inevitably lose the property. The people are not guilty of the wrongful acts of their officers, and it seems to me that an Idaho court — itself a creature of the State — could order a remedy for a breach that would not punish the people.

<sup>13</sup> *Harriman History*, Idaho Department of Parks and Recreation, <https://parksandrecreation.idaho.gov/state-park/harriman-state-park> (last accessed March 10, 2026).

<sup>14</sup> I.C. § 9-503. See also *Erb v. Kohnke*, 121 Idaho 328, 332, 824 P.2d 903, 907 (Idaho App. 1992). It should be noted that conveyances are controlled by the law that existed at the time of the conveyance, but the Statute of Frauds has remained unchanged since at least the early 1880s. See C.C.P. 1881, § 935. While some of the cases cited in this opinion were decided more recently than the conveyance of Harriman State Park in the late 1970s, the opinions are not inconsistent with the law at that time but merely state the relevant legal principles more clearly or concisely than older cases. Property law is notoriously unchanging, and more than one scholar has observed that if a 14th century English lawyer went to sleep and woke up, Rip Van Winkle-style, in modern America, he would need very little catch-up education to be able to practice property law.

<sup>15</sup> *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003).

<sup>16</sup> *Meir-Nandorf v. Milner*, 34 Idaho 396, 201 P. 720, 721 (1921) (cleaned up).

<sup>17</sup> *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1098 (1924).

<sup>18</sup> *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001).

<sup>19</sup> *Id.* at 766, 79.

<sup>20</sup> *Id.*

made a conditional gift. That condition was described in the Supplemental Gift Agreement, which in turn incorporated Paragraph 4 from the 1961 Agreement. For purposes of your question, the relevant portion of Paragraph 4 is subparagraph (b), which provides in its entirety:

The People of the State of Idaho *acting by and through the Legislature of Idaho will establish pursuant to law* a professionally staffed career Park Service whose personnel shall be chosen on the basis of merit alone, and which shall be administered under merit system procedures for personnel administration, and the said Park Service shall, when established, be vested with the control and administration of the Park, subject to the advice and consent of the Governor of Idaho.<sup>21</sup>

It is important to recognize what this language does and does not do. The language imposes four affirmative requirements on the State:

1. Establish by law a professional, career park service;
2. Select park service personnel on the basis of merit alone;
3. Administer the park service under a merit system; and
4. Vest administration and control of Harriman State Park with the park service, subject to the Governor's advice and consent.

But the language does not:

1. Mention a director or a park board;
2. Require that a director be selected by a park board;
3. Prohibit the use of the State's standard methodology for appointments<sup>22</sup> — nomination by the Governor, confirmation by the Senate — in selecting park service leadership; or
4. Prevent the Legislature from altering the selection process once it has been established.

In other words, the language concerns itself with selection *criteria* but not with *who* has authority to make the selection or under what *process* the selection shall be made. On the specific matters of selection authority and selection process, the conveyance instruments are silent.

However, silence is not the same as ambiguity. An ambiguous term is one that appears in an instrument but is subject to more than one reasonable interpretation, whereas silence means the term doesn't appear at all — it is simply not part of the agreement. As discussed above, where there is no ambiguity, the plain language of the instrument controls. An executed gift “stands upon the footing of an executed contract,”<sup>23</sup> and “words cannot be read into a contract to impart an intent unexpressed when the contract was executed.”<sup>24</sup>

In 1961, as now, Article IV, Section 6 of the Idaho Constitution provided that the “governor shall

<sup>21</sup> 1961 Agreement at 860-861, ¶ 4(b) (emphasis added).

<sup>22</sup> See Idaho const. art. IV, § 6.

<sup>23</sup> *Smith v. Peacock*, 114 Ga. 691, 40 S.E. 757, 759 (Ga. 1902). See also 38 Am. Jur. 2d Gifts § 2.

<sup>24</sup> *Nichols Holding, LLC v. Divine Capital Group, LLC*, 416 S.C. 327, 336, 785 S.E.2d 613, 617 (S.C. App. 2016).

nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for.”<sup>25</sup> The signatories of the 1961 Agreement knew or should have known that this constitutional provision existed, given that: (1) the agreement called for the Legislature to establish a new state agency, namely a park service; (2) state agencies generally have appointed leadership; and (3) one of the signatories was a sitting governor. Yet, no provision of the agreement specified that the standard constitutional process for appointments could not be used.

And, in fact, during the 1963 Legislature, a Senate bill was introduced to establish a park service with a director appointed by the Governor.<sup>26</sup> A competing House bill would have created a park service with a director appointed by the State Board of Land Commissioners.<sup>27</sup> Though neither bill was enacted, the disagreement was rooted not in legal concerns about the provisions of the 1961 Agreement but rather in the policy preferences of various legislators. Some legislators believed the new park service “should be under control of the governor,” while others preferred the Land Board.<sup>28</sup> To Governor Smylie, the method of appointment did not matter as long as a bill had “provision for a professional director to head the bureau and a professional staff under him.”<sup>29</sup> The *Idaho Statesman* noted that either bill would produce an agency that was “professionally staffed and under a merit system.”<sup>30</sup>

Two years later, the Legislature enacted House Bill 138, a compromise bill creating a Department of Parks<sup>31</sup> to be administered by a new six-person board.<sup>32</sup> The bill generated some controversy prior to passing. Though, after some minor amendments,<sup>33</sup> it easily passed the House,<sup>34</sup> the Senate voted to send the bill to its own amending order on a 23-22 vote in which the decisive vote was cast by the Lieutenant Governor.<sup>35</sup> Opponents of the bill apparently “question[ed] the act’s constitutionality” because they believed the park service should be administered by the Land Board,<sup>36</sup> while at least one supporter questioned the Land Board’s integrity and “argued Idaho’s park potential can be developed only by an independent board.”<sup>37</sup> Ultimately, the Senate declined to amend the bill,<sup>38</sup> and it passed.<sup>39</sup> Governor Smylie described the bill as the “greatest single advance in conservation in Idaho since the people

<sup>25</sup> Though Article IV, Section 6 has been amended more than once, this specific provision has remained the same since statehood. *See Idaho const. art. IV, § 6 notes* (Michie 2023).

<sup>26</sup> S.B. 25 §§ 1 and 2 (Idaho 1963).

<sup>27</sup> H.B. 35 §§ 1 and 3(1) (Idaho 1963).

<sup>28</sup> Sandor S. Klein, “ISC Measure Carded Today; Conflict Eyed; Park, Recreation Bill Seen Possible Source Of Legislative Dissent,” *Idaho Statesman*, Feb. 8, 1963, at 7.

<sup>29</sup> *Id.*

<sup>30</sup> Sandor S. Klein, “Parks Bureau Bill Sidetracked in House; Partisan Strife; Faith Breach Charge Issued by McDevitt; Postponement Granted After Voice Vote; Cooperation Noted,” *Idaho Statesman*, March 9, 1963, at 7.

<sup>31</sup> Today known as the Department of Parks and Recreation. *See I.C. § 67-4218.*

<sup>32</sup> H.B. 138, 1965 Idaho Sess. Laws ch. 85, p. 140, §§ 1 and 4.

<sup>33</sup> 1965 Idaho H. Jour. 152 (Feb. 11, 1965).

<sup>34</sup> *Id.* at 186 (Feb. 18, 1965).

<sup>35</sup> 1965 Idaho S. Jour. 212-213 (Feb. 27, 1965). *See also* “Parks Bill Stymied,” *Idaho Statesman*, March 1, 1965, at 4.

<sup>36</sup> *Id.*

<sup>37</sup> Jim Adams, “Party Lines Vote Passes Bill to Create Parks Board,” *Idaho Statesman*, March 5, 1965, at 13.

<sup>38</sup> 1965 Idaho S. Jour. 226 (March 2, 1963).

<sup>39</sup> *Id.* at 242 (March 4, 1963).

enacted the Fish and Game Commission by initiative in 1938.”<sup>40</sup>

Pursuant to H.B. 138, the members of the Park Board, today known as the Park and Recreation Board,<sup>41</sup> “shall be appointed by the Governor of the State of Idaho, with the advice and consent of the Senate.”<sup>42</sup> The board would have the power to “appoint a director to serve at its discretion.”<sup>43</sup> “The director shall be selected upon the basis of executive ability, experience and training in park and recreational matters.”<sup>44</sup> These provisions remain valid law today.<sup>45</sup>

Thus, as made clear by H.B. 138, the board and the position of director are creatures of *legislative* invention, as are the processes by which they are appointed. The creation of a board and a director were not mandated by the 1961 Agreement, and neither was the process by which they are appointed. The words “board” and “director” do not appear at all in Paragraph 4(b). That paragraph was concerned with selection *criteria* for park service personnel, not the selection *process* and not the selection *authority*. While S.B. 1300, if enacted, would change the selection process and the selection authority,<sup>46</sup> the bill leaves intact the selection criteria; that is, the requirement that the “director shall be selected upon the basis of executive ability, experience and training in park and recreational matters.”<sup>47</sup> By retaining this provision, the bill, if enacted, would satisfy the terms of the 1961 Agreement.

To believe that the 1961 Agreement has anything to say about selection *process*, as distinct from selection *criteria*, is to impermissibly read terms into the agreement that do not exist. The selection process was left, along with other logistics of establishing the park service, to the Legislature: “The People of the State of Idaho *acting by and through the Legislature of Idaho will establish pursuant to law* a professionally staffed career Park Service.”<sup>48</sup> Moreover, nothing in the 1961 Agreement, and nothing, specifically, in Paragraph 4(b), suggests that laws establishing the park service could never be amended. To believe such a thing is, again, to impermissibly read terms into the agreement that do not exist — terms that would, in any event, be both inadvisable and unconstitutional. Inadvisable, because it is a rare law that could never be improved by amendment, especially as circumstances change; and unconstitutional, because under the doctrine against legislative entrenchment, there can be no such thing as an unamendable law.<sup>49</sup>

Likewise, nothing in the 1961 Agreement, or even in the extrinsic contemporaneous records, such as news articles, suggests that the Harrimans had specific conditions regarding *who* should select park service personnel. If such conditions existed, they would have and should have been expressly included in the agreement. But no such condition was. To believe otherwise is to once more impermissibly read

<sup>40</sup> “Park Action Wins Praise Of Smylic; Creation of Agency Called Giant Stride For Conservation,” *Idaho Statesman*, March 6, 1965, at 9.

<sup>41</sup> I.C. § 67-4221.

<sup>42</sup> H.B. 138, 1965 Idaho Sess. Laws ch. 85, p. 140, § 4.

<sup>43</sup> *Id.* at p. 142, § 5(b).

<sup>44</sup> *Id.*

<sup>45</sup> I.C. §§ 67-4221(a) and 67-4222(b).

<sup>46</sup> S.B. 1300 §§ 1 and 4.

<sup>47</sup> *Id.* § 4, p. 9, ll. 16-18.

<sup>48</sup> 1961 Agreement at 860, ¶4(b) (emphasis added).

<sup>49</sup> The doctrine against legislative entrenchment is the constitutional principle that “one legislature may not bind the legislative authority of its successors.” See e.g. *U.S. v. Winstar Corporation*, 518 U.S. 839, 872, 116 S.Ct. 2432, 2453 (1996).

terms into the agreement that do not exist.

What the 1961 Agreement did specify is that personnel decisions must be based on merit and merit alone. For the provisions of S.B. 1300 to be *inherently* in conflict with that requirement, it would have to be impossible for the Governor to make a merit-based appointment and the Senate to make a merit-based confirmation. I find this suggestion of impossibility plainly fatuous. Accepting this suggestion would mean accepting that an Idaho Governor has *never* appointed, and an Idaho Senate has *never* confirmed, an officer on the basis of merit. Accepting this suggestion would mean that the Framers of the Idaho Constitution established a standard process — appointment by the Governor, confirmation by the Senate — that is forever and fundamentally at odds with meritorious appointments. One would certainly wonder why the Framers chose such a process if it meant that state agencies would be forever doomed to administration by incompetents.

In my opinion, governors elected to faithfully *execute* the law,<sup>50</sup> and senators elected to *make* the law,<sup>51</sup> are generally capable of *following* the law, and if the law says that they must appoint and confirm a director on the basis of merit, then the governors and senators who care about following the law will do so. It is possible, of course, that we will one day have a Governor and a Senate who are perfectly indifferent to the law, but then, it is also possible that we will one day have a Park and Recreation Board that is perfectly indifferent to the law. To me, it is logically unsound to suggest that: (1) the Governor is incapable of making a merit-based appointment; and (2) the Senate is incapable of making a merit-based confirmation; yet (3) a board whose members are themselves *appointed by the Governor and confirmed by the Senate* shall nevertheless always and unquestionably make merit-based appointments.

It is an unfortunate possibility that some public officers, whether due to confusion, incompetence, corruption, or malice, may fail to comply with and faithfully perform their legal duties, but that is not an argument for the law to never change. Rather, it is an argument that the public should be careful about whom they elect, and should always be vigilant in holding their public officers, elected or appointed, to account.

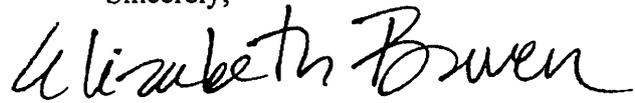
## CONCLUSION

There is no inherent conflict between the provisions of S.B. 1300 and the instruments that conveyed Harriman State Park to the State of Idaho. While the instruments provided selection criteria for park service personnel, the instruments did not specify a selection process or a selection authority. What matters for purposes of the conveyance instruments is not who selects park service personnel or the process by which they are selected, but whether they are selected on the basis of merit. As long as the Director of the Department of Parks and Recreation is appointed based on merit, the State has complied with the conveyance instruments.

<sup>50</sup> See Idaho const. art. IV, § 5.

<sup>51</sup> See Idaho const. art. III, § 1.

Sincerely,



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